

TILBURG UNIVERSITY

The Bernard Case:
What is the impact of training
compensation on national and
international associations?
The Case of Greece.

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List of Abbreviations

A-G	Advocate General
CAS	Court of Arbitration of Sport
DRC	Dispute Resolution Chamber
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EPAS	Europe's Enlarged Partial Agreement
EPFL	European Professional Football Leagues
ESLPI	European Sports Law and Policy Initiative
EU	European Union
FIFA	Fédération Internationale de Football Association
FIFPro	Fédération Internationale des Associations de Footballeurs Professionels
HFF	Hellenic Football Federation
INEA	Institute for European Affairs
PFPRO	Professional Football Players Observatory
RSTP	Regulations on the Status and Transfer of Players
TFEU	Treaty on the Functioning of the European Union
UEFA	Union of European Football Associations
URBSFA	Union Royal Belgian Football Association

I. Introduction

The impetus for writing this thesis was the ECJ's ruling on the Bernard Case delivered in March 2010. Almost fifteen years after the Bosman case -a judgment that is still being considered as a landmark in the case law relating to sports- the ECJ came with a new decision dealing once more with the free movement of players and the limitations on this fundamental right due to existing training compensation schemes. The vague notion of the specificity of sport, one of the main arguments among sports stakeholders and lawyers, is again in the middle of attention; The ECJ having an abundant jurisprudence since the Walrave case tried to set the limits between EU law and sport using a case by case approach. Nonetheless, after years of debates and discussions, the inclusion of sport in the Lisbon Treaty in December 2009 is a fact of high importance meaning that sporting activities will no longer be exempted from European or national law;¹ EU's competence in this field is secondary and supplementary whereas member states and sport governing bodies in the name of their autonomy have still the first say in sport relating issues.

The ECJ in the Bernard case acknowledged the specificity of sport and its social and educational role in accordance with the art. 165 TFEU by accepting that the encouragement of the recruitment and training of young players are a legitimate aim that can justify under conditions a restriction on the free movement of players. One could say that this ruling is the follow-up of the Bosman ruling. But the central question at this moment is "what will be the impact of this judgment on the national and international associations?" The court failed to give any concrete criteria on how to calculate the compensation of the training costs and as it is reasonable, there is a variety of compensation formulae among the countries while some of them may not even include a training compensation scheme in their regulations. Furthermore, the court didn't give any 'official' approval to the Regulations on the status and transfer for players of FIFA which is the competent governing body to regulate international transfers and provides a regulatory framework on the calculation of training compensation. So, "is the current FIFA scheme in compatibility with the Bernard's ruling?"

Additionally, except from the training compensation, as it was mentioned above, UEFA and FIFA laid down their own rules to protect the youth sector and thus enhance the training and further development of the young players. Are the 'homegrown rule' of UEFA and the '6+5 rule' of FIFA in compliance with the EU Law? And if so, are these rules suitable and appropriate to attain this objective?

¹ Michele Colucci, 'Sport in the EU Treaty: In the Name of Specificity and Autonomy, in the Future of Sports Law in the European Union. Beyond the EU Reform Treaty and the White Paper', in R. Blanpain (ed) Bulletin of Comparative Labour Relations, no.66, Kluwer Law International, 2008, p.23.

Finally, the case of Greece is in the forefront. A relatively small country with limited financial means and infrastructures but rather interventionist as far as sport relating issues are concerned. Consequently, what is left to be answered is if the regulatory framework on training compensation is in line with the EU law and the court's ruling. Therefore, the research question is: What is the impact of training compensation on the sport associations at national and international level?

Sources and Method

In order to write this thesis I used mainly previous case law of the ECJ and CAS, official documents of the EU as well as articles, books and regulations (mostly the FIFA Regulations on the Status and Transfer of Players). As secondary source I had past academic papers and material that I obtained from the internet.

In the first chapter I will try to analyze and make clear the vague notion of the specificity of sport as it is represented in the official documents of EU having as a peak the inclusion of sport in Lisbon Treaty. I will do a historical overview of the most important cases of ECJ which defined the boundaries between the sport and the EU. The next chapter of this thesis deals with the legal analysis of the Bernard case, namely the questions raised for preliminary ruling, the judgment itself as a follow up of the Bosman ruling, the Opinion of the Advocate General and my conclusions about the impact of the Bernard ruling on national associations. The third chapter is about the current FIFA Regulations on the Status and Transfer for Players on the training compensation which apply in the event of international transfers and an evaluation of the latter whether they fall or not in line with the ECJ ruling. The fourth chapter presents the 'Homegrown rule' and the '6+5 rule' of UEFA and FIFA respectively, as alternatives to enhance the youth sector and their compatibility with the EU Law and the last chapter provides information about the regulatory framework of training compensation in Greece which helps also to draw some conclusions for the general situation linking to the sport section. At last, I will finish this thesis presenting my conclusions.

II. Sports and EU

1. The specificity of Sport

The specificity of Sports is a notion that has stirred a lot of debate from time to time. Before the entry into force of the Treaty on the Functioning of the European Union² on 1 December 2009, Sport and EU was mainly dealt in the light of its economic dimension, and the specific nature of sport was mentioned only in some political documents which were not legally binding on the Member States, that is, the 1997 Amsterdam Declaration³, the Presidency Conclusions of the European Council of Nice in 2000⁴⁵ and of course the White Paper on Sport⁶ in which the Commission made a reference about the specific character of Sport. Furthermore, the case law of the European courts and the decisions of the European Commission show that the special character of sports has been recognized and taken into account; it lead the way according to which the Community law must be applied in the field of sport but without meaning the general exemption from the latter.⁷ Over the past 30 years or so and especially in the last decade, the ECJ, the Court of First Instance and the European Commission have all tried to articulate the meaning of 'sporting specificity' and to define more clearly the boundaries of Community Law in relation to sports matters.⁸ Since the Walrave case⁹ it is clear that as far as sport is an economic activity, European Law in principle is applicable to it and two of the basic freedoms of the Communities/ EU are essential in this respect: the freedom of movement for workers and fair competition.¹⁰

² Consolidate Version of the Treaty on the Functioning of the European Union, [2008] C115/47.

³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing The European Communities and related acts, in Official Journal C340, 10 November 1997. Declaration no.29 on Sport available at <<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0136040046>>.

⁴ Nice European Council, 7-10 December 2000, Presidency Conclusions <http://www.europarl.europa.eu/summits/nice1_en.htm>.

⁵ Michele Colucci, 'The Specificity of Sport and the Employment Relationship of Athletes' in R. Blanpain & F. Hendrickx (ed) Bulletin of Comparative Labour relations : Labour Law between Change and Tradition vol.78, Kluwer Law International, (2011) p.36.

⁶ European Commission, White Paper on Sport, COM (2007) 391, < http://ec.europa.eu/sport/white-paper/index_en.htm>.

⁷ Andreas Malatos, Lectures of Sport Law, Ant.N.Sakkoulas Publishers , 2010 p.258.

⁸ Gianni Infantino, 'Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?', 2006, available at <http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf> accessed 2 June 2011.

⁹ Case 36/74 ,Walrave and Koch v Association Union Cycliste Internationale, ECR [1974] 1405.

¹⁰ Rober Siekmann, 'The European Union and Sport: Is Sport "Special" in EU law and Policy?' in R. Blanpain (ed) Bulletin of comparative labour relations: The future of sports law in the European Union: beyond the EU Reform Treaty and the White Paper vol.66, Kluwer Law International, 2008 p.38.

It is common knowledge that as years went by sports played and still does play a major role in the economic life of a country and at global level as well. According to Juan de Dios Crespo Perez, 'the modernization of sport; the commercialization of it as a business and the professionalism have taken sports into the law and the legal rules, not only theirs, not only regarding the inside control of sport but also the outside control of it'.¹¹ So, sport and especially professional is in large part just another form of business, but it has also a range of special features that demand a customized set of practices to ensure its effective operation.¹²

1.1 Settled Case Law

The specificity of sport has been acknowledged by the court in a variety of cases, one of the most widely known is the Walrave and Koch case which is of high importance as the ECJ for the first time expressly recognized that sport could be subject to the Community Treaty in so far as sport was an economic activity within the meaning of article 2 EC Treaty.¹³¹⁴ According to its ruling 'the composition of sport teams, specifically national teams, has not an effect on prohibition of discrimination based on nationality as it constitutes an issue of purely sporting interest.'¹⁵ In addition, two years later the court in the Dona v Mantero case ruled that 'provisions do not prevent the adoption of rules or of a practice that exclude foreign players from participation in certain matches for reason which are not of an economic nature and relate to the particular nature and context of such matches and are thus of sporting interest only such as for example, matches between national teams from different countries'.¹⁶ As a consequence, rules and practices about issues of merely sporting interest cannot be regarded as discriminatory and in contrary with Community law as these laws are not within the scope of the latter.

Furthermore, the Bosman ruling several years later, namely in 1995, proved that the specific character of sport has also been taken into account by the court; in paragraph 106 of the judgment it is stated that: 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of

¹¹ Juan de Dios Crespo Perez, 'The Specificity of Sport in the CAS Jurisprudence' 'The European Union and Sport: Is Sport "Special" in EU law and Policy?' in R. Blanpain (ed) Bulletin of comparative labour relations: The future of sports law in the European Union: beyond the EU Reform Treaty and the White Paper vol.66, Kluwer law International, 2008, p.108.

¹² Aaron Smith and Bob Stewart, 'The special features of sport: A critical revisit', 13 Sport Management Review, 2010 available at <<http://www.aaronctsmith.com/Article%20PDFs/Smith%20SMR%202010.pdf>> accessed 3 May 2011.

¹³ art. 2 TEC was replaced by art. 3 TFEU.

¹⁴ Richard Parrish and Samuli Miettinen, 'The Sporting exception in European Union Law', T.M.C. Asser Press, 2008, p.81.

¹⁵ Case 36/74, Walrave and Koch v Association Union Cycliste Internationale, ECR [1974] 1405 para 8.

¹⁶ Case C-13/76, Dona v Mantero, [1976], ECR 13333 para 14.

equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.¹⁷ In other words, the court recognized that there is restriction on the fundamental principle of free movement of players but the recruitment and training of young players could be a legitimate aim able to justify this obstacle but I will come back to this case later in the next chapter.

The Deliege case is considered as an important case also. According to this judgment 'a rule which requires professional or semi-professional athletes to have been authorized or selected by their federation in order to participate in a high-level international sports competition, ... as long as it derives from a need inherent in the organization of such a competition, does not constitute a restriction on the freedom to provide services'.¹⁸ In other words, rules relating to selection criteria although may impose an obstacle to the principle of the freedom to provide services are not incompatible with the Community law as they are considered as purely sporting rules, inherent to the game, and for this reason the sporting federations are competent to lay down such rules having the appropriate knowledge.

At this moment, I would like to mention the Meca-Medina case¹⁹, which is in my opinion a rather significant case in the field of sport. According to this ruling, the ECJ held that 'even if rules do not constitute restrictions on the freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave and Koch and Dona), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles'.²⁰ This judgment broadened once more the scope of the EU law²¹ and caused the reaction of the world of sport; one of them, the Director of legal affairs of UEFA, characterized this ruling as a step backwards for the European sports model and the specificity of Sport opening a Pandora's Box of potential legal problems.²² So there is no general exemption from the community law for merely sporting rules and a case by case approach should be followed. One could also conclude that the court

¹⁷ Case C-415/93, Union Royale Belge Societes de Football Association and others v Bosman and others, [1995], ECR I- 4926 para 106.

¹⁸ Joined Cases C- 51/96 and C-191/97 Deliege v Ligue francophone de Judo et disciplines Associaees ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée [2000], ECR I- 2549 para 69.

¹⁹ Case C-519/04 P, Meca-Medina & Majcen v. Commission, ECR [2006] I- 6991.

²⁰ Meca-Medina, para 31.

²¹ Michele Colucci, 'The Specificity of Sport and the Employment Relationship of Athletes' in R. Blanpain & F. Hendrickx (ed) Bulletin of Comparative Labour relations : Labour law between Change and Tradition vol.78, Kluwer Law International, 2011, p. 39.

²² Gianni Infantino, 'Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?', (2006) available at <http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf> accessed 2 June 2011.

did not seem ready to accept the existence of rules that have solely sporting interest and that also these rules although they may prima facie be considered as merely sporting nevertheless should be checked if they are compatible with the Treaty articles as they often have economic interest as well.²³

Finally, the recognition of the special characteristics of sport was recognized in the Bernard judgment in which the court made a clear reference about the article 165 TFEU, accepting that compensation fees paid for the education of young athletes can be a legitimate aim that justifies the limitation on the free movement of players. But as I have already mentioned regarding the Bosman case I will come later for this case too.

As a conclusion, we fully understand that the special characteristics of Sport is the reason for having a differential treatment from the other 'businesses' and that this specificity has been taken into account by the European court in order to deal with the issue whether sport rules are in compliance with Community law or not. Except from the case law which tried to define the indistinct concept of specificity, the special nature of sport is highlighted in the Lisbon Treaty.

1.2 The article 165 of TFEU

After several years of strong debates and negotiations,²⁴ the Treaty of Lisbon entered into force on 1 December 2009.²⁵ For the first time there is a constitutional reference of Sport in a Treaty, which is of high significance as it provides European Union with a soft competence concerning sport issues. According to article 6 of the TFEU: " The Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be... (e) education, vocational training, youth and sport.. " This means that while before December 1, 2009, the EU was competent to interfere with the sport only via general rules applicable to all EU citizens or workers, since December 2009 sport can be addressed directly in the European law.²⁶ This gave rise to two concerns; firstly EU sports policy has been guided by the judgments of the ECJ and that single market laws, such as those concerning freedom of

²³ Marios Papaloukas, 'The importance for Sport of the 18-7-2006 ECJ Ruling of the Meca Medina Case', issue 3, Sports Law Review (2006) available at < <http://www.sportsnet.gr/images/stories/pdfs/ead/2006-3.pdf>> accessed 5 June 2011.

²⁴ The proposed Constitution in 2004 included an article on sport but was not approved by the citizens of the Netherlands and France.

²⁵ The Lisbon Treaty amends the two previous Treaties, namely the Treaty on European Union or Maastricht Treaty and the Treaty establishing the European Community or Treaty of Rome.

²⁶ Tomas Gabris, 'The specificity of sports in the International and EU Law', Issue 2/2010, Juridical Sciences Series, (2010), <http://www.utgjiu.ro/revista/jur/pdf/2010-02/11_TOMAS_GABRIS.pdf> accessed 6 June 2011.

movement and competition that have not sufficiently recognized the specificity of sport and secondly the EU sport policy lacked status and coherence.²⁷

It is without a doubt that the art. 165 TFEU introduces a new facet in the relationship between Sport and the EU and presents in detail the sports policy; this very important article is contained on the Third Part of the TFEU which concerns the 'Union Policies and Internal Actions' and in particular is included in Title XII which is referred to the 'Education, Vocational Training, Youth and Sport'.²⁸

In particular for Sport, according to art. 165 (1) of the TFEU it is provided that: " ... The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."

Art. 165 (2) states 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", while art. 165 (3) refers that "The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the field of education and sport, in particular the Council of Europe."

Lastly, article 165 (4) affirms that "In order to contribute to the achievement of the objectives referred to in this article, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States and the Council, on a proposal from the Commission, shall adopt recommendations."

From the combination of the abovementioned articles it is clear that regarding sport issues Member States have the main competence whereas the competence of EU is supplementary and supportive according to the principle of subsidiarity. The particular reference to sport means that sporting activities will no longer be exempted from the European or national law; this is especially the case in relation to

²⁷ Richard Parrish, Borja Carcia Garcia, Samuli Miettinen & Robert Siekmann, 'The Lisbon Treaty and EU Sports Policy' study, (2010) p.6 requested by the European Parliament's Committee on Culture and Education available at <<http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=32471#search=%20lisbon%20treaty>> accessed 2 May 2011.

²⁸ Andreas Malatos, Lectures of Sport Law, 2nd edn, Ant.N.Sakkoulas Publishers, 2010 p.254.

the issues of free movement and non discrimination.²⁹ FIFA welcomed the introduction of the article in the Lisbon Treaty stressing that the recognition of the specificity of sport is about protecting its universality, the foremost characteristic of its specific nature and as a result, inter alia, sport organizations in Europe will gain momentum through more funding opportunities because the reference to sport will enable the set-up of a specific EU sports funding program as well as a better mainstreaming of sport in existing programs.³⁰ Nonetheless, Jan Figel, the European Commissioner responsible for Sports, stressed that sport is not a business as usual and money is not the most important thing regarding art. 165 TFEU. Furthermore, he declared that this article will cause also qualitative changes such as establishing a base for an EU-wide sports program, which could mean transfer of knowledge, formation of networks, exchange of best practice, coordination in this area, mobility of sportsmen and women and trainers and young people.³¹

In my opinion the reference of sport in the Treaty is of high value since this article can be the common basis for a uniform regulation and put an end to legal uncertainty. It gives the opportunity a European sports policy to be developed and I go along with the UEFA's position on the significance of art. 165 TFEU which is that the reference of sport in the Treaty could be beneficial for the European Sport under the condition that it is applied in a way that can reconcile harmoniously the pursuit of the key values on which sport is founded with the requirements of EU law.³²

1.3 The Amsterdam and Nice Declaration

The Treaty of Amsterdam entered into force on 1 May 1999. As far as Sport is concerned, in the 29th Declaration of the Treaty the Conference emphasized the social significance of sport, in particular its role in forming identity and bringing people together and called on the bodies of the EU to listen to sports associations when important questions affecting sport are at issue.³³ Hence, it is evident that the wording of this Declaration is mild, it is only a limited victory for the sport governing bodies which are represented as to perform social functions and it does not amount

²⁹ Michele Colucci, 'Sport in the EU Treaty: In the Name of Specificity and Autonomy, in the Future of Sports Law' in R. Blanpain (ed) *Bulletin of comparative labour relations: The future of sports law in the European Union: beyond the EU Reform Treaty and the White Paper* vol.66, Kluwer Law International, 2008, p.23.

³⁰ 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>> accessed 3 May 2011

³¹ <http://www.euractiv.com/en/sports/figel-sport-business-usual/article-182298> (published on 15 May 2009) accessed 1 June 2011.

³² UEFA, 'Position on article 165 of the Lisbon Treaty' available at <http://www.slpc.eu/UEFA_position_paper_on_article_165_TFEU.pdf> accessed 5 June 2011.

³³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing The European Communities and related acts, in *Official Journal* C340, 10 November 1997. Declaration no.29 on Sport.

to an endorsement for sport to be exempt from Community Law.³⁴ Additionally, this Declaration referred to the amateur sport and its particular characteristics.

As far as the Nice Declaration is concerned, the latter was adopted by the European Council in September 2000. Like the Amsterdam Declaration, it is a non-legally binding instrument but of major importance providing guidelines of how certain issues should be dealt. In accordance with the Declaration, Community although does not have any direct powers in the area of sport should take into account the social, educational and cultural functions which are inherent in sport (para 1) and recognized that sporting organizations are competent to organize and promote their particular sports on the condition that they operate democratically and with transparency (para 7). Furthermore, the Declaration supported the preservation of sports training policies organized by sports federations and public authorities (para 11), stressed the importance of protection of young athletes expressing also concerns about commercial transactions of minors (paras 12 and 13) and asked for a social dialogue relating to the transfer system (para16).

Furthermore, in accordance with the Independent European Sport Review³⁵ (known also as Arnaut Report), a report in order to realize the implementation of the Nice Declaration, the specificity of sport can be divided in three categories of rules which are compatible with the Community law, and have to do with the a) regularity and proper functioning of competitions which include “rules of the game” or “field-of-play rules” such as rules concerning the composition of national teams and rules relating to transfer “deadlines, b) Integrity of sport such as the club licensing system and rules concerning players’ agents and c) Competitive balance such as rules concerning home-grown players and rules regarding cost controls.³⁶

It is obvious that there is a variety of issues relating to the specificity of sport that are coming into sight; the ECJ recognized that the specific nature of sport has to be taken into account. Nevertheless, the margin of discretion that sports governing bodies and actors have in rule making process, ought to be examined with cautiousness on a case-by- case basis abolishing the existence of the ‘purely sporting rules’ theory³⁷ so as to avoid arbitrary and disproportionate set of laws and be in line with the legitimate interest and real spirit of sport.

³⁴ Richard Parrish and Samuli Miettinen, ‘The Sporting Exception in European Union Law’, T.M.C. Asser Press, 2008 p.34-35.

³⁵ Jose Luis Arnaut, Independent European Sport Review, 2006 available at <http://www.independentfootballreview.com/doc/Full_Report_EN.pdf> accessed 30 April 2011.

³⁶ Arnaut Report paras 3.15 – 3.17.

³⁷ See also Meca- Medina Case.

1.4 The White Paper on Sport

This non-legally binding document, adopted by the European Commission in July 2007 played a central role in the future of sport in the European Union.³⁸ The White Paper on Sport explains the key problems that sport is facing in relation to three core areas that is to say: the societal role of sport, the economic dimension of sport and the organization of sport.³⁹ The term 'specificity' was first introduced in the White Paper on Sport as in the earlier official EU texts this word does not appear⁴⁰ and can be approached by two prisms: a) *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;* and b) *The specificity of the sport structure, including notably the autonomy and diversity of sport organizations, a pyramid structure of competitions from grassroots to elite level and organized solidarity mechanisms between the different levels and operators, the organization of sport on a national basis, and the principle of a single federation per sport.*⁴¹

Regarding the specificity of sport, the Commission refused to take an interventionist approach and in the main intended to restrict itself to ensuring the respect the basic freedoms when necessary.⁴² As it was above mentioned, it recognized two dimensions to the specificity of sport namely the traditional rules of the game and rules about the structure of sport.⁴³ Nevertheless, the Commission concluded that there are no 'purely sporting rules' and the compatibility of the latter with the EU law can only be assessed through a case by case approach.⁴⁴

³⁸ It is accompanied by an Action Plan, a Staff Working Document and an Impact Assessment and it is separated into five parts, namely the Introduction, the Societal Role of Sport, the Economic Dimension of Sport, the Organization of Sport and the Follow-up. Each of the abovementioned parts is divided into several sub-sections.

³⁹ Michele Colucci, 'Sport in the EU Treaty: In the Name of Specificity and Autonomy, in the Future of Sports Law' in R. Blanpain (ed) *Bulletin of comparative labour relations: The future of sports law in the European Union: beyond the EU Reform Treaty and the White Paper* vol.66, Kluwer Law International, 2008 p.26.

⁴⁰ Pedro Velazquez Hernandez, 'The European Commission's White Paper on Sport' in R. Blanpain (ed) *Bulletin of comparative labour relations: The future of sports law in the European Union: beyond the EU Reform Treaty and the White Paper* vol.66, Kluwer Law International, (2008) p.82.

⁴¹ Commission White Paper on Sport, COM (2007) 391, 11 July 2007, para.4.1.

⁴² Melchior Wathelet, 'Sport Governance and EU Legal Order: Present and Future' in S Gardiner, R Parrish and RCR Siekmann (ed) *EU, Sport, Law and Policy – Regulation, Re-Regulation and Representation*, T.M.C Asser Press, 2009, p.74.

⁴³ Richard Parrish and Samuli Miittinen, 'The Sporting Exception in European Union Law', T.M.C. Asser Press, 2008 p.44.

⁴⁴ Commission White Paper on Sport, COM (2007) 391, 11 July 2007, para.4.1.

2. The autonomy of the Sports organizations

The autonomy of the sports organizations is based on the fundamental principle of freedom of association which is guaranteed by the respective national legislation and is also expressed in the Charter of fundamental rights of the EU.⁴⁵ More specifically, sports organizations are entitled to form rules relating to the particular game, rules about the competitions they organize and rules on their constitutions. The autonomy of the sport governing bodies has been recognized in several official documents such as in the Nice Declaration where the European Council acknowledges the right of the sporting organizations to organize themselves and promote their particular sports using democratic and transparent methods.⁴⁶ And in the White Paper on Sport according to which the governance is mainly the responsibility of sports governing bodies and that Member States and social partners can have secondary role providing that the EU law is always respected.⁴⁷ Nonetheless, although the sport governing bodies enjoy a wide margin of appreciation in forming rules, the latter have to be in line with Community law following the principle of proportionality.

According to Jean-Loup Chappelet, author of the report 'Autonomy of Sport in Europe' which was commissioned by Council of Europe's Enlarged Partial Agreement on Sport (EPAS), a proposed definition which takes account of the various aspects of the sporting autonomy could be characterized as the possibility for non-governmental, non-profit-making Sports organizations to:

1. Establish, amend and interpret rules appropriate to their sport freely, without undue political or economic influence;
2. Choose their leaders democratically, without interference by states or third parties;
3. Obtain adequate funds from public or other sources, without disproportionate obligations;
4. Use these funds to achieve objectives and carry on activities chosen without severe external constraints;
5. Draw up, in consultation with the public authorities, legitimate standards proportionate to the fulfillment of these objectives.⁴⁸

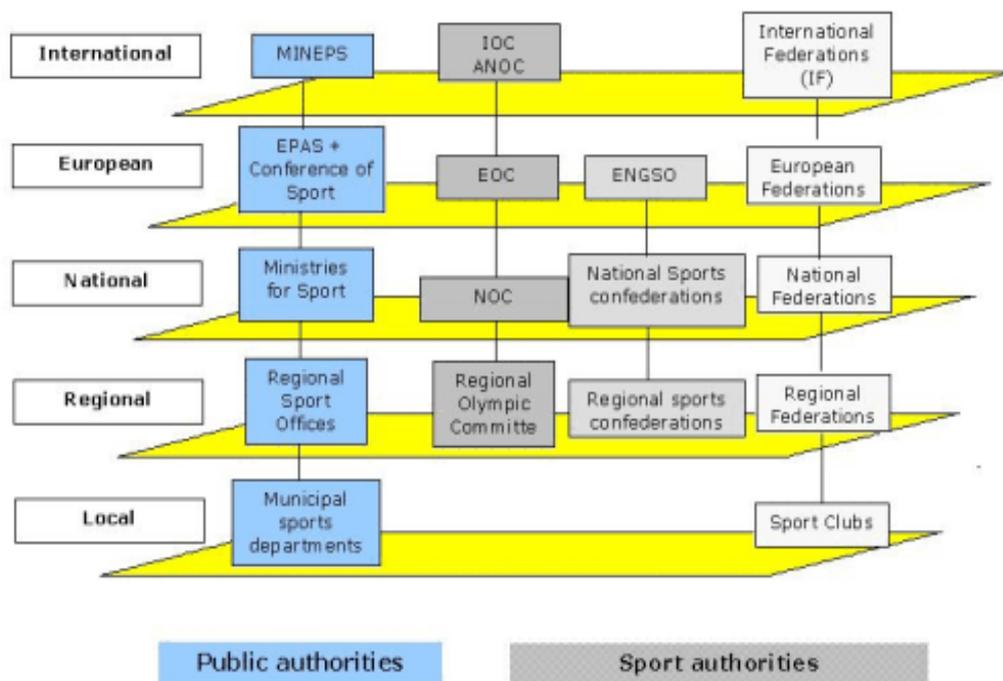
The autonomy of the sport organizations is in close connection with the pyramid structure of the sport associations. The following diagram illustrates the situation described.

⁴⁵ Charter of Fundamental Rights of the European Union, [2000], OJ 364/3 art.12.

⁴⁶ Nice European Council, 7-10 December 2000, Presidency Conclusions <http://www.europarl.europa.eu/summits/nice1_en.htm> para 7.

⁴⁷ European Commission, White Paper on Sport, 11 July 2007, part 4.

⁴⁸ Jappelet Jean- Loup, 'Autonomy of Sport in Europe', Council of Europe Publishing, Strasbourg, 2010 <<http://www.coe.int/t/DG4/EPAS/resources/6720-0-ID8704-Autonomy%20of%20sport%20assemble.pdf>> accessed 7 May 2011 p.49.



Source: EU Office

Available at: http://www.euoffice.euolympic.org/cms/?p=296&s=eoc_simplecontent&

Furthermore, as it was already mentioned, in the Deliege case the court acknowledged the right of sport federations to lay down rules relating to selection criteria and to make their selection according to them as they normally have the necessary knowledge and experience.⁴⁹

Sport governing bodies can also have their arbitrary and dispute resolution bodies. For example, the Dispute Resolution Chamber (DRC) is the FIFA's deciding body that provides arbitration and dispute resolution on the basis of equal representation of players and clubs and an independent chairman⁵⁰. Appeals to DRC are resolved by Court of Arbitration of Sport. In my opinion, 'the ability of governing bodies to self-regulate'⁵¹ is of high importance as there is an opportunity given to resolve a dispute without facing lengthy legal proceeding by judges who have efficient legal knowledge about sports issues and disputes. This is of high importance taken into account that the career of the athletes is of limited duration. Nonetheless, in general athletes ought to have as a last resort the civil courts if they are not satisfied with

⁴⁹ Joined Cases C- 51/96 and C-191/97 Deliege v Ligue francophone de Judo et disciplines Associaees ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée [2000], ECR I-2549, Paras 67-68.

⁵⁰ FIFA, 'Dispute Resolution Chamber', <http://www.fifa.com/aboutfifa/federation/administration/disputeresolution.html> accessed 7 May 2011.

⁵¹ Richard Parrish and Samuli Miettinen, 'The Sporting Exception in European Union Law', T.M.C. Asser Press, 2008 p.14.

the outcome of the case. Finally, I would like to highlight that the sport governing bodies have a wide discretion to lay down rules relating to the game or their structure as these bodies have the best knowledge and full understanding of the sport. However, this right should not limit disproportionately fundamental freedoms and rights of the athletes, so to resolve such a conflict, a delicate exercise of 'balancing of rights' will have to be effectuated.⁵²

3. The Pyramid Structure

As far as the football organizational structure in Europe is concerned, the current formation has the structure of a pyramid; the base of the pyramid is consisted by the pool of players. These players are organized in a way to form clubs. The clubs of a specific European country are members of the national associations that have, inter alia, as a principal responsibility to organize championships at national level. National associations are members of the continental confederations; at the top of the pyramid is the world governing body, namely the International Federation of Association Football otherwise widely known as FIFA. FIFA recognized six federations that supervise the game depending on the continent, namely the Asian Football Confederation (AFS), the Confédération Africaine de Football (CAF), the Confederation of North, Central American and Caribbean Association Football (CONCACAF), the Confederación Sudamericana de Fútbol (CONMEBOL), the Oceania Football Confederation (OFC) and the Union of European Football Associations (UEFA). A primary function of this pyramid structure is to facilitate an equitable distribution of revenue among the constituent sports clubs so as to encourage mass participation and competitive balance among clubs.⁵³

An example of the application of the pyramid model can be seen in the international transfers; in case a player wants to move to another country to play for a (foreign) club, not only the clubs need to agree on the transfer, also the agreement of the national football associations is required in terms of an International Transfer Certificate.⁵⁴

⁵² Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005, p.20.

⁵³ James Nafziger, 'European and North American Models of Sports Organization', in S Gardiner, R Parrish and RCR Siekmann (ed) EU, Sport, Law and Policy – Regulation, Re-Regulation and Representation, T.M.C Asser Press, 2009, p.37.

⁵⁴ Rob Simons, 'Protection of Minors VS European Law' in M. Colucci (ed) European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, 2010 p.122.

In this point, I would like to cite Weatherill's argument about the pyramid model.⁵⁵ He criticizes the pyramid structure by saying that it is not only an organizational structure but a set of practices that are vulnerable to challenge under EC law. For him the pyramid is too big and argues that many decisions taken by sport federations have direct and substantial commercial implications on the clubs (giving as an example the release of players) which is the result of the exclusion of the major football clubs from the formal participation in the taking-decision process. As a conclusion, I would like to stress once more that according to the text of the Nice Declaration, the right of the sport organizations to organize themselves should operate democratically and transparently. When rules are going beyond to what is necessary then reducing the size of the pyramid seems to be a good idea.

⁵⁵ Stephen Weatherill, 'Is the pyramid compatible with the EC law?' in *European Sport Law: Collected Papers*, T.M.C Asser Press, 2007 p.259-271.

II. Training Compensation in the forefront

1. A Restriction on the free movement of players?

The free movement of persons is an elementary aspect of the Internal Market; it is also attached to the citizenship of the Union and it constitutes a fundamental right in Community law.⁵⁶ One of the major issues that the ECJ was called to deal with was the interpretation of the art. 45 TFEU (ex article 39) concerning the freedom of movement of workers. According to the text of the article, freedom of movement entails the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.⁵⁷ Nonetheless, this fundamental right can be restricted but it has to be objectively justified due to reasons relating to public policy, public security or health.⁵⁸

Under this article EU citizens and especially the category of workers are entitled to accept offers of employment, move freely for this purpose within the territory of EU Member States, stay in a Member State for the purpose of employment and remain in the territory of a Member State after having been employed in that State.⁵⁹

As it was stated in the Walrave case sport is subject to the Community only in so far it constitutes an economic activity in the meaning of article 2 EC.⁶⁰ Consequently, once the Court has decided that a certain sporting activity is economic in nature, the next issue is to examine whether the athlete in question can be qualified as a 'worker' within the meaning of art. 45 TFEU or alternatively as a sportsman competing in an independent, self-employed capacity within the meaning of art. 49 and 56 TFEU.⁶¹

At this point, it would be appropriate to define the notion of the worker. This notion cannot be based on the definitions of national laws because the different meanings and terms would cause frustration or could result in the exclusion of certain categories of workers. According to the Lawrie Blum ruling the concept of the worker must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the person

⁵⁶ Erica Szyszczak, 'EC Labour Law', European Law Series, Pearson Education Limited, 2000, p.51.

⁵⁷ Treaty on the Functioning of the European Union, art. 45 para 2.

⁵⁸ *ibid* para 3.

⁵⁹ *Ibid*.

⁶⁰ Case 36/74, Walrave and Koch v Association Union Cycliste Internationale, ECR [1974] 1405 para 4.

⁶¹ Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005, p.30.

concerned;⁶² the essential feature of an employment relation, however, is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. So, to review, the three constituent elements of the notion of worker are: a) the performance of service, the pursuit of the effective and genuine activities, part-time included, with the exclusion of activities of such a small scale as to be regarded as purely marginal and ancillary, 2) in subordination, namely to perform services for and under the direction and supervision of another person, and for 3) remuneration.⁶³

However, it still needs to be answered whether a sportsman is regarded as a worker or not. Are football players considered as employees or self-employed? According to Stefaan Van den Bogaert,⁶⁴ there is a distinction between the athletes, who are part of a team such as football, basketball and handball players and those who perform an individual sport. According to him, for the first category, the criteria established in the Lawrie Blum case seem to be fulfilled, as they provide their services by being technically and tactically familiar with the rules of the game, they are financially awarded for representing their club and they are under subordination because they have to carry the coaching staff's instructions on the pitch and in general they are under the instructions of the club's management. On the contrary, athletes of individual sports are performing their services on an individual basis without being under the direction or supervision. Nonetheless, I am of the opinion that this distinction is not any more of major importance, especially as far as social security is concerned due to the fact that new Regulation⁶⁵ concerning the coordination of the social security systems covers the self-employed as well.

More specifically, in accordance with the FIFA Regulations on the Status and Transfer of Players,⁶⁶ as a professional is regarded the player who has a written contract and receives remuneration for his footballing activity - more than his expenses- whereas all the others are characterized as amateurs. As a consequence, players like any other nationals of Member States are taking advantage of the principle of free movement of workers or the freedom to provide services.

⁶² Case C-66/85, Deborah Lawrie-Blum v Land Baden-Württemberg, 3 July 1986, para 17.

⁶³ Roger Blanpain, 'European Labour Law', XII Revised Edition, Kluwer Law International, 2010 p. 300.

⁶⁴ Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p. 57-62.

⁶⁵ Council Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems [2003] OJ 200/1.

⁶⁶ See FIFA Regulations on Status and International Transfer of Players (2010 edn) art 2 para 2, available on <http://www.fifa.com/mm/document/affederation/administration/01/06/30/78/statusinha lt_en_122007.pdf> accessed 5 May 2011.

Furthermore, In Deliege⁶⁷ ruling, the court accepted that also sporting activities of an amateur athlete, such as the participation in international tournaments, can be regarded as economic activity within the meaning of providing services due to receiving as remuneration grants and sponsorship contracts linked directly to the results and sports achievements of the athlete. Of course, in order to apply the Community law provisions, a cross-border movement has to take place. According to previous case law, 'the provisions of the Treaty on freedom of movement cannot be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by the Community Law'.⁶⁸

In the Bosman and Bernard case, the core issue which the Court has to cope with was whether rules laid down by sports governing bodies under which transfer fees and training compensation respectively were to be paid to the former clubs constitute an obstacle to the free movement of workers, without making any reference to the freedom of providing services.

2. The Analysis of the Bernard Case

2.1 Introduction

The Bernard case is without a doubt a judgment of high importance in the field of sport. It has been approximately fifteen years after the Bosman case that the Court had to deal once more with the tricky and complicated issue of the freedom of movement (art. 45 TFEU) and the restriction on this principle due to transfer fees (Bosman) or training compensation (Bernard).

Emphasis also has to be placed on the fact that the Bernard ruling took place after the adoption of the art.165 TFEU, entered into force in December 2009 and recognized the specific nature of sport and its social and educational role. The Court mentioned the art. 165 of the TFEU -although in a supplementary way-, emphasizing 'the specific characteristics of sport in general, and football in particular, and of their social and educational function'.⁶⁹ So one could say that this case is also about a conflict of interests -rights, namely from one side it is the fundamental freedom of

⁶⁷ Joined Cases C- 51/96 and C-191/97 Deliege v Ligue francophone de Judo et disciplines Associaees ASBL, Ligue belge de judo ASBL, Union européenne de judo and and François Pacquée [2000], ECR I-2549 paras 51 & 60.

⁶⁸ Case C-175/178 R v Saunders ECR 1979 1129 para 11.

⁶⁹ Case C-325/08, Olympique Lyonnais v. Olivier Bernard and Newcastle United, ECJ 16 March 2010 para 40.

movement of workers which is limited by obligatory training compensation and from the other the protection of human capital investment of the employer and the encouragement of training of young athletes.⁷⁰ It is evident that professional football does not only constitute a significant economic activity at global level but also serves a social, cultural, educational even political role.

2.2 Facts and Setting

On 12 August 1997, Olivier Bernard, a professional football player from France, signed a 'joueur espoir' contract with a French club, namely the Olympique Lyonnais SASP for a period of three seasons. The contract had effect from the 1st of July of that year. Before terminating that contract, the Olympique Lyonnais offered Mr Bernard another contract as professional player for a period of one year beginning from 1 July 2000. Mr Bernard not only turned down the contract that Olympique Lyonnais offered him, but he also signed a contract as a professional football player with another club, Newcastle United FC.

When Olympique Lyonnais was informed that Mr Bernard concluded a contract with another club filed a suit against him before the Employment Tribunal (Conseil de prud' hommes) in Lyon in order to ask for damages jointly against the football player and the English club. The amount of damages that Olympique Lyonnais was seeking for was EUR 53 357.16, which was exactly the amount that Mr Bernard would have received as a payment if he had signed the contract with the French club.

The Employment Tribunal on 19 September 2003 in Lyon resolved that Mr Bernard ended unilaterally his contract with Olympique Lyonnais; as a result he had to compensate jointly with Newcastle United FC the French club by paying damages of EUR 22 867 in accordance with the article L. 122-3-8 of the French Employment Code. This article provided that: 'in the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure.' And that 'failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered'.⁷¹

Several years later, on 26 February 2007, the Court of Appeal made void the decision of the Employment Tribunal, on the grounds that the art. 23 of the Charter was not

⁷⁰ Frank Hendrickx, 'Justification of training compensation in European football: Bosman and Bernard compared' in M. Colucci (ed) *European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation*, Sports Law and Policy Center, (2010) p.19.

⁷¹ Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECJ 16 March 2010, para 6.

in compliance with the art. 45 TFEU (ex 39 TEC). At the material time, in accordance with the relevant Charter in France, the employment of football players had the status of collective agreement. Under the art. 23 of this Charter: 'On the normal expiry of the "joueur espoir" contract, the club is then entitled to require that the other party signs a contract as a professional player'. As 'joueurs espoir' were considered the players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract.⁷²

The Court of Appeal stated that although the abovementioned article of the Charter does not prohibit formally a football player from signing his first professional contract with another club, it does though make it for him less attractive or discourage him as the latter is under the obligation to pay damages.

On 9th of July 2008, the Court of Cassation decided to submit before the ECJ a preliminary ruling relating to the interpretation of art. 45 TFEU; that is to say, whether the provision included in the French Charter constitutes a limitation to the free movement of workers and if so, can this limitation be justified by a legitimate aim namely the need to encourage the recruitment and the training of young athletes.⁷³

2.3 The ruling of the ECJ

The ECJ promulgated its ruling on 16 March of 2010 referring first of all that sport is subject to the EU law as long as it constitutes an economic activity (that was already stated in Walrave and Dona Mantero); more specifically where this activity takes the form of gainful employment or the provision of services for remuneration, which is the case of professional or semi-professional sportsmen, falls within the scope of art. 45 TFEU.⁷⁴ According to the court the Charter had the status of a national collective agreement and for this reason was subject to art. 45 TFEU.⁷⁵ In addition, it was stated that provisions relating to the free movement of workers have as a purpose to facilitate the pursuit of occupational activities throughout the EU so as a consequence, measures that place nationals of Member States at disadvantage or even make less attractive the pursuit of an economic activity are precluded even though this restriction is regardless of the nationality of workers concerned.⁷⁶ Therefore, the court concluded that the provision of the Charter, which obliges the amateur player at the end of his training to sign his first professional contract with

⁷² Bernard, para 3.

⁷³ *ibid*, para 16.

⁷⁴ *ibid* paras 27 & 28.

⁷⁵ *ibid* para 32.

⁷⁶ *ibid* paras 33 & 34.

the club provided the training constitutes a limitation on the free movement of workers guaranteed within EU as it likely to discourage the player from exercising his right to free movement or make this exercise less attractive due to the fact that he is likely to be sued for damages for breaching the contract.⁷⁷

The main question now is whether this restriction can be allowed; the court answered to this question by stating that a measure which constitutes an obstacle to free movement of workers can be accepted only if it pursues a legitimate aim which is in line with the EU law, justified by overriding reasons in the public interest and following the principle of proportionality.⁷⁸ Then, as it has been already acknowledged in *Bosman* judgment,⁷⁹ taking into account the social importance of the football, the objective of encouraging the recruitment and training of young athletes must be accepted as legitimate and added that the specific characteristics of sport as well as its social and educational function are confirmed by the adoption of the art. 165 TFEU.⁸⁰ The training compensation is considered as a legitimate aim as it is likely to encourage clubs to search for new talents and train young players; nevertheless, the returns on the investment are of uncertain nature as one cannot predict with certainty the exact number of the players who will follow a professional career.⁸¹ So in the case that a club, especially a small one, does not receive training compensation, it is possible to be discouraged to train young athletes. The court concluded its ruling by stressing the fact that the training compensation has to depict the actual amount spent on the training, which is not in the case at stake, because the club demanded damages in relation to the cost suffered going beyond to what is necessary.⁸²

2.4 The Opinion of the Advocate General

The Advocate General Sharpston delivered her opinion on 16 July 2009. The AGs' opinions are not binding because their role is to propose to the court, having a status of complete independence, a legal solution to the cases for which they are responsible.⁸³ In the present case, the AG started her opinion by illustrating the existing reality of the football world which is from the one hand, young gifted players who desire to being spotted by a talent scout, end up signing highly promising

⁷⁷ Bernard paras 35-37.

⁷⁸ Ibid para 38.

⁷⁹ *Bosman*, para 106.

⁸⁰ Bernard, para 40.

⁸¹ Ibid paras 41 & 42.

⁸² Ibid paras 46-48.

⁸³ Press Release No 65/09, Advocate General's Opinion in Case C-325/08 *Olympique Lyonnais v Olivier Bernard & Newcastle United*, Press and Information available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=CJ/09/65&format=HTML&aged=1&language=EN&guiLanguage=en>> accessed 6 May 2011.

contracts and gaining a great sum of money and from the other hand, clubs especially small which do not want to see their best young hopefuls to be poached by other – usually richer- clubs.⁸⁴ Then, the AG acknowledged once more that sport is subject to Community law insofar it constitutes an economic activity and that rules which require transfer, development or training fees between clubs in case of a transfer are obstacles on the freedom of movement of workers.⁸⁵ As far as the dispute may touch on matters of competition law, she stated that these have not been raised by the referring court and additionally, if the dispute did raise issues of competition law that would not preclude the application of the free movement application rules like in the Meca-Medina case.⁸⁶ Furthermore, measures that constitute restrictions on the fundamental freedoms can be justified if they pursue a legitimate aim but they have to fulfill four criteria,⁸⁷ namely not to be applied in a non discriminatory manner, be justified by overriding reasons in the public interest, be suitable to attain the objective they pursue and not go beyond to what is necessary.⁸⁸ In this case there was no discriminatory approach, the recruitment and training of young athletes is considered as legitimate aim focusing on the social character of the football and the court ruled that the training compensation has to depict the real costs; as far as the principle of proportionality is concerned, the court merely declared that the damages claimed by the club went beyond to what was necessary. After pointing out the social character of the professional football and its social importance in Europe, the AG stressed that only a measure that compensates a club in a way that calculates the actual training costs can be appropriate and proportionate; consequently, training costs calculated according to the club's prospective profits cannot be acceptable.⁸⁹ Concluding, the AG Sharpston proposed two systems under which the calculation of the amount can be based, namely a system of compensation between clubs under which the amount is calculated on the overall costs taking into account the number of the players a club trained in order to produce one who will follow career as professional (as it is impossible to predict the exact number of the players that will play professionally) and a system based on the individual costs of the player in the case that the player has himself to bear the liability to pay compensation.⁹⁰ The court chose the first category of calculating the compensation that is to say on the expenses of the clubs taking into account 'the player factor'.

⁸⁴ Opinion of Advocate General Eleanor Sharpston, [2010], ECR I-00000 para 1.

⁸⁵ A-G Bernard, paras 36 & 40

⁸⁶ Ibid para 43.

⁸⁷ See Case C-19/92 Kraus [1993] ECR I-1663 para 32; Case C-55/94 Gebhard [1995] ECR I-4165 para 37; Bosman para 104.

⁸⁸ A-G Bernard, para 44.

⁸⁹ Ibid para 50.

⁹⁰ Ibid para 57.

2.5 Observations

As it was already mentioned, the court in the Bernard case had to contend with complicated problem of the free movement of workers. Whenever this issue comes for debate, almost everyone remembers the landmark case of the French football player Jean Marc Bosman. In that case the court ruled that transfer fees imposed to out-of-contract players in case of signing a professional contract abroad are an obstacle on the free movement of workers and thus are incompatible under the Community Law. But in the Bernard case, things seem to have changed. Perhaps the first step towards the training compensation was made fifteen years ago when the court recognized for first time that training fees could be a legitimate aim to justify the limitation on the fundamental freedom of movement. Nonetheless, it finally concluded that at that time compensation due to training provided could not be an adequate means and 'decisive factor' to encourage especially small clubs to seek for new talents and train young players.

It seems to me that in this case, the court as well as the AG Sharpston put a lot of emphasis on the uniqueness of sport; they took account of the special characteristics of the latter and its social and educational function which was reaffirmed by the adoption of the art. 165 TFEU. -the court mentioned it in its reasoning- and this is the reason why the sport has a different treatment from any other 'businesses'. In other words, training compensation could be invoked as well by other categories of employers when after the completion of the training, the employees terminated their employment contract. But this is exactly the specificity of sport having a social and education, or even a cultural dimension. The court's ruling seems to be rational considering the encouragement of recruitment and training of young athletes as a legitimate aim as this ruling may give a boost to youth sector of sport. Furthermore, the court highlighted that the amount of the compensation has to present the actual amount that the 'parent' club spent for the training of the athlete without going beyond to what is necessary to attain this aim. Hence, this is just the reason for finding the damages for breaching unilaterally the contract claimed under the French Football Charter disproportionate and unrelated to the real costs. Nonetheless, I would prefer the court to go one step further; namely, the court failed to give any guidance on how the amount of the training costs should be calculated in order to follow the principle of proportionality neither made any comment on the existing FIFA Regulations relating to the training compensation system. Finally, the court did not mention the legitimacy of the training compensation with regard to the relevant EU antitrust rules that is to say articles 101 and 102 TFEU as happened in Bosman, Deliege and Lehtonen but restricted its analysis only in the light of the principle of

freedom of workers.⁹¹ According to the A-G, as far as competition law is concerned, she just stated that these matters have not been raised by the referring court, so that the Member States and the Commission didn't have the opportunity to make a comment on them but if the dispute did raise issues of the competition law, this could preclude the application of the free movement provisions.⁹² Nevertheless, the employment of football players was regulated at the material time by the French Charter which had the status of a collective agreement⁹³ and as a consequence in accordance with the Albany ruling negotiations between management and labour in pursuit of social policy objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.^{94,95}

2.6 Bernard, the follow-up of the Bosman?

It is not more arguable that the Bosman ruling paved the way for a series of legal disputes, although some of them may not be justified; this decision except having a strong impact on the professional football, acquired dimensions which determined the relationship between sport and the EU.⁹⁶ The vast majority of the sport stakeholders do strongly consider the Bosman ruling, up to this moment, as a milestone in the sport-field cases and this because before the Bosman judgment the fundamental principle of football players was violated by the practices of FIFA and UEFA whose aim was to take the absolute control over the professional football at a global level;⁹⁷ transfer systems focused on preventing the athletes from the pitch and national clauses found by the court contrary to article 45 TFEU. In the pre-Bosman era, as it was successfully illustrated, soccer players were- and still outside the EU- treated like cattle which could be sold and bought.⁹⁸

⁹¹ Michele Colucci, 'The Bernard Case: An opportunity for all sports stakeholders' in M. Colucci (ed) in European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, (2010) p. 152-153.

⁹² A-G Bernard, para 43.

⁹³ Bernard, para 3.

⁹⁴ Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] I-05751 paras 59 & 60.

⁹⁵ See also Michele Colucci, 'The Bernard Case: An opportunity for all sports stakeholders' in M. Colucci (ed) in European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, (2010) p. 153

⁹⁶ Andreas Malatos, 'Lectures of Sport Law', Ant.N.Sakkoulas Publishers ,Athens , 2010 p.222.

⁹⁷ Roger Blanpain, 'European Labour Law', twelfth edition, Kluwer Law International BV, 2010 p.306.

⁹⁸ Ibid

The case came before the ECJ when Mr Bosman, a promising football player from Belgium, signed a professional contract with RC Liege for two seasons. Before his contract was due to expire, the Belgian club offered him a new one but decreased his payment. For that reason, Mr Bosman rejected the offer and was put on the transfer list. Mr Bosman, having no other offers, came in contact with a French club namely US Dunkerque. US Dunkerque and RC Liege agreed on the transfer of Mr Bosman, according to which the latter was transferred to French club for one year providing that RC Liege would receive a compensation fee. Nevertheless, RC Liege considered US Dunkerque solvent and therefore did not ask URBSFA (Union Royale Belge des Sociétés de Football Association) to send the transfer certificate to the French Football Association. As a consequence, the two contracts (the contract between the two clubs and the contract between Mr Bosman and the French club) were null and void. The player was also suspended for a season because he refused to sign a contract with the Belgian club. Not allowed to play and without an income, he brought an action before the Court of First Instance and finally reached the ECJ.

Mr Bosman argued that a rule under which a professional football player who is at the end of his contract with a club, and cannot be employed by another club of another Member state unless the latter club has paid to the former a transfer, training or development fee is incompatible with the fundamental principle of freedom of movement and the competition law.⁹⁹ Due to this thesis I will address only the issue of the training compensation as a legitimate aim, able to justify a restriction on the free movement of workers. Indeed, the court found out that rules which impose an transfer fee to be paid to the former club are likely to restrict the freedom of movement of players who wish to pursue an activity in another member state by preventing or deterring them from leaving the clubs to which they belong even after the end of their contracts with those clubs and even if they apply without regard of the nationality.¹⁰⁰ Then the court had to examine if this limitation could be justified by pursuing a legitimate aim in the public interest according to the principle of proportionality.¹⁰¹ Two possible grounds of justification were presented, namely the maintenance of financial and competitive balance and the encouragement of the recruitment and training of young players.¹⁰² The court accepted initially that the transfer, developing or training fees are likely to encourage clubs searching for new talents but due to the fact that these fees are uncertain and contingent as it is impossible to predict the number of the players that will follow a professional career are unrelated to the real costs borne by clubs; as a consequence, recruitment and training of young players is neither a decisive factor nor adequate means to justify the limitation on the freedom of movement of

⁹⁹ Bosman para 49.

¹⁰⁰ Ibid paras 96 & 99.

¹⁰¹ Ibid para 104.

¹⁰² Ibid para 106.

players.¹⁰³ The Advocate General Lenz being also of the same opinion that transfer, training and developing fees are not proportionate to attain the legitimate aim, proposed two alternatives, namely a collective wage agreement to put limits for the salaries paid to the players or a sharing of club's revenues such as income from tickets selling or television rights among the clubs.¹⁰⁴

In my view, as in the Bernard case, here also the uniqueness of the sport is at the centre of attention. The specific characteristics of sport in general and the football in particular must be taken into account in considering whether a system which constricts the freedom of movement is suitable without going further to what is necessary.¹⁰⁵ There are a lot of common things between these two cases; firstly, there is without a doubt a limitation on the free movement of players. Secondly, the court recognized the recruitment and training of young players as a legitimate aim which in principle could justify this limitation. Third, it was acknowledged by both courts that these fees are of uncertain nature because one cannot predict with accuracy the future of the young players. Finally, the compensation scheme has to be adequate, representing the real costs. I am of the same mind that the training fees are of uncertain nature but that cannot be a hindrance as the elements of uncertainty and contingency are part of the football reality as a whole.¹⁰⁶ For me, a training compensation system based on real costs without going further to what is necessary can bring valuable revenues especially to small clubs which will not have the fear of seeing their players being 'caught' by rich clubs; as Stefaan van de Bogaert successfully described, by investing capital in the youth sector it is more likely to produce better qualified players whose high-level performances will attract more and more fans to follow their teams in football stadiums while television channels will be interested to broadcast the team's matches and advertisers will be attracted by team's success. These all are interrelated with each other. For me while the entry of the training compensation was made in the Bosman case, the Bernard judgment went one step further. In the Bernard case, the court took into account more the specificity of sport and its social and educational role. It is apparent that the court's ruling was influenced by the inclusion of the sport in the Treaty and the 'official' acknowledgment of its special characteristics without of course meaning that it gained 'immunity' against the EU law.

2.7 The impact on national associations

¹⁰³ Bosman, para 109.

¹⁰⁴ Opinion of Advocate General Otto Lenz, [1995], ECR I-4921 para 226.

¹⁰⁵ Michele Colucci, 'The Bernard Case: An opportunity for all sports stakeholders' in M. Colucci (ed) , European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, (2010) p.145.

¹⁰⁶ see also Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p. 266.

The ruling of the Bernard case promulgated just recently on 16 March 2010, thus I believe it is quite early to draw up firm conclusions about its impact on the field of sport and in particular on the youth sector. Nonetheless, before explaining the possible impact on the national and international level of the Bernard judgment I would like to stress the fact that from the very first moment sport stakeholders and sports organization bodies reacted positively towards the decision. The members of the European Parliament welcomed this ruling and indeed, they were very quick to respond by declaring that the judgment recognized the unique nature of sport which was affirmed with the introduction of art.165 TFEU in the Lisbon Treaty and therefore it will encourage football clubs to support the training of the young athletes.¹⁰⁷ Furthermore, in a special conference¹⁰⁸ that took place in Brussels in order to debate about the European court's Bernard judgment, UEFA stressed that sport is not above the law but it is possible to have another approach and described the ruling as excellent. Similar views were also expressed by the Chief Executive Officer of the European Professional Leagues¹⁰⁹ and the spokesman of the Premier League who favored the ruling declaring that Premier League has always supported the proportionate compensation for young athletes.¹¹⁰ Consequently, it is more than obvious that so far the ruling has received positive reactions but again in my opinion it is early to make firm conclusions about its impact.

First of all, I would like to highlight again that under art. 6 TFEU the role of the EU in the field of sport is supportive and complementary following the principle of subsidiarity. As a consequence the member states are mainly competent to lay down rules relating to sport issues. In the case at stake, at the material time the French Sport Code had no provision about the training compensation and therefore the employment of football players was further regulated by the Professional Football Charter having the status of a collective agreement.¹¹¹ This Charter applied where no cross-board action was taken place (within the territory of France) and did not regulate compensation between clubs in cases where a player had been trained by one club and then signed a contract with another;¹¹² that is the reason why

¹⁰⁷ Martin Banks, 'MEPs welcome European court ruling on football', published on 17 March 2010, < <http://www.theparliament.com/latest-news/article/newsarticle/meps-welcome-european-court-ruling-on-football/>> accessed 10 May 2011.

¹⁰⁸ The European Sport Law and Policy Initiative (ESLPI) from the University of Leuven held a conference in Brussels with a panel representing the EU Institutions and football governing bodies entitled 'The Bernard Case, Judgment and Impact on the Sport World' on 29 April 2010 to debate about the European court's Bernard judgment, more information available on < <http://www.eslpi.eu/events.htm>>.

¹⁰⁹ EPFL, 'EPFL welcomes ECJ's ruling on Bernard Case', published on 17 March 2010 available at < http://www.epfl-europeanleagues.com/EPFL_welcomes_ejcs_ruling.htm > accessed 11 May 2011.

¹¹⁰ BBC news, 'Clubs can seek compensation for trainees who leave', published on 16 March 2010 available at < <http://news.bbc.co.uk/sport2/hi/football/8570329.stm>> accessed 10 May 2011.

¹¹¹ A-G Bernard, paras 7 & 8.

¹¹² A-G Bernard para 9.

Olympique Lyonnais brought a claim for damages under the French Code du Travail (Employment Code) based on the loss suffered. Nevertheless, it is of high importance the statement of the agent for the French Government at the hearing that in the meantime the rules have changed and the applicable rules in France were in close line with the FIFA Regulations adopted in 2001 in collaboration with the Commission so as to be in compliance with the Bosman ruling.¹¹³ This case led to a reform of the rules governing the signing of a first professional contract in France.¹¹⁴ The peculiarities of the training compensation system adopted by FIFA are represented in detail in another chapter of the thesis.

What I would like to stress is that the aftermath of the Bernard ruling is the possible (or vital?) changes on the applicable rules of federations and leagues in EU member states in order to be in compliance with that judgment and to guarantee that young players can change clubs after the completion of their training provided that a training compensation is due to the 'parent' club by the expenses of the new one. These amendments will certainly -as the court acknowledged too- give an enhancement to the youth sector and football will confirm its social and educational function. Furthermore, as the Chief Executive Officer of the European Professional Football Leagues declared: 'on national level, those in charge now know that they can place limitations on the movement of trainee players up to a certain limit'.¹¹⁵ This could be also for instance, the case of the English system which provides increasing payments (added to the training compensation) by the new club as the player becomes more successful, so payments that go beyond to what is necessary are not permissible.¹¹⁶ Under the rules of the Premier League and Football League, clubs are entitled to receive compensation for 'student' players moving between domestic league which is either a sum agreed between the clubs or otherwise a sum that the Professional Football Compensation Committee will determine after hearing the arguments and valuations of both sides, namely the player's former and new club.¹¹⁷ According to Regulations 3 and 4 of the PFCC Regulations, the Committee in order to calculate the amount of the training compensation takes into consideration criteria such as the costs involved in the training, the status of the clubs involved, the

¹¹³ Ibid para 10.

¹¹⁴ Martin Fauvel, 'Signing of a first professional football contract and training compensation in France: A practical aftermath of the Olivier Bernard Case', *Law in Sport 2010-2011*, available at < <http://www.lawinsport.com/index.php/articles/contract-law/2050-bernard-aftermath> > accessed 11 May 2011.

¹¹⁵ EPFL, 'EPFL welcomes ECJ's ruling on Bernard Case', published on 17 March 2010 available at < http://www.epfl-europeanleagues.com/EPFL_welcomes_ejcs_ruling.htm > accessed 11 May 2011.

¹¹⁶ Wil van Megen, 'Analysis of the Olivier Bernard case', *FIFPro News*, published on 18 March 2010, available at < http://www.fifpro.org/news/news_details/220 > accessed 12 May 2011.

¹¹⁷ The Premier League, *Premier League Handbook - Rules* (edn 2010-2011), art. 93.1 & 93.2 available at < <http://www.premierleague.com/staticFiles/db/52/0,,12306~152283,00.pdf> > accessed 3 May 2011.

age of the player, the period the player was trained for but also the player's ability and the terms of the contract offered to him.¹¹⁸ It is evident, that the calculation according to the last two criteria does not represent the actual training costs as the court in the Bernard case ruled and it very possible the PFCC to determine amounts that go beyond to what is necessary, especially in cases that a contract under good terms is offered or the player's performance is exceptional. Although the Regulations apply only within the territory of one member state, one cannot ignore the fact that this compensation schemes is in contrary with the rationale of the Bernard ruling. But what happens in the case that a country does not have a training compensation scheme or the training costs are lower than the real? Then the goal of freedom of movement is attained and the introduction of training compensation is a matter of discretion in the name of specificity and autonomy of the national sport governing bodies¹¹⁹ to adopt via internal regulations a training compensation system or even a state's action in cases of interventionist countries which regulate training compensation by laws, not an action of the EU bodies following the principle of subsidiarity.¹²⁰

To sum up, the court in the Bernard case failed to give any criteria on which a training compensation scheme should be based in order to calculate the actual training costs and thus be suitable to ensure the attainment of the encouragement of the young players. Nonetheless, in my view national sporting federations in cooperation with the respective clubs and players' trade unions should adopt such rules on the training compensation guided by the Bernard judgment that will guarantee that a player can change a club and countries with the new club compensating the former club enchaining by this way the youth development. Harmonization is extremely difficult and not desirable but sharing the same basic principles is vital.

¹¹⁸ The Football League, Regulations of the Professional Football Committee Compensation, Jurisdiction 3 and 4, available at < http://www.football-league.co.uk/regulations/20100801/appendix-5_2293633_2128224> accessible 12 May 2011.

¹¹⁹ Michele Colucci, 'The Bernard Case: An opportunity for all sports stakeholders' in M. Colucci (ed) European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, (2010) p.148.

¹²⁰ See also Tomas Gabris, 'Professional Football and the EU Law: Bernard Award of the ECJ from March 16, 2010', Social Science Research Network, (2010) available <SSRN:<http://ssrn.com/abstract=1635603>> accessed 15 May 2011.

III. The system of training compensation under FIFA RSTP

1. Introduction

On 5 March 2001 FIFA, UEFA and the Commission after extended discussions came to agreement (known also as the Gentlemen's Agreement) concerning a set of principles on the international transfer of professional football players namely the system of training compensation, the creation of solidarity mechanism, the international transfer of minors, the transfer windows, the duration of contracts, the system of sanctions, financial compensation in cases unilateral breach of contract, sporting sanctions and the arbitration system.¹²¹ FIFPro despite its initial opposition to the rules, at the end of August 2001, did reach also an agreement with FIFA about FIFPro's participation in the implementation of FIFA new regulations on international transfers of football players. As a consequence, the totally revised FIFA Regulations came into force on 1 September 2001. Since that, the system of training compensation in the broader sense provided for by the pertinent FIFA provisions is based on two constitutions: the training compensation in the narrower sense and the solidarity mechanism.¹²² In 2002, Commission approved the FIFA Regulations by stating that the amendment proposals were in balance.¹²³ These Regulations were modified again in 2005 when several adjustments were made but the training compensation itself remained in existence.¹²⁴ Every year FIFA provides an updated version of its Regulations. The training compensation of the FIFA Regulations was inspired by the idea that clubs should be compensated for their efforts to train young players.¹²⁵

¹²¹ see also 'Commission closes investigations into FIFA regulations on international football transfers' available <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/824&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 3 May 2011.

¹²² Omar Ongaro, 'The system of training compensation according to FIFA Regulations on the Status and Transfer of Players' in M. Colucci (ed) *European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation*, Sports Law and Policy Center, (2010)p.72.

¹²³ Commission Staff Working Document, "The EU and Sport: Background and Context – Accompanying Document to the White Paper on Sport", SEC (2007) 935, 11 July 2007 para 4.3.

¹²⁴ Mark Bakker, 'The training compensation system', *The International Sports Journal*, published 1 January 2008, available at <<http://www.thefreelibrary.com/The+training+compensation+system.-a0212546173>> accessed 4 April 2011.

¹²⁵ Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', *Kluwer Law International*, 2005 p. 240.

2. Regulatory Framework of the Training Compensation

FIFA Regulations on the Status and Transfers of players regulate only cases of international transfers; if a transfer takes place within the territory of a member state then the regulations laid down by the national football associations are applied which have to be approved by FIFA.¹²⁶ The XII Chapter of the FIFA Regulations on the Status and Transfer of the Players and in particular art. 20 and 21 constitute the regulatory basis of the training compensation and the solidarity mechanism respectively. Nevertheless, the provisions presenting the details of the training compensation scheme and the solidarity mechanism can be found in the Annexes 4 and 5 of the Regulations.

2.1 Training Period

The training period takes place from the age of 12 until 23 but is payable only for the training provided until the age of the 21 unless it is evident that the training period was over before reaching the age of 21.¹²⁷ It is though irrelevant whether the transfer takes place during or at the expiry of his contract.¹²⁸ For the sake of clarity, it needs to be emphasized that, despite that the mentioned provision refers to the player's age, what is actually meant is the season of the player's respective birthday.¹²⁹

At this point, it would be proper to place an example so as to fully comprehend until when training compensation can be claimed and which seasons are included in the amount of the compensation. For instance, if a club trained a player from the season of his 12th birthday until the end of the season of his 22nd birthday and then he moved to a different club in another Member State, then the club that provided the training is entitled to seek for compensation for 10 seasons (which is also the maximum), namely until the season of his 21st birthday, as the last season (the season of his 22nd birthday) cannot be taken into account on calculating the compensation. Obviously, if the player has terminated his training before the season of his 21st birthday, the season that he stopped his training will be taken on

¹²⁶ FIFA Regulations on the Status and Transfer of Players (edn 2010) art.1 paras 1&2 available at <http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf> accessed 2 May 2011

¹²⁷ Ibid Annex 4, art.1.

¹²⁸ Ibid art.20.

¹²⁹ Omar Ongaro, 'The system of training compensation according to FIFA Regulations on the Status and Transfer of in M. Colucci (ed) European Sports Law and Policy Bulletin: The Bernard Case: Sports and Training Compensation, Sports Law and Policy Center, (2010) p.72.

consideration for calculating the compensation and the burden of proof is placed on the club that has to pay the compensation.¹³⁰

According to CAS, it is of great importance in order to define the training period and subsequently training costs to make a distinction between what is considered as 'training' of a player and further 'development' of the latter. In one of its rulings, CAS ruled that several factors can be considered to determine the completion of the player's training namely the reference to the player as "a regular player for the club" or the loan of a player for significant sums of money tend to lend credence to the argument that the player is "effectively trained" and hence he will be a regular player; as a consequence the contribution for the further development of a player after he terminated his training period according to FIFA Regulations is not considered as a factor in the calculation of training compensation and does not entitle the club to such compensation.¹³¹

2.2 Circumstances under which a training compensation is payable

Training compensation is due as soon as a player is registered for the first time as a professional and each time a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday.¹³² The amount of the compensation has to be paid within 30 days of the registration of the player with the new club and is calculated on a pro rata basis in accordance with the period the player spent with each club¹³³

So, the new club has to pay not only an amount for the services of the player but an amount relating to training compensation as well and in the case of a professional player breaching contract obligations prematurely without just cause then there is also liability for reimbursement on the grounds of ending unilaterally the contract based on article 17 (1) of the FIFA RSTP.

There is no obligation of the new association to pay training compensation in the rise of three situations, that is to say if the former club terminates the player's contract without just cause, in case that the player is transferred to category 4 and in case a professional reacquires amateur status on being transferred.¹³⁴

¹³⁰ see general CAS 2004/A/594 Hapoel Beer-Sheva v. Real Racing Club de Santander S.A.D., award of 1 March 2005 (termination of training at 17).

¹³¹ CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander, award of 2 October 2006.

¹³² FIFA RSTP (edn 2010), Annex 4, art 2.

¹³³ Ibid Annex 4, art 3 para 1.

¹³⁴ Ibid Annex 4, art 2 para 2.

In the first case, the club that provided the training is not allowed to seek for training compensation as a punishment for violating the contractual obligations. The justification of this provision is that it is not rational for the new club to be forced to pay training compensation to a club that not only did not respect its contractual obligations but will gain economic profit as well. On the same grounds it is based also the underlying principle of article 6(3) of the Annex of FIFA RSTP, under which the club that provided the training to the player (former) is not entitled to compensation if it does not offer him a valid written contract at least of equal value.

2.3 Calculation of the training costs

According to art 4, Annex 4 of FIFA RSTP, the classification of the clubs by the respective associations in one of a maximum of four categories depends on the financial investment of the clubs in training players. The FIFA circular letter No. 1223/2010 is the most recent regarding the training compensation system and provides information about the classification of the clubs by the national associations in categories based on the extent of each club's expenditure for training young players.¹³⁵ According to the aforesaid circular letter the list of the training costs are set up on a confederation basis and it is updated annually.

Training costs of one player per category of each confederation annually (2010)

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

Source: FIFA available at:

<<http://www.fifa.com/mm/document/affederation/administration/01/27/61/28/circularno.1223-regulationsonthestatusandtransferofplayers-categorisationofclubsandregistrationperiods.pdf>>

The FIFA circular No. 1249/ 6-10-2010, which refers to the FIFA circular No.799/2002 (a document served to explain and implement FIFA RTSP of the year 2001), provides to national associations some guidelines about how they should allocate their clubs in full respect of the following criteria:

Category 1 (top level, e.g. high- quality training center)

¹³⁵ FIFA circular No 1223/2010, art 1.

- all first-division clubs of member associations investing on average a similar amount in training players.

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

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

Category 3

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

Category 4

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

National associations may have a restricted number of categories like Canada with two (only the third and the fourth) or have access to all four like Germany, France, Brazil and England.¹³⁶

In addition, according to the aforementioned FIFA circular, there are numerous cases about associations that do not follow these criteria in order to allocate their clubs. In such cases, the DRC applies the category following the criteria of the circular so as to ensure a 'fair and well functioning implementation of the entire training compensation system'¹³⁷ and FIFA via a Directive empowered the DRC to inform its Executive Committee for those cases of continuous and obvious abuse. The DRC is competent to review disputes that have to do with the amount of training compensations and has the margin of appreciation to adjust the amount if it is clearly 'disproportionate' to the case concerned.¹³⁸ Up to now, the DRC has heard numerous cases about training compensation disputes.

What is hidden behind this malpractice can be in close connection with the calculation of the training costs of players; as it was already stated there is no compensation in the case of a transfer between two clubs of category 4 (FIFA RSTP Annex 4, art 2 para 2) and also in order to determine the amount of the training costs it is necessary to take into account the expenses that the new club would have made if it had trained the player itself. (Annex 4, art 5, para 1) Consequently, it is apparent that clubs declare that belong to a lower category in order to pay less money in training compensations.

¹³⁶ Jean Christian Drolet, 'Extra time: Are the new FIFA Transfer ruled doomed?' in S. Gardiner, R. Parrsiah and R. Siekmann, *EU Sport Law and Policy, Regulation Re- Regulation and Representation*, The Hague: T.M.C. Asser Press, 2009 p.179.

¹³⁷ FIFA circular No 1249/6-12-2010, Regulations on the Status and Transfer of Players – training compensation and categorization of the clubs.

¹³⁸ FIFA RSTP, Annex 4, art 5 para 4.

2.4 The 'player factor'

As it was stated above, the national associations have to allocate their clubs into maximum of four categories according to the amounts spent for training players. 'The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average player factor, which is the ratio of players who need to be trained to produce one professional player.'¹³⁹

It is very interesting to notice that the 'player factor' principle was also included in the Bernard judgment. More specifically, the court stated that a scheme on training compensation in order to be proportionate has to take into account of the costs borne by the clubs in training both future professional players and those who will never play professionally'.¹⁴⁰

The rationale of this provision is that there is a lot of uncertainty about the exact number of the players that will follow a career as professionals seeing that the majority of the athletes unfortunately do not have the talent to be distinguished as professional athletes. So the 'player factor' is the number of the players needed to be trained in order to make one professional.

Furthermore, in order to calculate the training compensation the new club has to take into account the costs that would have been incurred, if it had trained the player itself multiplied by the number of the years of training, in principle from the season of the player's 12th birthday to the season of his 21st birthday.¹⁴¹ For the seasons of the player's 12th birthday to 15th birthday (first years of training and education) the training costs of the fourth category are always applied in order to ensure that the training compensation for very young players will remain in reasonable amounts.¹⁴² However, the provision was amended and this exception is not more applicable where the event giving rise to the right to training compensation occurs before the end of the season of the player's 18th birthday.¹⁴³

Finally, there are some specific rules about the transfer of players within the territory of EU/EEA,¹⁴⁴ namely in the case that a player moves from a lower-category club to a higher-category club, the amount of the compensation will be the average amount of the training costs of the clubs. In the opposite situation, that is to say when a player is transferred from a higher category club to a lower, the amount of the compensation will be based on the trainings costs of the lower category club.¹⁴⁵

¹³⁹ FIFA RSTP, Annex 4, art 4, para 1.

¹⁴⁰ Bernard, para 45.

¹⁴¹ FIFA RSTP, Annex 4, article 5, paras 2 & 3.

¹⁴² *ibid* Annex 4, art 5, para 3.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* Annex 4, art.6 para 1.

¹⁴⁵ *ibid* Annex 4, art 6, para 1.

2.5 Solidarity mechanism

The solidarity mechanism is analyzed in the article 21 of the RSTP and more peculiarities about the payment procedure can be found in Annex 5.

According to the solidarity mechanism in case of transfer of a professional player while his contract is still in force, each club that has invested in training the athlete and provided education will receive a proportion of the compensation paid to his previous club. In particular, the new club will pay 5% of any compensation (the training compensation is not included), an amount that will be deducted from the total amount of this compensation to every club that has trained and educated the player over the years.¹⁴⁶

The solidarity contribution from the seasons of the player's 12th and 15th birthdays is 5% per year, while from the seasons of 16th and 23rd birthdays is 10% and have no age limit in contrary with the training compensation that can be claimed till the season of the 23rd birthday of the player, while it is payable from the age of 12 – 21 of the athlete.

For instance, considering a player that was born in 1983 and received training and education by the club A from 1994 until 2004. At the age of 24 he moves to another club during the course of his contract. If the transfer fee is 100,000 EUR, then the new club has to pay to the club that provided the training (club A) 70% (from age 12-15:20% + from age 16-20: 50%) of the 5% of 100,000 EUR, namely the amount of 3,500 EUR. The fact that he moved to another club at the age of 24 does not mean that no solidarity contribution has to be paid, because there is no age limit.

3. Comments about the FIFA RSTP and their compatibility with the Bernard ruling

According to the court in the Bernard ruling a training compensation limits the freedom of movement of players. Nevertheless, it acknowledged that the objective of encouraging the recruitment and training of young players can be legitimate and capable to justify this limitation provided that the training compensation scheme is suitable and does not go further to what is necessary.¹⁴⁷ The scheme has to represent the actual costs of the training and not based on arbitrarily payments. However, the court neither gave any specific criteria according to which the training costs should be calculated nor specific approval to the current FIFA RSTP; its principles though appear to illustrate FIFA current scheme in a good light.¹⁴⁸ The only reference relating to the FIFA training compensation system in the Bernard's ruling was that the French and United Kingdom Governments and the Commission are of

¹⁴⁶ FIFA RSTP, Annex 5, art 1.

¹⁴⁷ Bernard, para 49.

¹⁴⁸ Opinion of Jack Anderson, 'Modern Sports Law- A Textbook', Hart Publishing, 2010 p.292.

the opinion that the FIFA provisions comply with the principle of proportionality.¹⁴⁹ The AG Sharpston did not also give her official consent for FIFA provisions due to the fact that in the material time those rules did not apply (adopted in 2001) but stated that some of the reasoning she or the court would use may have had relevant content with FIFA rules.¹⁵⁰

As it was mentioned above, in order to calculate the training costs, associations have to divide their clubs into a maximum of four categories according to the amount the clubs spent annually on training young players multiplied by a player factor namely the number of players trained to produce one professional. First of all, there are two important similarities between the FIFA scheme and the court's ruling; the fact that the clubs have to pay the training compensation and not the player and that the FIFA training compensation system takes into account the 'player factor' principle. Nonetheless, there are a lot of questions raising at this moment. First of all, the financial investment of the clubs on training that is used by the associations as a criterion to put the clubs in categories which have more or less the same expenses. The training costs per category are calculated by fixed sums established on a confederation basis.¹⁵¹ This can provoke a lot of criticism. Initially, there are some doubts about the accountancy of the training expenses. Rich clubs with big budgets and turnovers have to keep a detailed account of their revenue annually as they are large national undertakings, in contrary with the small clubs of lower divisions which may face difficulties with the accountancy of their expenses.¹⁵² Moreover, it is clear that the average cost of each category does not represent the actual costs that the club spent to train a player as the court ruled. Also, the training costs set up on confederation basis cannot be the same for all European countries as the economic condition of each country may be totally different from another European country. In addition, according with Drolet, one should be bothered about the fact that the numbers of training costs per category per confederation remain the same from 2005 and that training costs are almost the same across the world except from Europe; even though the prices are rising constantly in the other fields of the economy, FIFA seems to have created an immunity system towards the global inflation.¹⁵³ Nevertheless, one could argue that these fixed amounts per category based on confederation basis can be used as a safeguard and limit inbuilt in order to render the compensation proportionate to the aim sought.¹⁵⁴

¹⁴⁹ Bernard, para 25.

¹⁵⁰ A-G Bernard, para 62.

¹⁵¹ FIFA circular No 1223/2010.

¹⁵² Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p. 256-257.

¹⁵³ Jean Christian Drolet, 'Extra time: Are the new FIFA Transfer ruled doomed?' in S. Gardiner, R. Parrish and R. Siekmann, *EU Sport Law and Policy, Regulation Re- Regulation and Representation*, The Hague: T.M.C. Asser Press, 2009 p.180.

¹⁵⁴ Jack Anderson, 'Modern Sports Law- A Textbook', Hart Publishing, 2010 p.292.

Also regarding the player factor, the system of FIFA comply with the court as the latter acknowledged that it is difficult to predict the career of all young players so in order to calculate the costs, it is reasonable and proportionate to take into account the ratio of players who needed to produce one professional. This is reasonable as otherwise clubs will lose money and as consequence they might have no eagerness and determination to invest asset in training young players.¹⁵⁵

In addition, the general rule of FIFA provisions is that the training costs have to be calculated as if the new club had trained the player. This is also in contrast with the Bernard's ruling as it does not reflect the actual costs that the club spent on the training of the player. By calculating the costs according to the new club, the training costs do not only include the actual costs of the training but also the profit that the new club gained by obtaining a player that has already been highly educated, saving money and valuable time. As a result, this rule can also lead the EU/EEA clubs with low training costs to prefer employing third nation players, rather than other players from within the EU/EEA of clubs that have high training costs.¹⁵⁶

But also the specific provisions for the EU/EEA area seem to be in contrary with the Bernard ruling as they do not reflect the genuine costs. Within the territory of EU/EEA the training costs are calculated according to the former club and more specifically a transfer from a lower category club to a higher is calculated by the average costs of the two clubs. And in case of a transfer from a higher category to a lower then the costs are calculated on the basis of the lower club. It seems to be that these rules take also into account the added value of the player which not an objective criterion for the calculation of the real training costs.

To sum up, in order a scheme or a measure to be in compliance with the Bernard ruling it is important to depict or closely approach the actual training costs that took place so as to be suitable and proportionate. As far as I am concerned the main controversy about the FIFA scheme is that the training costs are calculated according to the new club and on a confederation basis; they are not the real costs but the estimated costs. The average fixed amounts presented in the FIFA chart haven't changed since 2005 which is rather absurd. These amounts cannot be the same for all EU countries as there are major discrepancies in the socio-economic condition between member states. A system of calculation based on national basis could be, from one point, more credible and accountable as it could reflect more accurately the real costs of training incurred¹⁵⁷ but from the other it is very difficult to be

¹⁵⁵ Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p.258.

¹⁵⁶ Braham Dabscheck, 'The Globe At Their Feet: FIFA's New Employment Rules - II', Sport in Society, 9: 1, 2006 p.1-18.

¹⁵⁷ see also on this point Katarina Pijetlovic, 'Another Classic of EU Sports Jurisprudence : Legal Implications of Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC' in European Law Review, volume 35, issue 6, 2010 p. 857-868 available at <<http://uk.westlaw.com/result/default.wl>

applied as it means a lot of compensation methods with variations for up to four categories per country. Are other alternatives?

The system of FIFA has received a lot of criticism from time to time. The current compensation scheme provided by FIFA does not seem to be in line with the rationale of Bernard court's ruling for the simple reason that it does not calculate the real costs that clubs spent for training young players but provides estimated fixed sums. Furthermore, many accused FIFA rules for deviating from the Bosman ruling regarding the abolition of obstacles for the out-of-contracts players. In addition, not few are those who believe that the revenues from the training compensation are not being invested in the promotion of the youth sector but are used to for the professional- players section.¹⁵⁸ Dabscheck, for instance, considers that there is also an issue of age discrimination as FIFA Regulations relating to training compensation have an adversely impact on the rights and earnings for players under 23 in comparison to players 23 and over.¹⁵⁹ In addition, according to him the concept of the training compensation is unrelated with the ethos of amateurism due to the fact that sport in amateur level is played for its own sake and its role is to promote character building, citizenship and so on.

The court in the Bernard case did not mention any alternatives measures to achieve the encouragement of the recruitment and training of young players as it did happen in the Bosman case. According to the AG Lenz, another alternative more suitable could be the division of the club's revenues obtained from tickets' selling or image selling rights to other clubs.¹⁶⁰ By this system a real sense of solidarity can be created by the existence of a solidarity fund at national, European and International level under which the revenues from TV rights, advertising, gambling, gate receipts etc paid to the big clubs would be distributed to the lower division clubs according to the number of effectively playing members they have.¹⁶¹ Nonetheless, according to S. van de Boagert, this system of pooling of resources has also its drawbacks as it prevents clubs from being paid for second time for the training of a player if he then moves to another club at a later time; consequently, the clubs being sure of receiving the money and deprived of the extra advantages of a transfer system, will lose their incentives and fall into a state of complacency regarding the recruitment

?mt=WorldJournals&origin=Search&srch=TRUE&utid=2&method=WIN&db=EURLR&rlt=CLID_QRYRLT572622726206&rltdb=CLID_DB981941126206&service=Search&eq=search&rp=%2fsearch%2fdefault.wl&sp=inttilburg000&query=olivier+bernard&vr=2.0&action=Search&sv=Split&fmqv=s&fn=_top&rs=TK3.0> accessed 13 April 2011.

¹⁵⁸ Roger Blanpain, 'European Labour Law', XII revised edition, Kluwer Law International BV, 2010 p.326.

¹⁵⁹ Braham Dabschek, "The Globe At Their Feet: FIFA's New Employment Rules – II", Sport in Society 9: 1, (2006) p.10.

¹⁶⁰ A-G Bosman, para 226

¹⁶¹ Roger Blanpain, 'European Labour Law', XII revised edition, Kluwer Law International BV, 2010 p.327.

and training of young players.¹⁶² Another good proposal has been also expressed by Dubey¹⁶³, according to whom a system that combines pooling of resources and a mechanism of compensating for costs incurred for training in a case of transfer is ideal. By using this system, clubs will have a flat sum from a financial fund supplemented with a compensation in the event of a transfer in order to ensure that they will not lose their incentives into training young players in the best possible way.¹⁶⁴ As far as the solidarity mechanism is concerned, this can also fit into the foresaid formula.

¹⁶² Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p.271.

¹⁶³ Jean Phillippe Dubey, 'La libre circulation des sportifs en Europe', Bruylant, 2000, p.604-605.

¹⁶⁴ see also Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p.272-273.

IV. 'Homegrown rule' VS '6+5 rule' :

A boost for the youth sector or other discriminatory clauses?

1. The UEFA 'homegrown rule'

In 1991, UEFA adopted the '3+2 rule' according to which each club of a national association was allowed to field maximum three foreign players (nationals of other member states) in any match of the first division of the respective national championships and two players who have played for a period of five years continuously, -three years out of five as juniors- in several clubs of the pertinent national association. UEFA argued that due to the specificity and autonomy of sport and the freedom of association,¹⁶⁵ sporting organizations are allowed to adopt rules relating to the organization of football. The aim of this rule was to preserve the identity of the clubs and to maintain a competitive and financial balance among them. The court decided that there is no justified limitation; the rule infringes the freedom of movement of workers since it deprived professional players who are nationals of one member state from pursuing an activity to another member state due to discrimination based on nationality.¹⁶⁶

UEFA having as a primary aim the encouragement and promotion of the training of young athletes¹⁶⁷ introduced the 'homegrown rule' in its Congress that held in Tallinn in 2005.¹⁶⁸ Ten years after the Bosman ruling, UEFA stressed that the 'homegrown rule' bears no resemblance with the '3+2 rule' and the pre- Bosman period. According to UEFA there is no violation of the EU law as this rule neither impose any quotas nor includes any nationality clauses.¹⁶⁹ According to the 'homegrown rule' each club of a national association has to include in its squad (list 'A') up to 25 players for UEFA competitions. For the season 2006-2007 two places out of 25 were kept for 'club-trained' players and two for 'association-trained' players. In the next two seasons, one place for 'local-trained' player and one for

¹⁶⁵ derived from the article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

¹⁶⁶ Bosman, para 137.

¹⁶⁷ UEFA, 'Declaration of the UEFA Congress in the subject of local training of players', 21 April 2005, Tallinn, art 1 available at < http://www.uefa.com/MultimediaFiles/Download/uefa/UEFAMedia/297202_DOWNLOAD.pdf> accessed 4 April 2011.

¹⁶⁸ Roberto Branco Martins, 'Regulation of professional football in EU' in Future' in S.Gardiner, R.Parrish and R.Siekman (ed) EU, Sport Law and Policy – Regulation, Re-Regulation and Representation, The Hague: T.M.C Asser Press, 2009 p.324.

¹⁶⁹ UEFA press release, 'Investing in Local Training of Players- Key messages', available at < http://www.uefa.com/MultimediaFiles/Download/uefa/UEFAMedia/273604_DOWNLOAD.pdf> accessed 4 April 2011.

'association-trained' player were added. At the moment, in accordance with the UEFA Regulations for the season 2010-2011, clubs have to reserve at least eight places for 'club-trained' and 'association-trained players'. In these eight places, the 'club-trained' cannot be less than four and the 'association-trained' players cannot be more than four. If there are fewer than eight 'locally-trained' players, then as a result the number of the players in List A is being decreased.¹⁷⁰

After an assessment of the European Commission relating to the content of the homegrown rule in May 2008,¹⁷¹ it concluded that the UEFA rule is not in contrary with the Community Law but in any case an evaluation of the rule will be made again in 2012 as the 'homegrown' rule is going to be put into action gradually. According to the study, although the rule entails indirect discrimination based on other criteria than nationality that is the training in the club or national association, as it is rather possible that more nationals than non-nationals may fulfill these prerequisites, it is considered to be suitable and necessary to achieve the objective pursued. The underlying idea is that the 'homegrown rule' would enhance the training and development of new talents and thus national teams would be strengthened if enough youngsters have the opportunity to play in the premier league of their country.¹⁷² Of the same view is also the European Parliament, as it recognized that the UEFA rule is proportionate to attain the objective and expressed its support.¹⁷³ It is though very possible that the ECJ would not accept a justification based on the need of enhanced training and education of young players in football, as the

¹⁷⁰ According with the articles 18.09-18.11 of Regulations of UEFA Champions League (edn 2011-2012), a "locally trained player" is either a "club-trained player" or an "association trained player". A "club-trained player" is a player who, between the age of 15 (or the start of the season during which he turns 15) and 21 (or the end of the season during which he turns 21), and irrespective of his nationality and age, has been registered with his current club for a period, continuous or not, of three entire seasons (i.e. a period starting with the first official match of the relevant national championship and ending with the last official match of that relevant national championship) or of 36 months. An "association-trained player" is a player who, between the age of 15 (or the start of the season during which the player turns 15) and 21 (or the end of the season during which the player turns 21), and irrespective of his nationality and age, has been registered with a club or with other clubs affiliated to the same national association as that of his current club for a period, continuous or not, of three entire seasons or of 36 months. See also on line < http://www.uefa.com/MultimediaFiles/Download/Regulations/competitions/Regulations/01/63/02/44/1630244_DOWNLOAD.pdf>.

¹⁷¹ Europa Press releases, 'UEFA rule on 'home-grown players': compatibility with the principle of free movement of persons', IP/08/807, published 28 May 2008 available at < <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed on 3 April 2011.

¹⁷² Roberto Blanco Martins, 'Agenda for a social dialogue in the European professional football sector' in S Gardiner, R Parrish and R. Siekmann (ed) EU, Sport Law and Policy – Regulation, Re-Regulation and Representation, The Hague: T.M.C Asser Press, 2009 p.388-389.

¹⁷³ European Parliament Resolution of 29 March 2007 on the future of professional football in Europe INI/2006/2130.

previous case law (Kolpak¹⁷⁴ and Bosman) did not accept general justification on these grounds.¹⁷⁵

In the contrary, the '6+5 rule' proposed by FIFA in the Congress that took place in Sydney in 2008, does not enjoy the same recognition and support as the UEFA 'homegrown' rule. The European Commission as well as the European Parliament are of the opinion that this rule is absolutely incompatible with EU law and consequently infringes the free movement of workers.

2. The FIFA '6+5 rule'

According to the '6+5 rule', each club when the match begins has to field on the pitch at least six players who are entitled to play for the national team of the country where the club is domiciled (so five at maximum players at the beginning of the match will not have the right to play for the national team of the respective country). The rule concerns one particular game and in particular the beginning of it. The number of the substitutes is irrespective. In accordance with the Institute for European Affairs (INEA) which was asked by FIFA to examine in depth whether or not this rule is in contrary with the EU law, the '6+5 rule' does not contain any discriminatory or 'foreign' clause,¹⁷⁶ consequently does not violate the free movement of workers as the entitlement to play for the national team does not based merely on nationality.¹⁷⁷ From the other side, FIFA realizing from the very first moment of the adoption of this rule that will face strong opposition, recommended that its implementation can take place gradually, that is to say for the season 2010-2011 to apply the "4+7 rule", the following season 2011/2012 the "5+6 rule" and finally for the season 2012/2013 the "6+5 rule". The rationale of the '6+5 rule' is, in general, similar to the 'homegrown rule' adopted by UEFA, namely the improvement of the sporting competition in European football, the promotion of the junior players and the protection of the national identity of football and the national teams.¹⁷⁸

Except from the INEA, FIFPro also advocates that the motivation for the adoption of the '6+5 rule' by FIFA is for a good cause, namely the achievement of a competitive balance among clubs, the re- establishment of national identity and the promotion

¹⁷⁴ C-438/00 Deutscher Handballbund eV vs Maros Kolpak [2003] ECR I-4135.

¹⁷⁵ Michael Gerlinger, 'UEFA's Declaration on "Homegrown Players" ' in International Sports Law, 2005/3-4, p.51 available at < http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id80_1_ISLJ_2005-3-4.pdf> accessed 4 April 2011.

¹⁷⁶ Institute for European Affairs (INEA) "Expert Opinion on the Compatibility of the '6+5 Rule' with European Community Law ", 2008 more info available at < http://inea-online.com/download/regel/lang_eng.pdf> accessed 5 May 2011.

¹⁷⁷ FIFA Statutes, VII Eligibility to play for representative teams, art. 15-18, August 2010.

¹⁷⁸ INEA, Expert Opinion regarding the Compatibility of the "6+5 Rule", 2008 p.22.

of the youth sector.¹⁷⁹ Nonetheless, FIFPro expressed its serious doubts about the effectiveness of the rule, concerning that it may face a lot of criticism on the grounds on being contrary to the European legislation. In opposition, FIFPro considers that the 'homegrown rule' will have the opposite effect of its purpose, it may in other words, increase the trade of young players and also violates the freedom of movement.

3. Comments

It is understood that the after-Bosman era is characterized by an increase in players' mobility; as a result, the number of foreign players in clubs has risen steeply. On 28 April 2010, for instance, the Italian club Inter Milan qualified for the final of Champions League after a game against Barcelona in which Inter's Portuguese coach started with a team that it did not feature one Italian.¹⁸⁰ One could support that the dominant presence of the foreigners in the clubs' squads may alter the local-regional- national identity of the latter. Nonetheless, for the purpose of this thesis, I would like to focus more on the aim relating to the promotion of the recruitment and training of young players. According to INEA expert Opinion the declared aims of the '6+5 rule' are the assurance of equality in sporting and financial terms between clubs, the promotion of junior players, the improvement of the quality of national teams and the strengthening of the regional and national identification of clubs and a corresponding link with the public. This rule undoubtedly puts an obstacle to the free movement of players. As far as I am concerned this rule constitutes a prohibited discrimination based on nationality as the prerequisites for classification in the team is for a player to be entitled to play in the national team which is directly connected with his nationality. FIFA invented this alleged criterion for escaping of being accused for direct discrimination but I cannot see no difference between the '3+2 rule' of Bosman and the '6+5 rule' of FIFA.¹⁸¹ In contrary the 'homegrown rule' of UEFA has more chances to pass the test of compatibility with the Community law. The concept of home-grown players is based on reference to residence and other requirements which appear to indirectly favor nationals of the home state and thereby constitute an indirect discrimination.¹⁸² Additionally, according to the White Paper on Sport: *'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*

¹⁷⁹ see FIFPro, FIFPro Opinion : 6+5 Rule, available at < http://www.fifpro.org/opinion/opinion_de tails/2> accessed 4 May 2011.

¹⁸⁰ Jack Anderson 'Modern Sports Law- A Textbook', Hart Publishing, 2010 p.341.

¹⁸¹ The same opinion shares Marie Kronberg, 'The future of Football in the European Union- from a legal point of view', ISSN 1652- 7224, published 13 October 2010 available at < <http://www.idrottsforum.org/articles/kronberg/kronberg101013.html>> accessed on 15 May 2011.

¹⁸² Richard Parrish & Samuli Miettinen, "Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)", Entertainment and Sports Law Journal Volume 5, number 2, 2007.

persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis ¹⁸³ Indeed, the central aim of the 'homegrown rule' is to enhance the investment in training and development of young players. This aim was accepted by the court in Bosman and Bernard cases as legitimate able to justify limitations on the free movement of workers. The question which arises at this moment is whether this measure is proportionate and adequate to achieve the attainment of the said objective or goes beyond to what is necessary. I believe that this measure will give a boost to the encouragement of the training of young players who can be of whatever nationality.

¹⁸³ Commission White Paper on Sport, COM (2007) 391, 11 July 2007 para 2.3.

V. The case of Greece

1. Introduction

The Greek legislator, realizing the positive influence of sport in the society, has included its protection in the Greek Constitution since 1975. It is without a doubt an institution of great importance for the structure and function of the Greek society without meaning that it is only a Greek exclusivity, as many other countries such as Spain and Portugal protect sport constitutionally. It constitutes an individual and social right under which each person ought to have free access to sports and be able to exercise every sport activity freely.¹⁸⁴ Football in particular, is in Greece the most popular sport counting numerous of fans. Consequently, it is of great significance to have an adequate legal framework that can guarantee and protect the smooth operation and management of football. As far as Greece is concerned, football not only brings masses together, urges young people in sport but also plays a dominant role in the economic life.

2. The structure of the Greek football

According to the pyramid structure, on the basis of the pyramid is the pool of players who are organized in clubs which in turn are members of local sport associations and the latter are members of the national sport federation (Hellenic Football Federation). HFF founded in 1936 and for the time being, it is consisted of 57 local sports associations. In other sports because the number of clubs are much fewer, members of national associations are clubs themselves and not the local associations. The HFF is a member of FIFA and UEFA since 1926 and 1954 respectively.

3. The legal conflict between FIFA, HFF and Government

In the beginning of 2000, FIFA pointed out that the laws and practices which regulate the organization and function of the Greek football were in contrary with FIFA Regulations and against the principle of the autonomy of sport. FIFA supported that the Greek Government should not intervene in the regulations of the federation and that the judicial review of the respective regulations should be made only by the courts and in no case by government authorities such as the Minister for Sport. In particular, FIFA stressed that the Greek government should not be involved in the financial control of the Greek federation and to issues related to education and

¹⁸⁴ Greek Constitution, art 16 para 9,1975.

exercise of football coaches or arbitration matters.¹⁸⁵ As a result, FIFA threatened Greece and indeed was briefly suspended from the membership in case the latter would not adopt rules that could guarantee the autonomy of Greek sport without the governmental interference. The final solution was given six years later with the adoption of Law No. 3470/2006 which is in compliance with the principle of the autonomy of football.

4. Regulatory Framework of Training Compensation

The general legal framework on the training compensation in Greece is regulated by Law No.2725/1999 which, inter alia, refers also to the status of athletes, transfers, releases, etc. The foresaid law was amended in 2006 and provisions about the case of amateur athletes who sign their first professional contract were added.

In particular, according to the Greek Law, players' training and education take place until the athletes reach the age of 18. After that age, they are obliged to sign their first contract as professionals with the club provided the training. The duration of the contract may last from 1-3 years, but provided that both parties agree, the duration of the latter can be extended to 5 years in total.¹⁸⁶ Furthermore, according to the same law, the training period is over and the athlete can be released without having any legal and financial commitments in two cases, namely: if there is a decision taken by the relevant club (which provided the training) that the athlete has no further obligations or in case the club provided the training does not offer the player a professional contract at the end of the season of player's 18th birthday. Consequently, the player is free to be registered as a professional athlete by another club without training compensation to be due.¹⁸⁷

It is apparent that the players are obliged to sign their first professional contract with the club that trained them as an exchange of the training and the promotion they received. Nonetheless, even though the abovementioned provisions are valid only within the Greek territory, it can be evidently identified as being contrary to the Community law and do not apply in cases of a player signing a contract with a club of another member state of EU.¹⁸⁸

The characterization of the law as against the Constitution was reaffirmed by a Council of State's ruling, according to which this article is not only against the Greek Constitution but also in contrary with article art 45 TFEU, as it prevents athletes from

¹⁸⁵ See also Jappelet Jean- Loup, 'Autonomy of Sport in Europe', Council of Europe Publishing, Strasbourg, 2010 p.21.

¹⁸⁶ Law on the Establishment, Organization and Operation of the Professional Sporting Associations and other provisions No.2725/1999 art. 90 para 3, as it was amended by the Law No.3479/2006.

¹⁸⁷ Ibid art 90B .

¹⁸⁸ Andreas Malatos, 'Lectures of Sport Law', 2nd edn, Ant.N.Sakkoulas Publishers , 2010 p.706.

pursuing an economic activity to another member state.¹⁸⁹ The court ruled that in accordance with the letter of the rule, the athletes are obliged after the end of the season of their 18th birthday to sign their professional contract with the club provided the training, (in the event that the club wishes to sign a contract); this is against the Constitution and in particular against 'the right to develop freely one's personality and participate in social, economic and political life of the country'¹⁹⁰ due to the fact that the player has not even the possibility to choose between the possible offers of work which is the most suitable for him. Furthermore, the court recognized the costs made by the club for the effective promotion of the young athlete, who is understood that at the age of eighteen years will not be able to perform its full potential, so the obligation (or the unilateral contract) aims to cover the expenses of the club and the profits derived from the work of the athlete after completing his/her 18 years of age. The court is of the opinion that the rationale of the law is to protect merely the economic interests of clubs. This purpose cannot be regarded as serving a public interest and thus to justify the limitation of the constitutionally protected freedom of participating freely in the economic life of the country. Finally, the fact that the young athlete is obliged to sign a contract unilaterally with the club provided the training means that the latter cannot pursue an activity in another member state; as a result the court concluded that the provision is also in contrary with the free movement of workers as it is expressed under article art 45 TFEU.

In my view, Greece has to make a lot of progress concerning the transfer system of players and in particular in the field of the amateur young athletes and their training compensation. It is against the Constitution and the Community law an athlete after the end of the training period to be obliged to sign a contract with the club provided their training; such a rule as the court found out constitutes an obvious breach of the core right to choose work according to their own terms and conditions and a limitation to the free movement of workers.

5. HFF Regulations on the status and transfer of players

On 5 June 2010, the General Assembly of HFF codified and approved the current Regulations on the status and transfer of football players. The Regulations consist of several sub-provisions concerning the status of players, the periods of registration and transfers, the international transfer certificate, the loan of professional players, termination of contracts with or without just cause, registration and protection of minors. These Regulations according to the HFF Statute have to be in compliance with the Regulations adopted by FIFA and UEFA by the very fact of being a member

¹⁸⁹ Case C-1277/2008, Court of State, 4th Department.

¹⁹⁰ Greek Constitution, article 5(1), 1975.

of them.¹⁹¹ As far as the training compensation is concerned, each club has the potential to train amateur football players until the completion of their 21st year. At the end of the season of their 21st birthday they are obtaining a 'free' status.¹⁹² The amateur player of any football club is entitled without the consent of its club, to sign his first professional contract with another association, provided that the new club has an obligation to compensate the club which provided the training in order to cover the costs of training. The reimbursement takes place via a deposit that is to be paid at the HFF, otherwise no player's identity card is issued by HFF. The amounts of the training compensation are calculated per club category as follows¹⁹³: for training that was provided by a first division club the costs are set up for EUR 35,000 per year and by a second and third division club the costs are EUR 29,500 and EUR 24,500 respectively.¹⁹⁴ From the above, we can conclude that there is a difference in the age at which the training of a player ends; according to FIFA Regulations on the status and transfer of players, the training can last until the season of the athlete's 23rd birthday whereas under the HFF Regulations the training takes place until the age of 21. Moreover, there is also a quantitative difference in the amount of training compensation depending on the category in which the club belongs which can be justified considering the size of financial market activity in Greece. There are no provisions about solidarity mechanism as this has been left to the discretion of the national sport governing body.¹⁹⁵

Nevertheless, in accordance with the FIFA Commentary on the Regulations for the status and transfers of players,¹⁹⁶ the national associations are 'responsible for regulating domestic transfers, i.e. transfers between clubs affiliated to the same national association. This margin of appreciation deriving from the principle of autonomy of sport allows associations to adapt their own regulations to the particular conditions and circumstances of the country concerned. As a general rule, FIFA does not interfere in the day-to-day business of the associations, provided that

¹⁹¹ Hellenic Football Federation, Statute (edn 2010) art 3(a) available at <http://www.epo.gr/pdf/10_11/KATASTASTIKO_EPO_IOYNIOS_2010.pdf> accessed 5 May 2011.

¹⁹² Hellenic Football Federation Regulations on Status and Transfer of Players (edition 2010) Annex A, art 1(b) available < http://www.epo.gr/kanonismoi/pdf/09_10/KANONISMOS_IDIOTHTAS_METEG_GRAFON_IOYN_2010.pdf> accessed 5 May 2011.

¹⁹³ It is not explicitly mentioned but the abovementioned amounts are calculated per player per year of training.

¹⁹⁴ Hellenic Football Federation Regulations on Status and Transfer of Players (edn 2010) Annex A, art 10 available < http://www.epo.gr/kanonismoi/pdf/09_10/KANONISMOS_IDIOTHTAS_METEG_GRAFON_IOYN_2010.pdf> accessed 5 May 2011.

¹⁹⁵ See also Ian Blackshaw & Boris Kolev, 'Irregularity of Solidarity or Solidarity in the Irregularity' in Robert C.R. Siekmann and Janwillem Soek (ed) *The international Sport Law Journal*, vol 3-4, 2009 p.11 about the application of the solidarity mechanism at the national level.

¹⁹⁶ FIFA Commentary on the Regulations for the Status and Transfers of Players, entered into force 1 September 2005, art.1 para 2. available at < http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf> accessed 7 Mat 2011.

severe infringements of the FIFA Statutes and/or regulations do not occur. The autonomy of the associations is, however, limited by the basic principles of the Regulations that have to be observed at all times and in particular by those provisions that are in particular binding at national level and have to be included without modification in the association's regulations'.¹⁹⁷ However, FIFA considered that some provisions of high importance such as the status of the players, the loan of the latter and the protections of minors have to be included to the regulations of the national associations without be amended.¹⁹⁸

The training compensation does not belong to the numerous clausus of the provisions that do not lend themselves to deviations, so national associations are capable to regulate this issue according to how it seems best to serve their needs due to the boundaries of permissible.

6. What happens in practice?

According to a demographic study of footballers in Europe of the year 2011 carried out by the Professional Football Players Observatory (PFPRO),¹⁹⁹ almost less than half of the total number of players in Greek clubs are recruited from abroad. In particular the percentage reaches the 47.9% whereas only 11.1% players in a squad are club trained.²⁰⁰ It also worth to be mentioned that the winner team of the Super League in Greece for the season 2010-1011 (Olympiacos FC) is one of the European teams with the highest number of players signed from abroad (69.57%). In 2010, Greek clubs have on average signed 12.3 players from other clubs, whereas the average number of players per league was 9.3 players, a fact which sets them in the top five of the ranking.

From the above, one may conclude that Greek clubs have the tendency to sign players from abroad, while the low number of club trained players shows that they do not pay as much attention as they could on the improvement and growth of their academies. According to data obtained by a survey carried out by the Institute of Sport Management,²⁰¹ the size of sports entrepreneurship in Greece for the year 2011 reaches EUR 2,5 billion and it is estimated that in 2015 the number will rise to 3,3 EUR billion. It has to be highlighted that 65% of the market concerns only two

¹⁹⁷ FIFA Commentary on the Regulation for the Status and Transfer for Players, art 2 (1) and (2).

¹⁹⁸ FIFA RSTP, art 3(a).

¹⁹⁹ Football Players Observatory, Demographic Study of Footballers in Europe 2011, International Centre for Sports Issues more information at <www.eurofootplayers.org>.

²⁰⁰ As club trained are regarded the footballers who played in the current club at least 3 seasons from the age of 15-21.

²⁰¹ More info available online < <http://www.iae.gr/>>.

sports, namely football and basketball; a fact that demonstrates the central role of the football in the Greek sport reality.²⁰²

As far as the clubs of professional level are concerned, according to the foresaid survey, their financial economic activity is estimated in 300 million Euros while they are characterized by insolvent budgets, middle-level professional organization, lack of long-term plan and investment.²⁰³ Relating to the Greek academies, there are approximately 1.100- 1200 academies within the territory of which more than 65% in football and their economic market size is estimated in 22 – 25 million Euros.²⁰⁴ Although they have to tackle with a variety of issues such as the lack of an efficient management organization and infrastructure, short of efficiently trained staff, and plan development without having strong government support and no sufficient donor funding, they have recorded rapid growth over the past 5 years. Nonetheless, despite this growth, there are no key changes.

In my view, the fact that there are not so many club-trained players in Greek teams is the outcome of a combination of several issues and situations. First of all, the main reason for the weak growth of the academies is due to economic crisis; Greece at the moment is facing a harsh financial crisis which has as a result the freezing of every business activity not only in the sector of sport but as a general phenomenon. However, beyond the economic crisis of the recent years, there was improper handling in the organization of Greek football. Insufficient economic arrangement and bad management, lack of knowledge about how the sports market functions, meaningless waste of money and corruption of those who are in charge are the real and underlying causes of the impaired growth of professional sport.

Sport stakeholders have to realize the usefulness of the academies. Academies have to be seen as an investment. Indeed, academies can be a high-value asset for the future of the clubs, especially of small and medium scale, as they will train players whom they can recruit in some years saving money or to sign a contract with another club that would return profit.

The regulatory framework developed in the recent years and case law proved that there is a tendency to protect the youth sector. Training compensation which depicts the real costs is proportionate and suitable and has acknowledged by the European court as a legitimate aim. Greece has to take the opportunity that it was given and change the legal framework on training compensation according to the Bernard's ruling. Greek associations can invest now in young players and be the first to benefit from their quality and education as they can be repaid in kind by these players if or

²⁰² The data have been also published in a Greek sports daily newspaper published 15 April 2011 available on line at <www.sday.gr> accessed on 10 May 2011.

²⁰³ Ibid.

²⁰⁴ Ibid.

when they make it into the first team of the club.²⁰⁵ Steps have been made through the academies, but there is still space for further development and an adequate legal frame is a necessity.

²⁰⁵ Stefaan Van den Bogaert, 'Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman', Kluwer Law International, 2005 p.273.

VII. Conclusions

The short historical overview on the previous case law relating to sport issues revealed that the ECJ acknowledges the specificity of sport and tried to find the striking balance by setting the boundaries between sport and EU law. It has been clear since the Walrave case that as long as sport constitutes an economic activity, European law will be, in principle, applicable. In addition, there is no more general exemption from the scope of the Community law by referring a rule as having purely sporting nature but according to the Meca –Medina ruling, the compatibility of a sporting rule with the Community law can only be defined by a case by case approach. Furthermore, it is of great importance that for the first time there is a constitutional reference of sport in a Treaty; in December 2009, art 165 TFEU introduced a new facet in the sports policy which gave EU a soft competence to deal with the social and educational aspects of sport whereas the member states continue to play the primary role in this area.

As far as the Bernard case is concerned, the court acknowledged that a provision which obliges an amateur player, who is at the end of his contract, to sign his first professional contract with the club provided the training, constitutes a limitation on the fundamental principle of free movement of workers as it is expressed in art 45 TFEU. According to the court this restriction can be though acceptable if it pursues a legitimate aim justified by overriding reasons following the principle of proportionality. As in the Bosman case, the judges in the Bernard case recognized that the encouragement of the recruitment and training of young athletes may constitute a legitimate aim. Training compensation will encourage clubs, especially small ones of local level to invest in the training of young athletes. The training costs though have to depict the actual costs without going beyond to what is necessary. The court failed to give any details or criteria about the calculation of the training costs neither approved officially the existing FIFA Regulations on the training compensation. One reason could be as the A-G Sharpston pointed out in her opinion that in the material time, the FIFA Regulations did not exist. Nonetheless, the Bernard ruling was welcomed in general by the sport stakeholders.

What is more, it is very reasonable for the member states and sport governing bodies to have developed their own rules on training compensation. As a consequence, there are a lot of compensation formulae, more or less complex and some states may have not a training compensation scheme at all. The EU due to the principle of subsidiarity cannot impose a uniform training compensation system. The Bernard

judgment gave some guidelines which the national sporting federations in cooperation with the respective clubs and players' trade unions should follow so as to adopt rules that will calculate and depict the actual trainings costs and no artificial without placing limitations on the free movement of players up to a certain limit such as in the case of the English system. Those which have not lay down a training compensation scheme it is time to seize this opportunity given by the court.

Concerning the FIFA Regulations on the training compensation, there are similarities and discrepancies with the Bernard ruling; first of all, the training compensation is an affair between the two clubs ('parent' and new) and the player is not liable to pay any training compensation as the A-G Sharpston has proposed as a second option. Secondly, the system of FIFA takes into account for the calculation of the training costs the player factor, a principle which also the court recognized; that is to say the ratio of players needed in order to produce one professional. However, the FIFA training compensation system does not depict the actual costs but the estimated costs. The training costs are calculated in principle as if the new club had trained the player and on confederation basis. This is in contrary with the Bernard ruling, so there are serious doubts that the current training compensation system of FIFA will pass the ECJ's proportionality test without legal consequences. At this point a system that could combine a distribution of revenues such as tickets selling, imagine rights etc among the clubs and a mechanism of compensating for training costs incurred in the event of a transfer seems to be ideal.

Apart from the training compensation as a means to give initiatives to the clubs for investing in young players, FIFA and UEFA introduced the '6+5 rule' and the 'homegrown rule' to give a boost to the youth sector and encourage the training of young athletes. I am almost convinced that the '6+5 rule' will not be accepted as compatible with the Community law as it constitutes a direct discrimination based on nationality. The 'homegrown rule' has more chances to 'survive' as it entails other criteria irrespective of nationality and age. Nevertheless, this rule constitutes also indirect discrimination as it is rather possible more national than non national to fulfill the prerequisites.

Lastly, there is a lot of room for progress as far as Greece is concerned. The law which regulates the general training compensation system obliges the athletes to sign their first professional contract with the club providing the training. This rule was found by the State of Council as being against the Greek Constitutional and the EU law as it deprives athletes from participating freely in the economic life of the country and puts an obstacle to the pursuit of an economic activity in another member state. The national sport federation, namely HFF, as a member of FIFA has laid down rules that are more or less in compliance with the existing FIFA Regulations. Of course the amounts per category (first- second – third division clubs) are significantly lower due to the limited financial means and infrastructures of the country. Nevertheless, the

training costs are calculated as if the new club had trained the athlete which may not depict the actual costs in contrary with Bernard's ruling. In general, according to data given, Greek clubs lack of club-trained players while they have the tendency to spend great amounts to sign players from abroad; this means that more attention should be paid to the youth sector. It is high time for Greece to take advantage of the Bernard's ruling, invest in young players and be the first to profit from their skills and education.

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