

PROTECTION OF MINORS VS. EUROPEAN LAW

by *Rob Simons**

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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 EC⁴ (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

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

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] E.C.R. 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] E.C.R. 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 102¹⁰) 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

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

registration according to paragraph 3 is subject to the approval of the sub-committee appointed by the Players' Status Committee for that purpose. The application for approval shall be submitted by the association that wished to register the player. The former association shall be given the opportunity to submit its position. The sub-committee's approval shall be obtained prior to any request from an association for an International Transfer Certificate and/or a first registration. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code. In addition to the association that failed to apply to the sub-committee, sanctions may also be imposed on the former association for issuing an International Transfer Certificate without the approval of the sub-committee, as well as on the clubs that reached an agreement for the transfer of the minor.

Especially the first exception has been abused a lot (par. 2(a)). In many circumstances the family of the player does not move to a foreign country for real labour or similar reasons, but are offered a fictitious job, in order to legitimate a transfer of a minor player that is already agreed upon. Leading case in this matter is CAS Cádiz C.F. & Caballero v/FIFA & Asociación Paraguaya de Fútbol.¹⁴

In this case the international transfer of minor player Caballero was rejected on the basis of paragraph 2(a). At the age of 16 Caballero signed a contract with Spanish football club Cádiz C.F. A week after signing, the player's mother signed a contract of employment with a restaurant in Spain. However the Paraguayan Football Association refused to issue an International Transfer Certificate due to the player's age and the fact that the conditions of article 19 had not been met.¹⁵ In appeal CAS concluded, in line with the FIFA Player Status Committee (*FIFA PSC*), that the player's decision to move to Spain was made first and the decision of the mother of the player to move to Spain was thus directly linked to the contract signed between the player and the club.¹⁶ Therefore the exception in paragraph 2(a) did not apply.

The second exception, article 19 paragraph 2(b), is meant for international transfers within the EU. An international transfer in the EU is allowed if the player is between the age of 16 and 18 and adequate (academic) education is provided.

An interesting case in this matter is CAS F.C. Midtjylland.¹⁷ In June 2006 Danish club F.C. Midtjylland registered three minor Nigerian players, previously registered with Nigerian club F.C. Ebedei, as amateurs at the Danish Football Association. The Nigerian players had been granted a residence permit by the Danish Immigration Service as students (without the right to work), and had been given an upper secondary school education in Denmark.¹⁸

¹⁴ CAS 2005/A/955 *Cádiz C.F., SAD v/FIFA en Asociación Paraguaya de Fútbol & CAS 2005/A/956 Carlos Javier Acuña Caballero v/FIFA en Asociación Paraguaya de Fútbol*.

¹⁵ CAS *Caballero*, *supra* note 14, paras 2.1–2.12.

¹⁶ CAS *Caballero*, *supra* note 14, para. 7.3.1.

¹⁷ CAS 2008/A/1485 *FC Midtjylland A/S/ v/ FIFA*.

¹⁸ CAS *FC Midtjylland*, *supra* note 17, paras 2.3–2.6.

In February 2007, the Fédération Internationale des Associations de Footballeurs Professionnels (*FIFPro*) contacted FIFA alleging that F.C. Midtjylland was systematically violating Article 19 par. 1 of the FIFA RSTP transferring minor Nigerian players. After investigations, the FIFA PSC agreed with FIFPro and issued a decision against F.C. Midtjylland and the Danish Football Association.¹⁹ In its decision the FIFA PSC stated that «to prevent abuse and maltreatment of young players, a strict, consistent and systematic implementation of Article 19 of the FIFA RSTP is necessary».²⁰

In one of its arguments in appeal at CAS F.C. Midtjylland refers to the partnership agreement between the European Union and a number of African countries, including Nigeria, called the «Cotonou Agreement».²¹ The club argues that a Nigerian citizen, who is a legal resident in Denmark, could invoke Article 13.3 of the Cotonou Agreement to be treated equally as a Danish citizen.²² Moreover, F.C. Midtjylland, referring to the *Simutenkov* case before the European Court of Justice,²³ is of the opinion that the exception in Article 19 par. 2(b) of the FIFA RSTP «should be interpreted that it can also benefit citizens from third countries which have made a bilateral agreement with the European Union to secure third countries' citizens from discrimination caused by nationality in terms of working conditions».²⁴

However, CAS rejects these arguments. First CAS argues that article 19 of the FIFA Regulations equally applies to amateur and professional minor players.²⁵

With regard to European law and the Cotonou Agreement, CAS states that the Nigerian players cannot benefit from the Agreement since the relevant provisions prohibiting discrimination on the basis of nationality only apply to «workers» and only as far as working conditions are concerned. It does not apply to students or other persons who intend to enter the employment market in a European Community Member State.²⁶ The appeal made by F.C. Midtjylland was dismissed.

Finally the third exception, article 19 paragraph 2(c), applies in case the player lives within 50 kilometers from the border and wants to move to a club in a

¹⁹ CAS *FC Midtjylland*, *supra* note 17, para. 2.8.

²⁰ CAS *FC Midtjylland*, *supra* note 17, para. 2.8.

²¹ 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

²² Article 13.3 of the Cotonou agreement: «The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State».

²³ Case C-265/03 *Igor Simutenkov v. Ministerio de Education y Cultura and Real Federación Española de Fútbol*, [2005] E.C.R. I-02579.

²⁴ CAS *FC Midtjylland*, *supra* note 17, para. 3.3.

²⁵ CAS *FC Midtjylland*, *supra* note 17, paras 7.2.4–7.2.7.

²⁶ CAS *FC Midtjylland*, *supra* note 17, paras 7.4.5–7.4.16.

neighboring country. This is permitted in case the maximum distance between the domicile of the player and the (new) club does not exceed 100km.

Article 19 of the FIFA RSTP, due to its additional conditions, limits the player's freedom of movement. The validity of this article was challenged in the above CAS Caballero case. However CAS came to the conclusion that the FIFA rules limiting international transfer of players under 18 years old do not violate any mandatory principle of public policy («ordre public») under Swiss law or any other national or international law, insofar as:

- i) they pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives, particularly if, as often happens the football career eventually fails or, anyways, is not as successful as expected;
- ii) they are proportionate to the objective sought, as they provide for some reasonable exceptions.²⁷

As with the Bernard judgment, the transfer limitation of minors, and thus a limitation in the freedom of movement, is justified since a legitimate objective is pursued and the rules are proportionate.

4. *New FIFA initiatives*

Despite the fact that CAS strictly applied the FIFA Regulations in international transfers of minors in the above CAS judgments, this was not sufficient enough to prevent further abuse of the Regulations. Therefore it was decided at the end of 2008 to revise some articles of the FIFA Regulations to combat these practices, including article 19 of the FIFA Regulations, which came into force on 1 October 2009. However, also other measures were taken by FIFA. Hereby an overview starting with article 19 par. 4 of the FIFA Regulations, the FIFA Players' Status sub-committee.

4.1 *FIFA Players' Status sub-committee*

From 1 October 2009 onwards, every international transfer involving minors is subject to the approval of a specially created sub-committee. The sub-committee consists out of a total of 9 representatives: of the players, clubs, minors' confederations of origin (e.g. CAF and CONMEBOL) and confederations of adoption (e.g. UEFA). This sub-committee is responsible for approving transfers of minors and to ensure that the exceptional circumstances laid down in Article 19, paragraph 2 of the FIFA Regulations are applied correctly.²⁸ This means that the responsibility does no longer lie with the member associations of FIFA.

²⁷ CAS Caballero, *supra* note 14, para. 7.2.2.

²⁸ FIFA, *Protection of minors and training clubs, principles approved by the FIFA Executive Committee*, Zurich, 24 October 2008, 1.

4.2 Academies – Article 19bis of the FIFA RSTP

Another amendment is the inclusion of an extra article in the FIFA Regulations, Article 19bis, which deals with minors at academies:

Article 19bis – registration and reporting of minors at academies

1. Clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors who attend the academy to the association upon whose territory the academy operates.
2. Each association is obliged to ensure that all academies without legal, financial or de facto links to a club:
 - a) run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or register with the club itself; or
 - b) report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates.
3. Each association shall keep a register comprising the names and dates of birth of the minors who have been reported to it by its clubs or academies.
4. Through the act of reporting, academies and players undertake to practise football in accordance with the FIFA Statutes, and to respect and promote the ethical principles of organised football.
5. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code.
6. Article 19 shall also apply to the reporting of all minor players who are not nationals of the country in which they wish to be reported.

This article is a first step to better regulate the organization of football academies. From now on, in order to control the emergence of private academies outside of association structures, such academies will be integrated within FIFA's member associations.²⁹ A distinction is made between academies linked to a club and private academies, like e.g. the Pepsi academy.³⁰ In case academies are legally, financially or de facto linked to a club, the club is required to report all minors who attend the academy to the association upon whose territory the academy operates (paragraph 1). If there is no direct link to a club, the association has to ensure that the academy runs a club that participates in the national championships. All players have to be reported to the association upon whose territory the academy operates or have to be registered with the club itself (paragraph 2a). Furthermore the association is obliged to ensure that all minors at the academies on its territory are reported to the association (paragraph 2b).

A major challenge will be to monitor all academies. Only in Accra, Ghana alone there are an estimated 500 illegal, non-reported and non-affiliated to the national association, academies operating.³¹ Given that the players in these types

²⁹ FIFA, *Protection of minors and training clubs*, *supra* note 28, 1.

³⁰ The website of the Pepsi football Academy is available at www.pepsifootballacademy.com.

³¹ D. McDougall, «The scandal of Africa's trafficked players», *The Observer*, Sunday 6 January 2008.

of academies are not affiliated with a club or federation, they fall outside any legal and administrative regulations that are aimed at safeguarding young players from unscrupulous agents.³²

4.3 Training Compensation

Also the challenged scheme in the Bernard case, training compensation, was amended. The objective of training compensation is to compensate clubs that have contributed to the player's training and education between the ages of 12 and 23 years old. As can be read in Annexe 4 of the FIFA Regulations, training compensation shall be payable, as a general rule, up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21.³³

Clubs are divided in different categories. Depending on the category of the club (1 to 4, the better the club, the higher the category, 1 being the highest), the amount of the training compensation per season is determined (which in Europe varies from EURO 90.000 for category 1 clubs, EURO 60.000 for category 2 clubs, EURO 30.000 for category 3 clubs and to EURO 10.000 for category 4 clubs). Under the old regulations, training compensation between the ages of 12 to 15 was always based on a club-category 4 amount (i.e. EURO 10.000).

However article 5 paragraph 3 of Annexe 4 of the FIFA RSTP now stipulates that where the event giving rise to the rights to training compensation occurs before the end of the season of the player's 18th birthday, the training costs for players for the seasons between their 12th and 15th birthdays (i.e. four seasons) shall no longer be based on the training and education costs of category 4 clubs, but on the category of the new club.³⁴ This means that the higher the category of the club, the more expensive it becomes for this club to sign a minor before the age of 18.

4.4. FIFA Transfer Matching System

Another new initiative was the involvement of minors in the FIFA Transfer Matching System (TMS) as can be read in Annexe 2 of the FIFA Regulations. The objective of the TMS is, on the one hand, to make sure that football's authorities have more details available to them on each and every transfer, and on the other hand, to increase the transparency of individual transactions, which will in turn improve the credibility and standing of the entire transfer system. At the same time, the system will also ensure that it is indeed a player who is being transferred

³² P. DARBY, G. AKINDES & M. KIRWIN, «Football Academies and the Migration of African Football Labor to Europe», *Journal of Sport and Social Issues*, 2007, 153.

³³ Article 1 Annexe 4 of the 2009 FIFA RST.

³⁴ FIFA Circular no. 1190, «Revised regulations on the status and transfer of players – protection of minors», 20 May 2009, 2.

and not merely a fictitious player being used to move money («money-laundering»). And last but not least, it will also contribute towards safeguarding the protection of minors.³⁵

Via the TMS, the movement of players is monitored through a central database, from which also ITC's can be issued. From October 2010 onwards, the use of TMS will become a mandatory step for all international transfers of professional players, including minors, and any professional player registrations made without the use of TMS will be deemed invalid by FIFA.³⁶

4.5 Awareness campaign

Finally in conjunction with FIFPro an awareness campaign is being launched directed at minors' countries of origin, in order to draw the attention of the public authorities, as well as of parents and minors themselves, to the consequences and social dangers posed by the issue of minors in football today.³⁷ Important to emphasize is that it is not always in the best interest of the child to leave his country at a young age in order to try to obtain a contract in mainly Europe.

5. UEFA Regulations regarding the protection of minors

Besides FIFA (club) competitions, clubs also participate in UEFA (club) competitions, the UEFA Champions League and the UEFA Europe League (formerly known as UEFA Cup). Also UEFA has taken measures to protect minors in its (European) competitions. Already in 2005, the homegrown rule was introduced and recently a resolution was adapted to prohibit international transfers of a player under 18 years old.

5.1 UEFA Homegrown Rule

In 2005 UEFA agreed on the introduction of a so-called *homegrown-rule*. This rule states that squad lists for UEFA club competitions will continue to be limited to 25 players for the main «A» list. From season 2006/07, the final four places were reserved exclusively for «locally trained players». A locally trained player is either a «club trained player» or an «association trained player». In the following two seasons, one additional place for a club trained player and one additional place for an association trained player was reserved on the A list with the final number of four club trained and four association trained players in place for the 2009/10 season. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between

³⁵ FIFA Circular no. 1205, «FIFA TMS transition phase», Zurich, 23 September 2009, 1.

³⁶ FIFA Circular no. 1205, «FIFA TMS transition phase», Zurich, 23 September 2009, 1.

³⁷ FIFA, «Protection of minors and training clubs», *supra* note 28, 2.

the ages of 15 and 21. An association trained player fulfils the same criteria but with another club in the same association. In the event that a club fails to meet the new conditions for registration, the maximum number of players on the «A» list will be reduced accordingly.³⁸

As can be read in articles 18.08 – 18.14 of the 2009/10 UEFA Regulations this system is still in place, clubs are, in UEFA club competitions, required to have (minimum) four locally trained players and (maximum) four association trained players listed in places 18 – 25 on list A.

Even though this rule is obviously (indirectly) discriminating, UEFA is of the opinion that this rule can be justified since it is proportionate and pursues a legitimate objective; reaching a «competitive balance» between clubs and «to encourage and protect the training and education of players».³⁹

In *Bosman* a rule which limited the number of professional players who were nationals of other Member States to be fielded (3+2 rule) was dismissed as being contrary to the freedom of movement since it was directly discriminating and moreover could not be justified.⁴⁰ At the same time, in paragraph 106 of the *Bosman* judgment the Court stated that «in the view of the considerable social importance of sporting activities, and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate».

The difference between the 3+2 rule in *Bosman* and the UEFA homegrown rule is that the homegrown rule is «legally distinguishable in that although the objective is an attempt to link attributes of residence and players' club affiliations, the method employed does not constitute direct nationality discrimination but indirect discrimination which arises from requirements which more nationals than non-nationals are likely to fulfill. Since it is indirectly discriminatory, categories of objective justification beyond the limited Treaty grounds may be available».⁴¹

A very important side effect in this regard should not be forgotten. A player must be registered with a club for three years between the ages of 15 – 21 in order to be considered a homegrown player. This means that the younger a player when registered with a club (i.e. 15 years old), the sooner he can be regarded as homegrown, which is an advantage for the club to field another non-homegrown player. This could encourage clubs to attract players at a young age rather than to protect these youngsters.

³⁸ S. MIETTINEN & R. PARRISH, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 (2) *Entertainment and Sports Law Journal* (2007), 3.

³⁹ Also supported by the European Parliament as can be read in the European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (2006/2130(INI)), para. 34-35.

⁴⁰ *Bosman*, *supra* note 5, para. 15 summary.

⁴¹ S. MIETTINEN & R. PARRISH, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 (2) *Entertainment and Sports Law Journal* (2007), 9.

Though, in combination with the new strict FIFA Regulations and additional measures regarding minors which are in place as summarized above, this rule can indeed encourage and protect the training of young players. However, the FIFA Regulations should be observed strictly.

5.2 *International Transfer Prohibition U-18*

In 2009 a resolution was ratified by UEFA together with representatives of the associations, clubs, leagues and players, in which it was agreed that «no international transfers (or first registration of non-nationals) of players under 18 into Europe or within Europe should be permitted. This means in particular that the third exception foreseen today in Article 19, paragraph 2 b), of the FIFA Regulations for the Status and Transfer of Players, and which relates only to the EU/EEA, should be reviewed in order to guarantee that the same system regarding transfer bans of under-18 year old players applies both within and outside Europe and that this system is strictly monitored».⁴²

However, within the European Union, as already mentioned, one of the core principles is the internal market and the freedom of movement provisions. In particular Article 45 of the TFEU applies in this matter, which deals with the freedom of movement of workers. As can be read in this article (paragraph 2, the freedom of movement of workers «shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment». In paragraph 3 of Article 45 TFEU it is explained what this right explicitly entails; the right to accept offers of employment actually made (sub a), to move freely within the territory for this purpose (sub b), to stay in a Member State for the purpose of employment in accordance with the provisions governing employment of nationals of that State laid down by law, regulations or administrative sanction (sub c) and to remain in the territory of a Member State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission (sub d).

An international transfer ban for players under 18 years would obviously infringe this fundamental right of EU citizens. Even though this rule would apply irrespective of nationality, a legitimate question is whether such limitation on the freedom movement is proportionate.

6. *Sports agents – Study performed by the European Commission*

Faced with a steady rise in the price of players, many European clubs are increasingly turning to non-European markets, most of which are located in the African and South American continents, where it is possible to acquire talented

⁴² UEFA MEDIA RELEASE, *Protection of young players and encouragement of youth development, Resolution of the Professional Football Strategy Council*, Nyon, 9 March 2009.

players at significantly lower prices than in Europe.⁴³ Trafficking in sportspersons mainly concerns young sportspersons from third countries, particularly from Africa and Latin America. In the specific case of football, these continents represent a reservoir of young talent and are the main areas of origin of foreign professional football players who play in European championships.⁴⁴

In 2009, the European Commission published a study on sports agents in the European Union. This report describes in 7 steps how minor football players, from Africa and South-America in particular, are being trafficked by agents:

- 1) An intermediary spots a – usually young – player and promises to have him recruited by a European club. In most cases these players, who wish to emulate their idols, practice their sport in informal settings which are not easy to monitor.
- 2) The intermediary asks the player's family for money in exchange for finding a «placement» for him in Europe. Sometimes the player's family will sell all their possessions or take out a loan to pay the intermediary, in the hope of receiving a quick return on their investment.
- 3) The player arrives in Europe, in most cases with a one-month tourist visa. The travel conditions are often illegal (e.g. travelling as a stowaway in a ship) and dangerous (excessively long journeys, dehydration, hypothermia, etc.).
- 4) Once he arrives in Europe, the player is «put to the test» by several clubs, which are not necessarily those promised by the intermediary. He is taken from one club to another until the intermediary is satisfied or gives up the process.
- 5) If the tests are successful, the player signs a (usually, short-term) contract with the club (in fact, very often the intermediary encourages the player to sign a short-term contract). The contract is often precarious and its terms are disadvantageous to the player. If the player no longer has a contract with a club, the intermediary often «drops him».
- 6) If the player does not pass any of the tests and is not recruited by a club, the intermediary usually abandons him to his fate.
- 7) In principle, an intermediary who brings a player to Europe should bear the costs of his stay as well as all travel costs, including the return fare to the country of origin. However, many intermediaries will abandon the player when the tests with the clubs do not lead to a contract. With no money, no connections and often unable to speak the language of the country where he stays, the abandoned player usually has no choice but to remain in Europe in an irregular situation, i.e. without a work permit or a stay permit. He will end up doing undeclared, casual jobs for a living, possibly sending part of his earnings to his family back home. Most often, the player is unable to return

⁴³ EUROPEAN COMMISSION, KEA – CDES – EOSE: *Study on Sports Agents in the European Union*, November 2009, 120.

⁴⁴ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 121.

to his country of origin because he cannot afford the fare or because he does not wish to return, since this would be perceived as failure by his family, which made sacrifices for him. In general, it is apparent that very few players from these countries are recruited or given a contract in relation to the high numbers who travel to Europe – which results in a large population of destitute persons who are reluctant to return to their countries of origin and who try to remain in Europe at any price.⁴⁵

Sports agents are influential economic actors. The commissions earned by player agents on transfers of players in European football are estimated at EUR 200 million per year.⁴⁶ According to the study performed by the European Commission on Sports Agents, there are currently between 5.695 and 6.140 sports agents – including both official and unofficial agents in the various sports disciplines considered in the study – operating in the territory of the European Union, of which football is by far the sport with the largest number of official sports agents.⁴⁷ At FIFA, at a worldwide level, there are 5208 of licensed agents registered.⁴⁸ Remarkable is that in Spain only, 550 licensed agents are registered.

However, according to FIFA, only 25 to 30 percent of the transfers are performed by licensed agents.⁴⁹ Therefore FIFA is considering abolishing the FIFA licensing system. However, by opening this market, a morbid growth of player agents would be created. Instead FIFA could consider a system whereby clubs are sanctioned if dealing with unlicensed agents. This way unlicensed agents are forced to obtain a license or they will lose their business. All licensed agents should be published and with every transfer made it should be made clear who represented the player. Since clubs are affiliated with FIFA, FIFA is able to impose sanctions upon clubs who (also indirectly) deal with unlicensed agents. This should include (malicious) licensed agents who are put forward by unlicensed agents to formally finalize an agreed transfer.

The Commission concludes in its report that «sports federations are not adequately equipped to combat and punish offences against public order, particularly in the fields of human trafficking (which falls within the province of migration and security policies) and financial crime (which falls within the province of financial supervision, fiscal control and crime prevention/law enforcement policies)». However, the Commission states, «a number of recent initiatives by the sports federations, such as the introduction of a licensing system for clubs or the Transfer Matching System seem to be moving in the right direction in terms of promoting good governance in sport and strengthening the supervision and transparency of financial flows».⁵⁰

⁴⁵ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 121.

⁴⁶ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 4.

⁴⁷ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 4.

⁴⁸ See www.fifa.com/aboutfifa/federation/administration/playersagents/list.html.

⁴⁹ FIFA.COM, «*FIFA acts to protect core values*», 15 July 2009, www.fifa.com/aboutfifa/federation/administration/news/newsid=1081337.html.

⁵⁰ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 172.

According to the Commission, «states must play a complementary role by supervising the measures implemented by national federations and imposing criminal penalties for offences against public order. This involves, for example, such measures as the following:

- Intensify the audits and checks performed by tax, social welfare and labour inspectors in sports clubs. Carry out checks of various aspects, including financial flows, work permits, social security registration, undeclared labour, working conditions, housing etc.;
- Improve the control of training centers in Europe to ensure compliance with national laws on the protection of minors;
- Establish indicators to measure the “sport variable” in statistics on illegal immigration and financial fraud».⁵¹

The Commission is of the opinion that governments should play a stronger role in protecting minors. Sports federations alone cannot solve this problem themselves.

Furthermore, more transparency in professional sport is recommended by the Commission, e.g. inform about reprehensible or illegal practices by sportspersons, agents, clubs, organizers of sports events or federations (including information on sanctions imposed by the sports authorities or public authorities); publish a list of sports agents and their clients (including, if possible, information on the duration of the contracts signed with the clients as well as on the qualifications and experience of the agents); include, in all placement contracts, the name of the agent and his/her remuneration and publish and make available to the members of the boards of directors (of clubs/organizers of sports events) the accounts concerning placement of sportspersons.⁵²

7. *European Parliament & European Commission Reports*

The scale and importance of protecting minors cannot only be solved by rules laid down by sporting organizations. At European level, already in 2007, both the European Parliament and the European Commission have recognized the problems regarding minors in respectively the European Parliament Resolution on the Future of professional football in Europe and the White Paper on Sport. In its resolution on the Future of professional football in Europe in 2007, the European Parliament confirms the problems regarding minors and calls for action. In its report the European Parliament:⁵³

37. Insists that immigration law must always be respected in relation to the recruitment of young foreign talent and calls on the Commission to tackle the problem of child trafficking in the context of Council Framework Decision

⁵¹ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 46, 172-173.

⁵² EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 46, 175.

⁵³ European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (2006/2130(INI)), paras 37-38.

2002/629/JHA of July 2002 on combating trafficking in human beings and/or in the context of the implementation of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work; points out that young players must be given the opportunity for a general education and vocational training in parallel with their club and training activity, so that they do not depend entirely on the clubs; calls for action to prevent social exclusion of young people who are ultimately not selected;

38. Calls on the football governing bodies and the clubs to engage in the fight against human trafficking by

- subscribing to a European charter for solidarity in football, that commits subscribers to respect good practices concerning the discovery, recruitment and reception of young foreign football players;
- the creation of a Solidarity Fund that would finance prevention programmes in countries most affected by human trafficking;
- reviewing Article 19 of the FIFA Regulations for the Status and Transfer of Players in relation to the protection of minors.⁵⁴

The problems are acknowledged and the European Parliament advocates for active action to prevent further exploitation of minors. E.g. immigration law provisions should play an important role in this regard, with the help of European Directives. Not only the European Parliament supports action, but also the Commission calls for measures in the White Paper on Sport.

In its White Paper, the European Commission continues and confirms that «there are concerns that the exploitation (sometimes referred to as “trafficking”) of young players is continuing. It is reported that an international network managed by agents takes very young players to Europe, especially from Africa and Latin America. The most serious problem concerns children who are not selected for competitions and are abandoned in a foreign country, often falling in this way in an irregular position which fosters their further exploitation».⁵⁵

The Commission further elaborates on the immigration law provisions already mentioned by the European Parliament: «as far as violations of immigration law are involved, Member States must apply the protective measures for unaccompanied minors envisaged by national legislation, where appropriate in accordance with Council Directive 2004/81/EC of 29 April 2004 on the residence permit.⁵⁶ In line with the UN Convention on the Rights of the Child, the best interest of the child must be a primary consideration for Member States when applying national legislation, especially concerning education and social integration. Finally, according to the Commission’s proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country

⁵⁴ Reviewing Article 19 of the FIFA RSTP was done in 2009 as can be read in this chapter.

⁵⁵ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.5.

⁵⁶ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

nationals, the “best interest of the child” should be taken in due account when making any decision on the return of the child, in particular with respect to the duration of the child’s stay in the Member State and of the existence of family, cultural and social ties with the country of origin». ⁵⁷

Active action cannot be done without the Member States. In the end, the responsibility to criminalize the phenomenon and to prosecute traffickers remains the responsibility of national legislations. ⁵⁸

8. Conclusion

This chapter took a step back from the Bernard judgment and took a deeper look into the protection of minors and European law.

European law allows for specificity of sports. Therefore also regarding minors specificity exists even though this specificity limits the freedom of movement of the players and despite the fact that this right fully applies to minors from the age they are competent to sign an employment contract. Examples in this regard are the transfer limitations mentioned in article 19 of the FIFA Regulations for players under 18 years of age. Limitations that are justified on the grounds of pursuing a legitimate objective and being proportionate to this objective, namely the protection of young players from international transfers which could disrupt their lives (see CAS Caballero).

FIFA has taken important initiatives to improve the protection of minors with the introduction of a Players’ Status sub-committee, the inclusion of article 19bis that concerns academies, changes in the calculation of training compensation and the involvement of minors in the FIFA Transfer Matching System.

Due to these measures, UEFA’s homegrown rule has become much more effective too since it has become more difficult to abuse the FIFA Regulations. Therefore clubs are obliged to pay more attention to recruiting and training its own youth players rather than to sign minors at a young age, whilst avoiding the FIFA Regulations, in order for them to become «homegrown» as soon as possible.

However, UEFA’s resolution to prohibit transfers U-18 in Europe is contrary to the EU free movement provisions. Whether such limitation is justifiable and proportionate under EU law will be an important question.

Also the European Parliament and the European Commission support action to improve the protection of minors and call for Member States to take action e.g. through Directives. As the protection of minors looks sufficient on paper, important is that this is reflected in practice. Therefore it is very essential that all actors, FIFA, UEFA, national associations, but also Member States work close together and strictly supervise all provisions.

⁵⁷ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.5.

⁵⁸ J. SCHERRENS, *The Muscle Drain of African Football Players to Europe: Trade or Trafficking?* European Master in Human Rights and Democratisation 2006-2007, 58.

Furthermore the European Commission's study on sport agents was a clear signal that FIFA should also actively act against malicious agents. E.g. a blacklist of agents could be created who make the minors sign killer contracts or abandon players after unsuccessful trials. Moreover, an interesting option could be to sanction clubs for doing any business with these malicious and/or unlicensed agents.

In conclusion, the protection of minors is a good legitimate cause. However, all measures and initiatives should always be carefully balanced with the fundamental right of free movement.