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THE BERNARD CASE

SPORTS AND TRAINING COMPENSATION

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EDITORIAL

by Michele Colucci

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

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

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

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

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

Brussels, 1 September 2010

Michele Colucci

INTRODUCTORY REMARKS

by *Roger Blanpain – Michele Colucci – Frank Hendrickx*

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

«*In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken of the specific characteristics of sport in general, and football in particular, and of their social and educational function.*
The Court's view, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players.
The Court stated that: a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be capable of actually attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.
It follows that the principle of freedom of movement for workers does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it».

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

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

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

So quite a number of questions arise:

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

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

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

The program was as follows:

Introduction
Prof. Dr. Roger Blanpain
Tilburg University, Member of the Royal Flemish Academy of Belgium

The Bernard Case: a brief overview
Prof. Dr. Michele Colucci
Tilburg University, Lessius & K.U. Leuven

Bosman and Bernard compared
Prof. Dr. Frank Hendrickx
K.U. Leuven, Tilburg University

The International Sports Associations' viewpoints
Mr. Omar Ongaro
FIFA Players' Status and Governance
Mr. Julien Zylberstein
UEFA Professional Football Services
Mr. Wil Van Megen
FIFPRo Legal Department

Round table: Training compensations in a European and national perspective
Mr. Ivo Belet
Member of the European Parliament
Mr. Gianluca Monte
European Commission, DG EAC, Sport Unit
Mr. Frans Van Daele
European Council, Head of Cabinet of the President

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

Brussels, 1 September 2010

Roger Blanpain, Michele Colucci & Frank Hendrickx

CHAPTER I

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

by *Frank Hendrickx**

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

Introduction

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

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

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

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

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

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

Olivier Bernard is a football player who signed a so-called «promising player»-contract («*joueur espoir*») with the French football club *Olympique Lyonnais*, for three seasons, with effect from 1 July 1997. Before that contract was due to expire, *Olympique Lyonnais* offered him a professional contract for one year from 1 July 2000.[3] *Olympique Lyonnais* seemed to act in line with the applicable Professional Football Charter, which, at the time, regulated employment of football players in France. This Charter had the status of a collective agreement and included the position of «*joueurs espoir*», like Bernard (i.e. players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract).[4] At the end of his training with a club, the Charter obliged a «*joueurs espoir*» to sign his first professional contract with that club, if the club required him to do so.[5] Bernard, however, did not accept the offer of *Olympique Lyonnais* but, instead, in August 2000, signed a professional contract with the English club *Newcastle United*.[6]

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

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

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[3] Cf. Opinion of the AG Sharpston, *Bernard*, para. 18, not yet published in the ECR.
[4] ECJ, *Bernard*, para. 3.
[5] ECJ, *Bernard*, para. 4.
[6] Cf. Opinion of the AG Sharpston, *Bernard*, para. 18.
[7] Cf. Opinion of the AG Sharpston, *Bernard*, para. 19.
[8] Cf. Opinion of the AG Sharpston, *Bernard*, para. 20.
[9] ECJ, *Bernard*, para. 6.
[10] ECJ, *Bernard*, para. 12.
[11] Cf. Opinion of the AG Sharpston, *Bernard*, para. 21.

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

2. *Training compensation from Bosman to Bernard*

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

2.1 *Facts and setting*

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

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

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[12] ECJ, *Bernard*, para. 14.

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

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

2.2 Historical connection

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

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

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

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

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

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

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

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

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

2.3 Underlying problem

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

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

[14] *Idem*; Meeting of 13 March 2001.

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

CHAPTER II

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

ANALYSIS

by *Gianluca Monte*[*]

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

1. Introduction

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

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

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

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

1.1 The facts

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

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

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

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

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

1.2 The questions

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

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

1.3 The ruling

The Court replied to the questions giving the following ruling:

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

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

1.4 Analysis

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

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

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

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

2. *The legal scope of the ruling*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1 The application of EU law to sport

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

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[3] ECJ, *Bernard* , para. 27; ECJ, Bosman, para. 73.
[4] ECJ, 12 December 1974, *Walrave & Koch*, 36/74, ECR 1405, para. 4.

CHAPTER III

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

by *Julien Zylberstein**

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

Introduction

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

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Union (hereinafter: «EU») competence in the field of sport for the first time, the Court of Justice of the European Union (hereinafter: «the Court») issued a judgment that had been eagerly anticipated by the whole sports community.[1] By ruling that a club is entitled to demand compensation for a player whom it has trained signs his first professional contract with another club upon completion of his training period, the Court closed a key chapter of the controversy triggered by the *Bosman* judgment[2] 15 years ago. A breath of fresh air for the European sports model, whose structures have been under pressure since the *Meca-Medina* judgment.[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[5] ECJ, 12 December 1974, *Walrave & Koch*, 36/74, ECR 1405, para. 4; ECJ, 14 July 1976, *Donà*, 13/76, ECR 1333, para. 12; ECJ, 15 December 1995, *Bosman*, cit., para. 73; ECJ, 11 April 2000, *Deliège*, C-51/96 and C-191/97, ECR I-2549, paras. 13 and 41; ECJ, 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, ECR I-2681, para. 32; ECJ, 18 July 2006, *Meca-Medina,* cit., para. 22.
[6] ECJ, Para. 27 of the judgment.

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

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

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

1.1.2 An incomplete legal argument?

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

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

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

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

[8] Para. 29 of the judgment.

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

[10] Opinion of the Advocate General, para. 27.

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

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

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

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

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

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

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

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

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

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[12] ECJ, 11 April 2000, Deliège, cit., para. 64.

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

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

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

[16] Opinion of the Advocate General, para. 43.

CHAPTER IV

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

by *Omar Ongaro*[*]

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

1. Introduction

1.1 General remarks

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

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

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

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

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

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

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

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

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

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

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

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

[3] Cf. ECJ, Bernard, point 46 et seqq.

[4] Cf. ECJ, idem, point 25.

[5] Cf. ECJ, idem, point 45.

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

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

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

1.2 Brief historical summary

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

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

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

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

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

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

[9] *Ditto*.

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

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

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

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

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

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

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

2. *Training compensation*

2.1 *Regulatory basis*

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

2.2 *Principles*

2.2.1 *Training period*

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

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

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

1[17] and, particularly, art. 5 par. 2,[18] all of Annexe 4 of the FIFA Regulations 2009.

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

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

2.2.2 Events giving rise to the right to training compensation

Basically, training compensation is due if one of the following two situations occurs (Annexe 4, art. 2 par. 1 of the FIFA Regulations 2009):
- when a player is registered for the first time as a professional; or
- when a professional player[20] is transferred between clubs of two different associations.

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

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

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

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

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

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

CHAPTER V

THE *OLIVIER BERNARD* CASE COMPARED

by *Wil Van Megen*[*]

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

Introduction

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

In the Walrave-Koch case,[1] the European Court of Justice (ECJ) issued its first signal that the professional pursuit of sport was not outside the reality of European law. The Bosman judgment[2] interpreted this in explicit terms, with the opinion of Advocate General Lenz also playing a very important role. Both the freedom of movement for workers and the competitive aspects were discussed at length. The Bosman case was finally decided on the basis of the free movement of workers.

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

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

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

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

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

activity is concerned. The Bernard case[4] relates to an aspect already addressed in the Bosman case, i.e. the situation with regard to the training of young football players at their clubs. A sound training structure is essential to the supply of successful top sports men and women. In order to ensure a return on the investment involved, a regulation existed in France that obliged young players to sign a contract with the club that trained them, as soon as a contract of this kind was offered to them. The regulation also contained a provision that applied in the case of the player refusing to sign the contract. This provision implied that the player could not play in France for a period of two years and compensation was payable in the event of the player's departure for a country other than France. In this case, the French club Olympique Lyonnais claimed compensation from the English club Newcastle and the player Olivier Bernard.

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

1. The general significance of the Bernard judgment

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

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

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

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

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

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

2. *Specific implications: allocation of costs*

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

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

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

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

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

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

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

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

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

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

3. *Right to clarity*

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

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

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

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

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

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

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

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

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

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

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

CHAPTER VI

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

by *Vitus Derungs*[*]

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Den Haag, 2000, 200.

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

[4] Ibid., 431.

[5] Ibid., 433 ff.

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

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

Before the Perroud case, sports-related disputes were generally considered by Swiss courts to be non-judiciable. For example, in 1956, a Swiss civil court rejected a club's appeal against a points deduction pronounced by a football association committee, considering that the dispute was non-judiciable due to its relation with sport.[8] However, based on the distinction between the rules of a game and the rules of law, established and published by Kummer[9] in 1973, Swiss courts in the 1970s started to consider sports-related disputes in which rules of law were to be applied as judiciable.[10]

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

- The rules of the Swiss Professional Football League were understood as a restraint of competition (art. 340 ff. of the Swiss Code of Obligations[11]). However, as these rules did not constitute a valid restraint of competition such as stipulated in the Swiss Code of Obligations, they were considered null.[12]
- According to the applicable rules, if a professional player under contract with a club wanted to avoid a retention period of two years, he had to accept any offer of renewal of his employment contract. In view thereof, the federal tribunal decided that the rules in question were null[13] also because

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

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

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

[9] M. Kummer, *Spielregel und Rechtsregel*, Bern 1973, 45.

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

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

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

[13] Ibid., consid. 8. b), 222.

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

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

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

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

4. *The Bosman Case (EU 1995)*

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

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

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

[16] Ibid., consid. 7., 220 f.

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

[18] Ibid., consid. 4.b), 246.

CHAPTER VII

PROTECTION OF MINORS VS. EUROPEAN LAW

by *Rob Simons*[*]

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

1. Introduction

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

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

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[1] See article 19 of the FIFA RSTP.

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

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

2. *Organization of sport*

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

2.1 *Pyramid model of Sport*

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

Sports associations thus usually have practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sports events under Article 82 EC[4] (currently Article 102 TFEU).

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

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[2] European Commission, KEA – CDES – EOSE: *Study on Sports Agents in the European Union*, November 2009.

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

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

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

2.2 Specificity of sport and autonomy of sports organizations

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

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

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

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

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

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

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

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

[8] European Commission, *White Paper on Sport*, 11 July 2007, para. 4.1.

[9] European Commission, *White Paper on Sport*, 11 July 2007, para. 4.1.

Very interesting in this regard is also the *Meca Medina* judgment of the European Court of Justice from 2006. In its decision, the Court of Justice made an important legal point by rejecting the theory of the existence of «purely sporting rules», falling a priori outside the TFEU (and therefore its articles 101 and 102[10]) and affirming to the contrary that each sporting rule should be studied case by case in the light of the provisions of articles 101 and 102 TFEU.[11]

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

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

3. Freedom of movement and the protection of minors

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

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

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

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

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

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

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

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

Article 19 FIFA RSTP 2009 - Protection of minors

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

CHAPTER VIII

THE *BERNARD* CASE: AN OPPORTUNITY FOR ALL SPORTS STAKEHOLDERS

by *Michele Colucci*[*]

SUMMARY: Introduction – 1. The legal reasoning of the Court – 2. Alternative measures to training compensations – 2.1 Football: transfer compensation and solidarity mechanism – 2.2 Basketball and the establishment of a «solidarity fund» – 2.3 Handball: negotiated compensation among the parties – 2.4 Rugby: effective and real training costs but also quality of training – 3. Training compensation and EU competition law – Conclusions

Introduction

For the first time in the case *Olympique Lyonnais v Olivier Bernard and Newcastle United FC* (hereafter «*Bernard*»)[1] the Court of Justice delivered a judgement on a sport issue by making an explicit reference to the «specificity»[2] of sport as it has been recognised in art. 165 of the Treaty on the Functioning of the European Union.[3]

Fifteen years after the *Bosman*[4] judgement when the Court of Justice

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

[2] A definition of «specificity» of sport is contained in para. 4.1. of the *White Paper on Sport* (2006) published by the European Commission and available at http://ec.europa.eu/sport/white-paper/index_en.htm (October 2010).

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

[3] Art. 165 TFEU reads as it follows: «The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function».

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

declared that a *transfer* compensation at the end of contract was against EU law, then in *Bernard* the judges decided that a *training* compensation is an obstacle to the freedom of movement of workers but, in principle, it could be justified by the objective of encouraging the recruitment and training of young players.

In particular the Court decided, in light of the specificity of sport, that training compensation must reflect the real costs sustained by the clubs and that the amount of that compensation is to be determined on the basis of the costs borne by the clubs in training both future professional players and those who will never play professionally.

It is definitely an important judgement which can be defined as a «balanced» one. However it is also vague in its attempt to guarantee the freedom of movement of the athletes on one side and football club's economic interests on the other.

The judgement now needs to be implemented in the legislation of all EU Member States, and above all, in the regulations of all sports associations at every level: international, European, and national.

Therefore the relevant sports associations could be obliged to amend their regulations – where it is necessary – and could be confronted with the problem of how to calculate the actual training costs of their athletes.

In the present article the author will focus exclusively on those legal aspects which have not been retained in the judgement and then will review other training compensation systems as well as equivalent measures adopted by some sports international associations – other than football ones – in order to achieve the objective to encourage the training of young athletes.

The goal of such analysis is to try to understand what will be the impact of such an important judgement on sport in general and what will be the role of all sports stakeholders in calculating the training costs and therefore the related compensation.

1. The legal reasoning of the Court

In line with its previous case law the European Court of Justice recalls that with regard to the objectives of the European Union, sport is subject to European Union law in so far as it constitutes an economic activity[5] and, therefore, the one carried out by a «jeune espoir» like Mr. Bernard falls within the scope of article 45 TFEU on freedom of movement of workers.[6]

In that regard the judges point out that all of the provisions of the Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and forbid measures which might place nationals of the Member States at a disadvantage when they wish to pursue an economic

[5] ECJ, *Bernard*, para. 27; ECJ, *Bosman*, para. 73.

[6] See, in particular, ECJ, 18 July 2006, *David Meca-Medina & Igor Mejcen*, C-519/04, ECR I-6991, para. 23 and the case-law cited.

activity in the territory of another Member State.[7]

National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement, therefore, constitute restrictions on said free movement even if they apply without regard to the nationality of the workers concerned.

The French sport rules applicable to Mr. Bernard, regarding «joueur espoir», state that at the end of his training period, he is required under pain of being sued for damages, to sign a professional contract with the club which trained him. These rules somewhat restrict the player's right to free movement.[8] They are contrary to the principle of freedom of movement enshrined in the Treaty on the Functioning of the European Union.

The Court recalls that a measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by «overriding» reasons in the public interest.

Further, even if that is the case, the application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.[9]

More precisely the Advocate General in her opinion states: «National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may none the less escape prohibition if they pursue a legitimate aim compatible with the Treaty. In order for that to be so, however, they must fulfil four further conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary for that purpose».[10]

With regard to professional sport, the Court has already had occasion in the *Bosman* case to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate.[11]

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

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[7] ECJ, *Bosman*, cited above, para. 94; Case C-109/04 *Kranemann* [2005], ECR I-2421, para. 25; and Case C-208/05 *ITC* [2007], ECR I-181, para. 31.

[8] ECJ, *Bernard*, para. 35.

[9] ECJ, *Bernard*, para. 38; ECJ, *Bosman*, para. 104.

[10] Opinion of Advocate General Sharpston, 16 July 2009, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR, para. 44.

[11] ECJ, *Bosman*, para. 106.

The Court chooses a line of reasoning which does not consider the broader implications of the case on employment and, in particular, its impact on training of young people in the workplace in general. It does so for a practical reason: «the Court did not hear sufficient submissions to deal with the wider issue adequately»[12] and then because the specific characteristics of sport «must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector».[13]

The Court refers to the new legal basis of the Treaty on Sport (art. 165 TFEU)[14] rightly stressing the fact that professional football is not merely an economic activity but also a matter of considerable social importance in Europe and, in this perspective, training and recruitment of young players should be encouraged rather than discouraged.[15]

Thus a training compensation represents the justification of the obstacle to freedom of movement.

Already in the Bosman case the Court held that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players.[16] The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club.

Nevertheless the costs generated by training young players are, in general, only partly compensated for by the benefits which clubs can derive from those players during their training period.

Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club.

In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.[17]

On the basis of this reasoning the judges conclude that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the

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[12] AG, Opinion, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, para. 31.

[13] AG, Idem, para 30.

[14] ECJ, *Bernard*, para. 40.

[15] ECJ, *Bernard*, para. 41; ECJ, *Bosman*, para. 108.

[16] ECJ, *Bernard*, para. 42; ECJ, *Bosman*, para. 109.

[17] ECJ, *Bernard*, paras 43-44.

recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.[18] The reasoning of the Court is sound and logical and the conclusions are founded on both the relevant case law and the new legal basis on sport written in the Treaty on the Functioning of the European Union. Nevertheless it is quite interesting to note that in searching the justification for the obstacle to the freedom of movement of workers the Court does not consider the existence of alternative measures to training compensations but it based its reasoning on «overriding reasons» and «legitimate objectives».

One could doubt that clubs would be encouraged in training young players if they can cover only the training costs. Furthermore, the problem of how to calculate such costs still exists.

Finally, the Court does not even examine the compatibility of the French training compensation in the light of the competition law.

The following paragraphs examine more in details the above mentioned issues.

2. Alternative measures to training compensations

In the Bernard judgment there is no empirical analysis. The european judges do not consider, or better to say, they do not have the opportunity to take into account other alternative measures to training compensation contrary to what they did in the Bosman case when they retained that «because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those (transfer)fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs».[19]

Then it admitted that the same aims of the «transfer compensation» could have been achieved at least as efficiently by other means which do not impede freedom of movement for workers.[20]

In particular the Advocate General Otto Lenz[21] was of the opinion that it would be conceivable to distribute the clubs' receipts among the clubs. Specifically, that means that part of the income obtained by a club from the sale of tickets for its home matches is distributed to the other clubs. Similarly, the income received

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[18] ECJ, *Bernard*, para. 45, ECJ *Bosman*, para. 109.
[19] ECJ, *Bosman,* para. 109.
[20] ECJ, *Bosman,* para. 110.
[21] AG, Carl Otto Lenz, Opinion delivered on 20 September 1995, Case C-415/93. ECR, 1995, I-4921, paras. 226 and ff.

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