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Another classic of EU sports jurisprudence: Legal implications of Case C-325/08

Olimpique Lyonnais v. Olivier Bernard and Newcastle United

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The core of this article rests with the argument that the Court in *Bernard* has, in fact, followed the suggestions of Advocate General regarding accepted models of training compensation. Furthermore, it is recognised that whereas *Bernard* does not depart from the well-established analytical framework in free movement cases, it does depart from *Bosman* on the point of the Court's appraisal of the suitability of training compensation within the confines of that framework. It is exactly this fact that gives some weight to the otherwise symbolic and unnecessary reference to Article 165(1) TFEU and paragraph 40 of the judgment. The Court's justification of the restrictions on free movement for out-of-training-contract players contrary to the *Bosman* judgment in which the same restrictions for out-of-professional-contract players were deemed illegal can be taken as both: exception to prohibition on age discrimination in EU law and the *prima facie* validation of the current FIFA Regulations.

Background

The debate surrounding the nature of the relationship between EU law and sport began in 1974 with the *Walrave* judgment in which the Court of Justice famously held: “the practice of sport is subject to Community law only in so far as it constitutes economic activity [...]”.¹ Rules of ‘purely sporting’ interest that are limited to their proper objectives and have nothing to do with economic activity, such as the composition of sport teams, national teams in particular, are excluded from the scope of the Treaty.² This became known as the sporting exception in EU law. In *Donà*, the Court reformulated and confirmed this

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¹ Case 36/74 *Walrave and Koch v. Union Cycliste Internationale and others* [1974] ECR 1405, paragraph 4.

² *Ibid.* paragraphs 8 and 9.

exception. Hence, EU law does not apply to rules or practices ‘[...]excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature or context of such matches and are thus of sporting interest only,’ and are limited to their proper objectives.³

Almost two decades later, in *Bosman*,⁴ the Court was asked to consider a directly discriminatory 3+2 rule and non-discriminatory international transfer rules which restricted the professional activities of football players. Citing *Donà*, the Court extended the sporting exception to further exclude from the scope of the Treaty non-discriminatory sporting activities and rules which, although economic in nature, can be justified on non-economic grounds related to the particular nature and context of certain matches and which are limited to their proper objectives. Sporting rules which had economic implications and could not satisfy these requirements were brought under the existing analytical framework of the Treaty free movement provisions, including objective justification framework as established in *Kraus* and *Gebhard*.⁵ Against this setting, ‘in view of the considerable social importance of sporting activities and in particular football in the Community,’ the Court accepted as legitimate the objective of ‘encouraging the recruitment and training of young

³ Case 13/76 *Gaetano Donà v. Mario Mantero* [1976] ECR 1333, paragraphs 14-15.

⁴ C-415/93 *Union Royale Belge Sociétés de Football Association and others v. Bosman and others* [1995] ECR I-4921.

⁵ *Ibid.*, para. 104. Case C-19/92 *Dieter Kraus v. Land Baden-Württemberg* [1993] ECR I-1663, para. 32 and Case C-55/94 *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 37.

players’.⁶ Finally, it is interesting to observe that the Court assessed the application of objective justification with regard to the directly discriminatory 3+2 rule after it found that objectives put forth were not persuasive or legitimate enough to benefit from the exception established in *Walrave* and *Donà* because they applied to all official matches and thus to ‘the essence of the activity of professional players’.⁷

The Court’s reasoning in *Bosman*, coupled with the boom in commercialisation of the sports industry in the 1990s has been the reason behind the proliferation of EU policy instruments in the area of sport. In the absence of direct legislative competence in the area, numerous policy documents were adopted by EU institutions including the 1999 Helsinki Report on Sport⁸ and the Nice Declaration on Sport in 2000.⁹ What these documents have in common is their core mission to reconcile the interests of different stakeholders, in other words, to preserve the traditional values of sport and the autonomy of sport governing bodies on the one hand, and to have their rules and practices comply with the economic provisions of the Treaty on the other. Accordingly, sport bodies enjoy a form of autonomy to organise and regulate their respective sport conditional upon compliance with these

⁶ *Ibid.*, para. 106.

⁷ *Ibid.*, para. 128. See also R Parrish and S Miettinen ‘*The Sporting Exception in European Union Law*’ (The Hague, T.M.C. Asser Press, 2008).

⁸ Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework *The Helsinki Report on Sport* Brussels, 10 December 1999 COM(1999) 644 final.

⁹ Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies 13948/00, Annex to the Presidency Conclusions, Nice European Council Meeting, December 2000.

economic provisions, whereas the Union has an equivalent duty to ‘take account of the social, educational and cultural functions inherent in sport and making it special’¹⁰ in the implementation of common policies. The Commission has set out its approach in a comprehensive 2007 White Paper on Sport,¹¹ a strategic orientation document which aims *inter alia* to illustrate the application of EU law to sport.

In December 2009, the Lisbon Treaty amendments gave ‘complementary’ competence to the Union in the area of sport.¹² Article 165(1) TFEU (under Title XII on education, vocational training, youth and sport) states: ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.’ The ruling of the Grand Chamber of the Court in *Bernard*¹³ is the first to make reference to this ‘sports article’ even though the facts of the case pre-date the entry into force of the Lisbon Treaty. *Bernard* embraces the sentiment of European sports policy and insists on certain parameters for the application of law in the sports sector within the established objective justification framework. It legitimises restrictions on player mobility by means of proportionate training compensation schemes which rely on ‘real training costs’. Although this case does not conflict with *Bosman*, in the sense that it does not depart in any way from the well-established analytical framework, it nevertheless does the earlier judgment in terms of the

¹⁰ *Ibid.*

¹¹ White Paper on Sport Brussels, 11 July 2007 COM(2007) 391 final.

¹² Articles 2(5) and 6(e) of the Treaty on the Functioning of the European Union.

¹³ Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United UFC*, judgment of 16 March 2010, not yet reported.

Court's appraisal of the suitability of training compensation within the confines of that framework and ultimately in the effects produced. It is exactly this fact that gives some weight to the otherwise largely symbolic and unnecessary reference to the Article 165(1) TFEU and leads to the assumption. Nevertheless, until we have another case to confirm or deny this assumption, it would be premature to draw any firm conclusions about the *stare decisis* value of *Bernard* in this respect.

Facts of the case

In 1997, the French football club Olympique Lyonnais (Lyon) and the 17-year old Olivier Bernard entered into a training contract for three seasons with effect from 1 July that year. The legal dispute between the parties arose three seasons later when Bernard refused to accept a one year professional contract offered to him by Lyon to take effect as of 1 July 2000. Instead, in August 2000 he signed a professional contract with Newcastle United FC and moved to England.

At the material time, the employment of football players in France was regulated by the *Charte du Football Professionne* (the Charter), which had the status of a collective agreement. Trainee players between the ages of 16 and 22 and employed by a professional club under a fixed-term training contract belonged to a category known as *joueurs espoir*. Article 23 of the Charter provided that the club is entitled to require a trainee to sign a contract as a professional player on the expiry of the training contract. Should the player refuse, he was prohibited from signing with another French club for a period of three years without the written agreement of the club in which he was a *joueur espoir*. If the club did

not offer him a professional contract, he was free to sign with a club of his choice without any compensation being due to the club that trained him. Although this rule implied that compensation is due if the player refuses to sign a professional contract with that club, the Charter contained no scheme for compensation. The club could nevertheless rely on Article L. 122-3-8 of the French *Code du travail* (Employment Code) to bring an action for ‘damages corresponding to the loss suffered’ against the *joueur espoir* for breach of contractual obligations flowing from Article 23 of the Charter.

When Bernard left for Newcastle United FC, Lyon considered that the compensation principle should extend outside of France and sued him and his new club. It sought an award of EUR 53 357 in damages, the amount corresponding to the remuneration Bernard would have received over the period of one year under the professional contract with Lyon which he refused to sign. The judgment of the *Conseil de prud’hommes*, ordering Bernard and Newcastle United FC jointly to pay Lyon damages of EUR 22 867, was quashed by the *Cour d’appel* which considered that obligation on the *joueurs espoir* under Article 23 of the Charter contravened freedom of movement under Article 39 EC (now Article 45 TFEU). Lyon then appealed to the *Cour de cassation* which, in July 2008, referred two related questions to the Court of Justice for a preliminary ruling, essentially asking i) whether Article 39 EC (now Article 45 TFEU) precludes the provision of a national law requiring *joueur espoir* to pay damages in the described context, and ii) if so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective capable of justifying such a restriction.

Analytical overview of the judgment

The existence of a restriction on freedom of movement for workers

The Court first dealt with the question of the restrictive nature of the compensation scheme. This part of the judgment does little but confirm settled case-law. Citing *Bosman* (and the reference to *Walrave and Koch* in that judgment), the Court reminded us that Article 45 TFEU applies not only to actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner, thus bringing the Charter under the scope of the Treaty.¹⁴ Furthermore, the Court used the obstacle approach to find that the Charter, constituting neither a prohibition on signing a contract with a club in another Member State nor discrimination on the basis of nationality, nevertheless discourages the player from exercising his right of free movement and makes the exercise of that right less attractive. Thus, it constitutes a restriction contrary to Article 45 TFEU. The Court makes no distinction between sport and any other sector at this stage of its analysis. The contested rules or practices are either restrictive or not, notwithstanding the specific characteristics of the sector.¹⁵

Justification of the restriction – legitimate objective

Paragraph 38 of the Court's judgment follows a familiar roadmap for analysing the existence of justifications for measures restricting the free movement provisions of the Treaty. Accordingly, a restriction may be accepted only if it pursues 'a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest', and

¹⁴ Para. 30 of the judgment.

¹⁵ Paragraph 30 of the Advocate General's opinion in this case says that 'the specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether there is a prohibited restriction on freedom of movement. [...]'

the application of that restrictive measure is a) capable of ensuring achievement of that aim, and b) does not go beyond what is necessary for that purpose. The Court goes on to confirm paragraph 106 of *Bosman*: '[...]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.'¹⁶ Therefore, the said objective was easily recognized as legitimate by reference to previous case-law. It is apparent from the language of the Court that the social importance of sport plays a crucial role in legitimating this objective and that it would probably not be accepted as such in (m)any other employment sectors.

Standard of application of the proportionality principle

This aspect of the judgment deserves more attention. The Court states that:

‘In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.’¹⁷

For the first time, the Court mentions the social and educational function of sport at this stage of analysis and refers expressly to sport as a sector which requires specific characteristics to be taken into account in the examination of possible justifications. This does not represent a novelty in terms of the relevant factors taken into account by the Court

¹⁶ Para. 39 of the judgment.

¹⁷ Para. 40 of the judgment.

at different stages of objective justification analysis. The novelty is in the express language of the Court, coupled with the reference to Article 165(1) TFEU.

Although not relevant in *Bernard* itself (since, here, a non-discriminatory restriction was at issue), it is interesting to remember that under the traditional approach, the analytical framework first required labelling the measure as directly discriminatory, indirectly discriminatory, or non-discriminatory but restrictive on the exercise of the freedoms conferred. By allowing the directly discriminatory 3+2 rule in *Bosman*, discriminatory transfer windows in *Lehtonen*¹⁸, and quota on foreign players in *Kolpak*¹⁹ and *Simutenkov*²⁰ to be considered under the objective justification framework as opposed to the express derogation framework, and therefore treating it as if it were an indirectly discriminatory or non-discriminatory restriction, it could be thought that the Court has effectively introduced the concept of the ‘specificity of sport’ to the traditional classification process.²¹ Sport is not the only sector in which the Court has taken such a detour for directly discriminatory

¹⁸ Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681.

¹⁹ Case C-438/00 *Deutscher Handballbund v. Kolpak* [2003] ECR I-4135.

²⁰ Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, [2005] ECR I-2579.

²¹ The traditional measure-classification stage in the analysis is nonetheless still evident in the Court’s analytical structure in several cases. See C Barnard ‘The Substantive Law of the EU’ 2nd ed. Oxford UP, 2007, pp. 279-282.

measures.²² But sport is the only sector where it has taken this approach consistently, thus making it a rule in the application of EU freedom of movement law to sports, which could be attributed to the specificity of sport. In *Bernard*, the Court's novel reference to Article 165(1) TFEU might signal that the provision has not just confirmed but has in fact given some additional weight to the specificity and socio-educational function of sport, which could prove just enough to influence the outcome in certain cases. This is, however, evident only when considered in the context of the suitability assessment and the Court's departure on that matter from the judgment in *Bosman*. The discussion in the following section illustrates this point.

Suitability of training compensation systems

Turning to the issue of the suitability of training compensation schemes in light of the specificities of sport and its social and educational function, the Court said that

‘41. [...]the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see *Bosman*, paragraph 108).

42. The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, *Bosman*, paragraph 109). [...]

²² See, for example, C-67/97 *Bluhme* [1998] ECR I-6717 (biodiversity), Case 2/90 *Commission v. Belgium (Walloon Waste)* [1992] ECR I-4431 (environmental protection), Case C-19/92 *Kraus* [1993] ECR I-1663 (protection of public against misleading use of academic titles).

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

45. It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, *Bosman*, paragraph 109).’

Compare this reasoning of the Court with paragraph 109 in *Bosman* in which it held 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 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.’²³ While, in *Bosman*, training compensation schemes were viewed as unsuitable for the achievement of the objective of *encouraging* the recruitment and training of young players, in *Bernard* they were deemed suitable. Furthermore, in paragraph 46 of her Opinion, AG Sharpston said: ‘[...] Rules such as the one in question here are therefore perhaps not decisive in encouraging clubs to recruit and train young players. None the less,

²³ C-415/93, para. 109.

such rules ensure that clubs are not discouraged from recruitment and training by the prospect of seeing their investment in training applied to the benefit of some other club, with no compensation for themselves.’

Interpreting the word ‘encourage’²⁴ as meaning to ‘not discourage’ seems to be a linguistic modification, enabling the Advocate General to depart from the decision in *Bosman* as regards the suitability of training compensation schemes.²⁵ But why would AG Sharpston undertake such a linguistic maneuver and why would the Court follow her Opinion on that point? One possible reason is discussed above and relates to the change of direction with regard to the weight given to socio-educational functions. The other explanation would be that the Court simply did not expressly acknowledge the departure from *Bosman* in this respect, when it in fact changed its opinion as regards the importance of the contingent and uncertain nature of compensation fees in assessing the suitability of the measure. AG Lenz in *Bosman* did not find that the nature of compensation fees prevented him from reaching the conclusion that they are appropriate means for attaining the aim of encouraging training and recruitment of young players, but the Court, back then, did not follow him on this point.

²⁴ As required by the objective accepted as legitimate in para. 39 of *Bernard* and para. 108 of *Bosman*.

²⁵ The objective required that the restrictive rule *encourages* clubs to train and recruit young players, and not that it did not discourage clubs from doing so. The aim of ‘not discouraging’ presents lower bar to attain for restrictive rule to be found suitable for its attainment than the aim of ‘encouraging’. Therefore, the restrictive rule (training compensation) used to attain the objective so re-worded and modified will more likely be found suitable in the former, but not in the wording of the latter.

Proportionality: calculation of training compensation

Finally, addressing the system of compensation in *Bernard*, the Court saidThe Court offered only very general guidelines on the accepted methods of calculating compensation. Accordingly, such methods should be related to compensation for the real training costs incurred by the club (the criteria for calculation of which should ideally be determined in advance). What constitutes ‘real training cost’ is the issue left open. Moreover, paragraph 45 tells us that the costs to take into account in designing a scheme are not just those associated with training future professional players but, also, costs associated with training those players who will never turn professional.

Weatherill suggests that interpreting the criteria noted in paragraphs 46-47 of the judgment in *Bernard* to mean that only a scheme tied directly to the actual costs of training one player is permitted ‘might be too narrow an interpretation’, and that the criterion in paragraph 45 ‘might conceivably be interpreted to mean that the compensation payable by those who succeed as professionals might be inflated beyond the costs incurred in their particular case to allow also some coverage of training costs incurred but wasted on those players who fall by the wayside’.²⁶ Lindholm also suggests that the Court favoured a total-training-cost-model and ‘appeared’ to have rejected the Advocate General’s suggestions of an individual-training-cost-model.²⁷ Although this is a possible interpretation of the

²⁶ S Weatherill ‘The *Olivier Bernard* case: how, if at all, to fix compensation for training young players?’ *International Sports Law Journal* 1-2, 2010, p.5.

²⁷ J Lindholm ‘Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United UFC*, Judgment of the Court of Justice (Grand Chamber) of 16 March 2010, not yet reported’ *Common Market Law Review* 47, 2010, p. 1192.

judgment, there is an alternative explanation which, although not as straightforward, appears more convincing. There are several considerations which lead to the conclusion that the criterion in paragraph 45 is an *additional* criterion that applies *only* in schemes in which the new employer, as opposed to a player, is liable to pay the compensation, and that the Court has in fact followed the suggestions of AG Sharpston on the point of setting different criteria for ‘employer pays’ and ‘player pays’ schemes.

First, paragraph 45 appears in the part of the judgment in which the Court addresses compensation schemes in general and not ‘player pays’ schemes in particular, whereas paragraphs 46-47 address the scheme in the main proceedings, i.e. a ‘player pays’ scheme. It would be unreasonable to expect the *Cour de cassation* to recognize this criterion as applicable to the case before it. The Court has left out the criterion of ‘and those who never play professionally’ in its answer to the preliminary reference because it did not want the *Cour de cassation* to reach the decision using that criterion to determine the dispute. If it were applicable, the Court could easily have added this criterion at the end of paragraph 49. Additionally, in paragraph 45, as well as in the preceding reasoning, the Court cites *Bosman*, in which the ‘employer pays’ scheme was at issue. It would have made all the difference were the attainment of the ends in that case dependant on ‘player pays’ means. If it were, the Court in *Bosman* would not have implied that training compensation had to be related to the ‘actual cost borne by the clubs of training both future professional players and those that will never play professionally’.

This leads to my second point. Namely, the Court could not have intended to subject a young trainee to the burden of a total-training-cost-model,²⁸ because it could have the disproportionate effect of actually preventing him from moving to a club in another Member State. This is especially true with respect to sports other than football in which the costs of training might be as high but the players' services are much less valued. Such an approach would fail to satisfy proportionality *strictu sensu*. To illustrate this in more concrete terms, we can look at the FIFA training compensation system, according to which an employer is liable to pay up to EUR 90 000 per year of training if it offers the first professional contract to a young player. The costs are supposed to reflect approximate total training costs. According to FIFPro²⁹ comment on FIFA's compensation rules, history has shown that 'such fees operate as a significant and sometimes definite restraint that can not only undermine player earnings but also put players out of the game'.³⁰ If there is any truth to this claim regarding the FIFA 'employer pays' scheme, for football trainees to be held liable for similar total-training-cost-covering-sums, and for trainees in other sports to be held liable for equivalently restrictive amounts in their respective sports (which could be legally installed in any sport if paragraph 45 is interpreted as applying to 'player pays' schemes), would mean preventing most players from moving anywhere after completing their training. Has the social and educational function along with the specificity of sport really been raised to *such* high level of importance to be capable of justifying these consequences for freedoms guaranteed by Article 45 TFEU? Although it could become more important in the future, depending on how the sport governing bodies react to

²⁸ Discussed in the next section of this article.

²⁹ FIFPro is the Federation Internationale Des Associations De Footballeurs Professionnels.

³⁰ FIFPro report on the Joint FIFA/UEFA Negotiation Document (International Transfer of Players), available at www.uefa.com.

Bernard, this discussion is currently of more theoretical than practical value when placed in the context of the present-day state of affairs, to which we now turn.

In the ten years since the litigation started, FIFA has introduced a system operated on the ‘employer pays’ basis, France has changed its rules for internal transfers in football to reflect that system, Bernard finished his footballing career, and Lyon’s lawyers probably forgot they ever started the litigation as the club’s budget would not be affected at any detectable level by whatever Bernard would have been held liable to owe. In addition, sports today do not apply ‘player pays’ schemes. For example, basketball, handball, football and rugby run ‘employer pays’ schemes. Cricket, fencing, hockey, cycling, polo, volleyball, ice-hockey, skiing, swimming and baseball have no training compensation at all. One explanation which renders the judgment valuable in the present day is that the criterion in paragraph 45 applies to any type of scheme including ‘player pays’ schemes, which is something that I have argued against above. The only other possible explanation is that the paragraph 45 criterion is strictly intended to apply to systems in which employer bears the burden of training compensation.

This explanation of the judgment is in line with AG Sharpston’s suggestions. She rejected two models of compensation: one based on the player’s prospective earnings, because it is susceptible to manipulation; and the other based on the club’s prospective loss of profits, because it is too uncertain.³¹ Two other models discussed in the Opinion were the total-training-cost-model and the individual-training-cost-model. ‘[...]If it is necessary to train n

³¹ See para. 50-51 of her Opinion.

players in order to produce one who will be successful professionally, then the cost to the training club (and the saving to the new club) is the cost of training those n players. It seems appropriate and proportionate for compensation between clubs to be based on that cost. For the individual player, however, only the individual cost seems relevant', regardless of the overall training costs. So, the Advocate General suggested the total-training-cost-model as appropriate for 'employer pays' schemes and the individual-training-cost-model in any instance of 'player pays' schemes.

Weatherill considers that the Court chose not to explore the nuances suggested by AG Sharpston because 'calculation is in any event complicated by the practical reality that players are trained in groups, not individually: the cost of training twenty players is lower than the cost of training one multiplied by twenty thanks to realisation of economies of scale.'³² But it may well be that the Court has left the nuisance of the nuances to the clubs and/or their governing bodies. After all, football clubs nowadays, especially those playing in the higher divisions of a national league, are professional undertakings with huge turnovers that must have proper accounting systems to manage their revenues and expenditures and, therefore, they should be able to assess quite precisely the expenses involved in the training of young players.³³ It does not seem to be too different or too much harder to calculate the costs of training one player than it is to calculate the costs of training

³² Weatherill, op. cit., note 26, p.5.

³³ S Van den Bogaert '*Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*' (Kluwer, The Hague, 2005) pp. 256-257.

one player plus the fluctuating number of other players but not of entire trainee squad.³⁴ It is true that the calculations may prove to be more difficult for smaller clubs. However, even small clubs have to manage their accounts during the financial year. If they do not have an in-house accountant, they can hire one specifically to devise a cost template and demonstrate how to calculate costs of training, which fixed and variable costs to include/exclude, which deductions to make, and so on. It is a one-time hire and a one-time expense (which can then possibly be labelled as a cost of training and shifted to another party).

Regardless of the method used for calculating costs, sums of compensation must be set between suitability and necessity, i.e. they must be high enough to be capable of attaining the objective but they must be the lowest possible that can achieve that objective. It can be rightfully claimed that ‘player pays’ schemes based on the individual-training-cost-model are not suitable to achieve the objective of encouraging clubs to train and recruit young players, simply because of the very low amounts of compensation involved. This is also recognised by AG Sharpston: ‘[...] investment in training would be discouraged if only the cost of training the individual player were taken into account when determining the appropriate compensation.’³⁵ Therefore, in team sports, ‘employer pays’ schemes based on total training cost seem to be the only model that can satisfy all of the legal criteria, and are

³⁴ It takes an average of 10 players to produce one professional. See European Commission, *Education of Young Sportspersons, Final Report*, August 2004, p. 49, and R. Blanpain ‘*Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*’ (The Hague, Kluwer, 2003) p. 52.

³⁵ See para. 52 of her Opinion.

therefore the right way to go. The reason that the Court ruled that individuals should compensate only for the costs of their own training (under the interpretation of judgment presented in this article) in a team sport such as football is to enable the *Cour de cassation* to settle the issue between the parties to the main proceedings. This ruling can also be important for the future, however, in the event of the establishment of mixed systems where the duty to compensate is divided between the player and the employer, or the player and the common compensation pool (which would make the system pass the suitability test).

Regarding the applicability of the judgment to schemes existing today, the criteria for team sports and ‘employer pays’ schemes are set out in paragraph 45 of the judgment. In addition to this, ‘real training costs’ (in paragraphs 46 and 50) should be taken as meaning i) costs for training one individual player in ‘player pays’ schemes (to settle the case at hand and any eventual future systems where individual would be liable to pay), and ii) costs for training one individual player plus the number of players that do not make it professionally taking into consideration the appropriate ‘player factor’ (the ratio of players who need to be trained to produce one professional player) in ‘employer pays’ schemes. Paragraphs 46 and 50 refer only to the link between the compensation payable and the actual costs incurred – the Court does not insist on precise congruence.³⁶ It is enough that the relevant calculations are based on the broad criteria set by the Court.

The answer to the questions referred

‘49. [...] the answer to the questions referred is that Article 45 TFUE does *not* preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of

³⁶ See Weatherill, op. cit., note 26, p.4.

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.

Here, the Court omitted to complete the sentence with the paragraph 45 criterion ‘taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally’. The final word flowing from the reasoning in paragraphs 46-48 was that the ‘player pays’ scheme in *Bernard* failed to satisfy the necessity principle because damages were calculated, ‘in a way *which is unrelated to the actual costs of the training*’.³⁷ So the ruling of the Court was in favour of Bernard and Newcastle United FC. But the reason for that is not because the Court considered training compensation schemes in sports illegal, but because this particular compensation scheme was considered illegal.

The current FIFA training compensation system

Article 20 and Annex 4 of the FIFA Regulations³⁸ set out the rules for training compensation. Accordingly, training compensation shall be paid to a player’s training club(s): (1) when a player signs his first contract as a professional, and (2) on each transfer of a professional until the end of the season of his 23rd birthday.³⁹ The obligation to

³⁷ Para. 50 of the judgment.

³⁸ FIFA Regulations for the Status and Transfer of Players available at <http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/statusandtransfereinhalt2010.pdf>

³⁹ *Ibid.* Article 20.

compensate applies whether the player is transferred during or at the end of his contract.⁴⁰

A special provision that applies for transfers from one association to another within the EU/EEA stipulates that if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. Such an offer must be at least of an equivalent value to the current contract.⁴¹

In order to calculate the compensation due for training and education costs, national football associations divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and are said to correspond to the amount needed to train one player for one year multiplied by an average 'player factor', which is the ratio of players who need to be trained to produce one professional player. The training costs are established on a confederation basis for each category of club as well as the categorisation of clubs for each association.⁴² UEFA⁴³ has established the following sums for Europe: Category I clubs EUR 90 000, category II clubs EUR 60 000, category III clubs EUR 30 000 and category IV clubs EUR 10 000.⁴⁴ So, when a player that has been trained for five years by club X, a

⁴⁰ *Ibid.*

⁴¹ Annex 4, FIFA Regulations for the Status and Transfer of Players.

⁴² *Ibid.*

⁴³ Union of European Football Associations. Confederation for Europe.

⁴⁴ FIFA circular letter nr.1223. Available at

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

category III club, refuses to sign their first professional contract with club X and instead signs with club Y, a category II club, club Y will owe 45 000 EUR times the number of years that the player spent with club X (when a player moves from a lower to a higher category, the average amount between the two categories applies). The total amount owed for five years of training a player in this case would come to EUR 225 000. If the player were to move from first to first category club after five years of training, EUR 450 000 would be the applicable amount. In Europe, only six national associations have clubs classified as belonging to category I. About half of the national associations have only category III and IV clubs.

The FIFA Dispute Resolution Chamber reviews disputes concerning the amount of training compensation payable and has discretion to adjust this amount if it is clearly disproportionate in the case under review.⁴⁵ A question which has received increased attention after *Bernard* is whether the FIFA training compensation system is compatible with the requirements of EU law. *Prima facie*, it appears that Article 20 and Annex 4 of the FIFA Regulations satisfy the general criteria of the judgment in *Bernard*. The European Commission has already given an informal green light to these rules. However, until someone actually challenges the rules, we will not be able to say with certainty which provisions are perhaps precluded by the EU law and need amendment.

The feature of the system that appears most controversial is the fact that payable flat sums are set on the level of confederation.⁴⁶ The actual costs of training are not the same or even

⁴⁵ Annex 4, FIFA Regulations for the Status and Transfer of Players.

⁴⁶ In other words, UEFA as confederative body sets sums for all European national football associations, and other regional governing bodies set the sums in their respective regions.

similar in all European countries due to differences in economic conditions. Therefore, it seems more desirable that the flat rate sums for different categories of clubs should be set by national associations to reflect more accurately the real costs of training incurred, as required by *Bernard*.⁴⁷ On the other hand, the existence of a FIFA Dispute Settlement Chamber that has the power to adjust the sums in individual cases is a positive feature of the system which can be used as an argument against claims that sums are clearly disproportionate. It follows implicitly from the judgment in *Bernard* that *precise* sum of the real training costs is not a must.

Final remarks

Let us remind ourselves that the judgment in *Bosman* led to the abolition of transfer fees for out-of-contract professional players who then became free agents whereas, under *Bernard*, out-of-contract trainee players were not considered to be free agents and compensation fees were given a green light. This differential treatment of young trainees who embark upon a professional career and professional players can, *inter alia*, be considered to be an exception to the prohibition on age discrimination in EU law.⁴⁸ It can also be a preliminary indication of the validity of FIFA rules that have for years maintained, contrary to *Bosman*, transfer fees for out of contract trainees. In this sense, *Bernard* represents a restriction on the scope of *Bosman*.

⁴⁷ See on this point also S. Van den Bogaert, *op.cit.* note 33, and J-C Drolet 'Extra Time: are the new FIFA Transfer Rules doomed?' Ch. 10 in S. Gardiner, R. Parrish and R. Siekmann, '*EU Sport Law and Policy*' (The Hague, TMC Asser Press, 2009).

⁴⁸ See Article 10 TFEU and Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303/16, 2 December 2000).