# Chapter 6
# *From Bosman to Bernard* C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177

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**Abstract** The Bosman (Full citation: Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921) proceedings involved a reference from the Court of Appeal, Liège in Belgium seeking a preliminary ruling on two questions raised by a Belgian-born professional footballer, Jean-Marc Bosman, and relating to the compatibility with EU law of certain player transfer rules then applying in European professional football. The questions referred to the Court of Justice of the European Union (CJEU) by the Court of Appeal, Liège for a preliminary ruling were as follows: Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club; (ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise? In answer, the CJEU held that Article 48 of the EEC Treaty (free movement of workers) precluded the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee. It also held that Article 48 of the EEC Treaty precluded the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States. The impact that

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the Bosman judgment has had on the legal, administrative and financial landscape of professional football in Europe has been profound and is accounted for in this chapter with reference inter alia to recent case law, such as the Bernard proceedings, (Full citation: Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177) and also the continuing debate on efforts to promote "homegrown" players in professional football.

## Contents



## 6.1 Introduction

On 15 December 1995, the undivided attention of the sporting world was focused for once on Luxembourg. That day, the CJEU delivered its judgment in the *Bosman* case,[1] outlawing certain aspects of the traditional transfer system and also the so-called "3+2" nationality clauses in professional football in Europe for infringing the rules on free movement for workers laid down in the European Treaties. In almost no time, this ruling acquired a place in the Court's "Hall of Fame" of legendary judgments.[2] In the first place, this is due to the fact that it called for drastic changes to be put in place in the football industry. As an immediate consequence, clubs could no longer ask for a transfer sum when one of their EU/EEA football players at the end of his contract intended to move to a club in another EU/EEA country. Sporting associations were also no longer authorised to impose limitations on the number of EU/EEA sportsmen to be fielded during official matches. But the actual impact of the decision goes far beyond the mere

[1] Case C-415/93 *Bosman* [1995] ECR I-4921.

[2] From the wealth of analysis, see, for instance, Dubey 2000; O'Keeffe and Osborne 1996; Thill 1996; Van den Bogaert 2005; Weatherill 1999, 346–350 and the four contributions (of respectively Ilesic; Weatherill; Van den Bogaert and Infantino and Mavroidis) in Poiares Maduro and Azoulay 2010, 475–506.

circumstances of the case, or the sphere of football. It yields consequences for sports in general. It can safely be stated that *Bosman* constitutes the genesis of European sports law. It also perfectly illustrates how European law, albeit indirectly via the free movement and/or competition law provisions, also applies to economic aspects in other sectors of society for which the EU may not have been given any—or only complementary—express competence to act. Furthermore, several of the statements of principle established or reaffirmed by the CJEU in *Bosman* have become of great relevance for the development of European law. And, also important, because of all the media attention it received, the *Bosman* case allowed for ordinary European citizens to get acquainted with the existence, role and functioning of Europe's supreme court. It is fair to state that *Bosman* constitutes to date the most well-known judgment in the history of the CJEU. More than fifteen years have now passed since it was rendered. In these years, the judgement has been extensively discussed, debated, applauded and criticised. Here follows yet another account of the case, the judgment and its impact on sports.

## 6.2 In the Beginning…

In preliminary, it must be observed that the legal setting of the case was not unequivocally clear. Sport had not been included in the original Treaty of Rome. It was the then European Court of Justice that established in 1974 in *Walrave*[3] and reiterated two years later in *Donà*[4] that sport nonetheless forms part of European law insofar as it constitutes an economic activity within the meaning of the European Treaties. Subsequently, the Court proceeded in these cases to address the conformity with EU free movement law of the contested rules of, respectively, the International Cycling Union and the Italian Football Federation.

Contrary to common expectations, these judgments did not lead to a stream of challenges against the compatibility with EU law of certain sports rules and practices before national courts and tribunals. Sporting associations are often formidably powerful and influential private organisations. The ranks were closed in sporting circles. Rather than accepting the applicability of European law, the federations tried to ignore the Court's dicta or comply with them only reluctantly and to the minimum extent possible. The protagonists in *Walrave* were strongly dissuaded from pressing for a judgment before the national court after the then Court of Justice had rendered its preliminary ruling, as the International Cycling Union threatened to remove the discipline in which they were active from the programme of the next World Championships.[5] Moreover, the Italian football

[3] Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 4. Discussed generally at Chap. 3 of this volume.

[4] Case 13/76 *Donà v Mantero* [1976] ECR 1333, para 12.

[5] Van Staveren 1989, 67.

federation even tried to ignore the consequences of the *Donà* decision, although ultimately it was forced to comply with its terms when a similar request for a preliminary ruling was referred to the then Court of Justice.[6] From a practical point of view both decisions appeared thus to have caused nothing but a "storm in a teacup". Afterwards, it was business as usual. Most sporting associations continued to regulate and settle their affairs autonomously, operating on the assumption that they were practically immune from legal intervention from outside. It would effectively take almost 20 years before another dispute concerning sports regulations would reach the stadium of the Court in Luxembourg.

When, in 1990, Jean-Marc Bosman commenced legal proceedings to challenge the rules that prevented him from freely contracting with the club of his choice, even though he was no longer contractually bound to his previous club, he exposed himself to heavy pressure from the football establishment to drop the case or at least come to a settlement out of court. He had to resist various kinds of cunning legal manoeuvres to slow down the process of the case before the various courts. Had it not been for his perseverance, stubbornness and dogged determination to defy the football system, there would simply not have been a *Bosman* case at all. Who knows how long the transfer rules and nationality clauses would have continued to exist without Bosman? Ultimately, one player thus managed to defeat the whole football establishment, a story reminiscent of David's mythical victory over Goliath. The Court's ruling in Bosman's favour clearly conveys the message that citizen's rights are to be taken seriously under EU law. But then again, there is also a darker side: to vindicate his rights, Bosman basically had to sacrifice his career. One career for all players' freedom at the expiry of contracts was a high price to pay.

## 6.3 *Bosman*: The Facts

It is well worth briefly recalling the facts of the dispute, if only to illustrate the magnitude of the impact of the case. First, it is now a well-established rule that footballers are free to move to another club once they arrive at the end of their contract. The credit for this must entirely go to Jean-Marc Bosman. For this had not always been common practice in professional football. At the material time, and this is not even 25 years ago, Belgian first division football club RC Liège was still entitled to receive a transfer sum for the transfer of one of its players, Jean-Marc Bosman, to French second division club US Dunkerque even if he had served the terms of his contract with RC Liège and was thus no longer contractually bound to the club. The transfer ultimately fell through, because RC Liège refrained from requesting the Belgian Football Association ("KBVB") to send the

[6] Request for a preliminary ruling, presented by an ordonnance of the 'Procura della Repubblica italiana de Salerno', Case 46/79 *Criminal proceedings v Gennaro Brunetti*, 28 April 1979, OJ C 107/14.

international transfer certificate to the French Football Federation ("FFF") and, as a result, Bosman was prevented from playing for another team for the entire 1990–1991 season.[7] He then instituted the legal proceedings which would ultimately bring him to Luxembourg five years later.

Secondly, it is often lost out of sight that this aspect of the football transfer system was not the only rule that was at stake in this case. Bosman also challenged the lawfulness of the then applicable UEFA "3+2" nationality clauses, claiming that these rules could impede his career. According to this "3+2" rule, national associations were permitted to limit to three the number of foreign players whom a club could field in any first division match in their national championships, plus two players who had played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior. The same "3+2" limitation also applied to matches in UEFA's European Cup competitions for club teams.[8] Again thanks to Mr Bosman this rule appears now as a relic from an already long forgotten past. For instance, in the 2010 UEFA Champions League final, Italian champions Internazionale defeated Germany's Bayern Munich with a team of 4 Argentine footballers, 3 Brazilians, 1 Dutchman, 1 Romanian, 1 player from the Republic of Macedonia and 1 player from Cameroon. Only one Italian came on the pitch, as a substitute, in the dying seconds of the game. Even the coach of the *nerazzurri* was not Italian, but rather the *Special One* from Portugal, José Mourinho. And this is by no means an exceptional example. In sum, *Bosman* liberalised even globalised the labour market for football players in Europe.

## 6.4 *Bosman*: The CJEU's Judgment

In *Bosman*, the CJEU first dismissed all arguments contesting the Court's jurisdiction to hear the case, firmly reaffirming that sport falls under the scope of EU law to the extent it constitutes an economic activity.

Concerning the contested transfer rules, the Court observed that those rules are "likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs, and therefore the transfer rules could be regarded as an obstacle to the freedom of movement of workers."[9]

Turning to the issue of justification, the Court accepted that the aims of maintaining a balance between clubs by preserving a certain degree of equality and

[7] Case C-415/93 *Bosman* [1995] ECR I-4921, para 33.

[8] Interestingly, for the purposes of those clauses, nationality was defined in relation to whether the player could be selected to play in a country's national or representative team. See Case C-415/93 *Bosman* [1995] ECR I-4921, para 25.

[9] Case C-415/93 *Bosman* [1995] ECR I-4921, paras 99 and 100.

uncertainty as to results and of encouraging the recruitment and training of young players were, in principle, legitimate objectives, "in view of the considerable social importance of sporting activities, and in particular football, in the Community."[10] This statement remains of crucial importance, for it means that, in the CJEU's view, not every transfer rule is automatically infringing the free movement provisions. It clearly signals the readiness of the Court to regard a particular transfer system in conformity with the Treaty provisions, provided it actually pursues these legitimate aims in a proportionate way. However, this condition ultimately appeared not to be fulfilled by the transfer rules at stake in *Bosman*.

Firstly, the Court rejected the argument that the application of the contested transfer rules was an adequate means of maintaining financial and competitive balance in the world of football. It considered that those rules neither precluded the richest clubs from securing the services of the best players, nor prevented the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.[11] Secondly, while acknowledging that the prospect of receiving transfer, development or training fees might indeed likely encourage football clubs to seek new talent and train young players,[12] the Court held that in actuality the prospect of receiving such fees could not 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.[13] It reached this conclusion on the grounds that: (i) it is impossible to predict the sporting future of young players with any certainty; (ii) only a limited number of such players go on to play professionally; and (iii) the transfer fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally.

In the end, the Court subtly hinted that these aims, even though illegitimate *in se*, "could be achieved at least as efficiently by other means which do not impede the freedom of movement for workers"[14] almost casually referring to the opinion of Advocate General Lenz in this respect.[15] And it left it at that. This unmistakably (and still) constitutes an invitation to the football authorities to develop an alternative transfer system in conformity with the Treaty.

In addition, and concerning the contested nationality clauses, the Court established the existence of an obstacle to the freedom of movement, holding that "in so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts

[10] Case C-415/93 *Bosman* [1995] ECR I-4921, para 106.

[11] Case C-415/93 *Bosman* [1995] ECR I-4921, para 107.

[12] Case C-415/93 *Bosman* [1995] ECR I-4921, para 108.

[13] Case C-415/93 *Bosman* [1995] ECR I-4921, para 109.

[14] Case C-415/93 *Bosman* [1995] ECR I-4921, para 110.

[15] Case C-415/93 *Bosman* [1995] ECR I-4921, Opinion of Advocate-General Lenz, paras 226 *et seq*.

the chances of employment of the player concerned."[16] The "3+2" rule also failed to pass the justification hurdle. None of the arguments put forward by the sporting associations and by the intervening governments succeeded in convincing the Court.

First, the CJEU unequivocally quashed the argument based on the role served by the nationality clauses to maintain a traditional link between a club and country. According to the Court, a football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town or region. It pointed out that there exists no such rule restricting the right of clubs to field players from other regions, towns or localities in official matches either.[17] Secondly, the Court also failed to be convinced by the supposed indispensability of the nationality clauses for the good of the national team. It observed that although the right to freedom of movement "by opening up the employment market in one Member State to nationals of the other Member States, has the effect of reducing workers' chances of finding employment within the Member State of which they are nationals, it also, by the same token, offers them new prospects of employment in other Member States."[18] In addition, the Court noted that football clubs were obliged to release their foreign players for official matches of their national team.[19] Thirdly, the Court also ruled that the nationality clauses are not an appropriate means to preserve a certain competitive equilibrium between clubs: these clauses may prevent the richest clubs from engaging the best foreign players, but there are no rules limiting the possibility for such clubs to recruit the best national players and "thus undermining that balance to the same extent."[20]

## 6.5 *Bosman* and the Birth of "European Sports Law"

The *Bosman* judgment yielded important and far-reaching consequences both for football specifically in the matter of transfer rules and the nationality clauses, but also for sport and sports law in general. Moreover, *Bosman* conveys the loud and unequivocal message that sportsmen have rights under EU law, and that they can also effectively enforce them before the ordinary courts. Federations have definitively and irrevocably lost their aura of immunity under EU law. They remain primarily competent to organise and regulate any given sporting discipline, but their autonomy is conditional, in the sense that the sporting associations must take into account the exigencies of EU law. By the same token, when dealing with

[16] Case C-415/93 *Bosman* [1995] ECR I-4921, para 120.
[17] Case C-415/93 *Bosman* [1995] ECR I-4921 para 131.
[18] Case C-415/93 *Bosman* [1995] ECR I-4921, para 134.
[19] Case C-415/93 *Bosman* [1995] ECR I-4921, para 133.
[20] Case C-415/93 *Bosman* [1995] ECR I-4921, para 135.

sports-related issues, the EU institutions will also have due regard for the specificity of sport.[21] This unquestionably constitutes the most important lesson from *Bosman*.

In the aftermath of *Bosman*, athletes started making use of the possibility of vindicating their EU rights either to or before the European Commission, the General Court and the CJEU.[22] For instance, in *Deliège,* the CJEU was asked to rule on the compatibility with the freedom to provide services of the rules laid down by the responsible judo federations as regards the requirement that professional sportsmen be authorised or selected by their national federation to be able to take part in an international competition.[23] These selection rules inevitably had the effect of limiting the number of participants in a tournament. However, such a limitation was regarded as being "inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted."[24] Therefore, such rules could not in themselves be regarded as constituting a restriction on the principle of freedom of movement.[25]

The *Lehtonen* case concerned a dispute involving a Finnish basketball player wishing to play for a Belgian team in the play-offs after the regular season but registered to play after the transfer deadline. The Court held that the material rules on the transfer deadlines constituted an obstacle to the free movement of workers. However, the Court also acknowledged that "the setting of deadlines of transfers for players may meet the objective of ensuring the regularity of sporting competitions", again displaying openness to the specificity of sport.[26] It further specified that "late transfers might be liable to change substantially the sporting strength of one or the other in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole."[27] Ultimately, the CJEU left it to the national court to ascertain whether different transfer windows for players from different countries could be objectively justified.

In the early years after *Bosman*, most sport-related cases invariably concerned that of freedom of movement. Gradually, this picture has changed. Nowadays, the courts also tackle sports cases involving EU competition law issues and most notably in *Meca-Medina*, where the compatibility of the international doping rules with EU competition law was at stake.[28] The CJEU stipulated in principled terms that the compatibility of rules with the Treaty provisions cannot be assessed in the

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[21] On the "specificity" of sport in an EU context see generally Parrish and Miettinen 2008.

[22] See generally Weatherill 2003; Van den Bogaert and Vermeersch 2006 and Bogusz et al. 2007.

[23] Case C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 42.

[24] Case C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 64.

[25] See further Van den Bogaert 2000.

[26] Case C-176/96 *Lehtonen et al. v FRSB* [2000] ECR I-2681, para 53.

[27] Case C-176/96 *Lehtonen et al. v FRSB* [2000] ECR I-2681, para 54.

[28] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

abstract: for the purposes of application of a Treaty provision to a particular case, account must first of all be taken of the overall context in which the rule was taken or produces its effects and, more specifically, of its objectives; then, it has to be considered whether the consequential restrictive effects it produces are *inherent* in the pursuit of those objectives and are *proportionate* to them.[29] Concretely, the Court ruled, first, that the general objective of the contested anti-doping rules was to combat doping, in order for competitive sport to be conducted fairly; and that this included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[30] Secondly, it held that the effect on athletes' freedom of action of the penalties imposed in the federation's rules to enforce the doping ban, must be considered to be, in principle, inherent in the organisation and proper conduct of competitive sport, whose very purpose is to ensure healthy rivalry between athletes.[31] Finally, the CJEU did not find a violation of the proportionality principle. It therefore concluded that the anti-doping rules did not in law constitute a restriction of competition incompatible with the common market even if they in fact had ancillary effects that did restrict competition.[32]

*Meca-Medina* is an important judgment, perhaps the most important sports-related one since *Bosman*. This certainly has to do with the fact that it concerns doping and that it is the first time the CJEU actually applied EU competition law rules to sport and immediately seems to have set the scene for later decisions, but also because the judgment perfectly illustrates once again how EU law is applied to sports: on a case-by-case basis, requiring compliance with the Treaty provisions but contemporaneously having regard to the specificity of sport.[33]

The *Bosman* judgment has not only led to increased litigation at both a national and EU level but it has also given a renewed impetus to sports-related regulatory activities at EU legislative and policy-making level encapsulated in 2007 by the Commission's White Paper on Sport.[34] Importantly, in the 2009 Lisbon Treaty, sport was included as an official EU policy by way of Article 165TFEU. For the first time, the EU has been given the explicit authorisation to act in the field of sport. The insertion also has a symbolic character, for it "legitimizes" initiatives and actions already taken in the domain of sport. Moreover, Article 165TFEU can be said to demarcate the level playing field of the EU in sport, outlining a division of competences between the EU, its Member States and the sporting associations. The primary competence remains in the hands of the Member States and the federations and EU competence is limited to supporting, coordinating and complementary action. Although Article 165TFEU is not expected to bring about any substantial

[29] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para 42.
[30] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para 43.
[31] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para 45.
[32] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para 55.
[33] *Meca-Medina is* discussed generally at Chap. 9 of this volume.
[34] White Paper on Sport, COM(2007) 391 final.

changes in the application of the Treaty free movement and competition rules to sport, its very presence illustrates the enduring influence of the *Bosman* judgment. Truly, *Bosman* can be considered as the genesis of EU sports law.

## 6.6 Football Transfer Rules, Post-*Bosman* and Today

The *Bosman* ruling evidently exerted its most direct and immediate impact on transfer rules and nationality clauses in sports. Concerning transfer rules, the judgment was clear: transfer sums for transfers within the EU/EEA of professional out-of-contract EU/EEA players were incompatible with EU law. It must be remembered that the Court only outlawed this specific aspect of the transfer system; it had not invalidated the entire transfer system. This did not mean that the other aspects of the transfer system, relating to, inter alia, transfers within one Member State, transfers involving third-country nationals or to non-EU/EEA countries, were necessarily compatible with EU law; the Court had simply not expressed itself on these issues and wisely left it to the football authorities to come up with alternatives to the existing system at the time. However, when the football authorities made it plain that they were not going to make any further changes to the transfer system apart from the one to which they were constrained after *Bosman*, the European Commission ultimately started infringement proceedings against some of the residual aspects of the transfer system.

With the unappealing perspective of another "loss" at the CJEU looming in the background, the football authorities, UEFA and FIFA, reluctantly started thoroughly revising football's transfer system, in close consultation with the European Commission. In 2001, a radically renewed transfer system emerged, which managed to secure the approval of the Commission, inducing it to bring an end to the infringement procedure. The main features of the revised FIFA Regulations on the Status and Transfer of Players were the protection of minors; respect for contracts; a new system to compensate clubs for the training of young players; a "solidarity" mechanism; and a new system of dispute resolution.[35] Since 2001, these rules have been slightly amended on a number of occasions. This new transfer system has been widely received as a major improvement. Whether it is now entirely "EU proof" is yet uncertain. The CJEU has not had to pronounce itself on it yet. Until proof of the contrary, the transfer system can thus continue to regulate international transfers of players. This however does not mean that since *Bosman* the transfer rules have gone entirely unchallenged. Two aspects of the new transfer system, namely the rules concerning a training compensation for young players and the rules concerning the respect for contracts, have already led to judicial disputes.

[35] For a detailed analysis see Van den Bogaert 2005, Chap. 5.

On the former issue, the *Bernard* proceedings concerned a dispute about the payment of damages for unilateral breach by the player of his obligations under the French Professional Football Charter applicable at the material time.[36] According to French labour law, football club Olympique Lyonnais was entitled to receive compensation for the training of talented youngster Olivier Bernard after he had left Lyon for Newcastle United in the English Premier League, thereby contravening the rules of the French Professional Football Charter. The French Supreme Court referred the case to Luxembourg for a preliminary ruling.

The CJEU held that rules which require a "joueur espoir", at the end of his training period, under pain of being sued for damages, to sign a professional contract with the club which trained him, are likely to discourage that player from exercising his right of free movement and must therefore be considered as a restriction on freedom of movement for workers.[37] Subsequently, the Court confirmed its admission from *Bosman* that "the objective of encouraging the recruitment and training of young players must be accepted as legitimate."[38] Ultimately, however, the CJEU concluded that the French system could not be upheld because the damages to be paid for unilateral breach of contract were calculated in a way which was unrelated to the actual costs of the training, and therefore went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.[39]

In football circles, there was little concern about Bernard given that since 2001 the new FIFA rules had replaced the French rules at issue. Indirectly, there was an anxiety to hear what, if anything, the CJEU might say about extant FIFA regulations on player transfers. Indeed, the CJEU was explicitly asked to express its opinion on the lawfulness of the FIFA rules under EU law, but refrained from doing so and limited itself to adjudicating solely on the narrow issue at hand. Be that as it may, the CJEU did make a number of statements in the judgment that could be of relevance to assess the conformity of FIFA's regulations with EU law. For example, in para 45 of *Bernard*, the Court stated that a scheme providing for the payment of compensation for training must take "due account of the costs borne by the clubs in training both future professional players and those who will never play professionally." At para 50, the CJEU added that the compensation must not be "unrelated to the actual costs of the training." These appear to be the parameters set by the Court: the compensation for training may be higher than what is strictly needed to train the specific player concerned, but it may not be so high as to be unrelated to the costs of training. Arguably, if the system of training

[36] Case C-325/08 *Bernard* [2010] ECR I-2177.

[37] Case C-325/08 *Bernard* [2010] ECR I-2177, paras 35–37.

[38] Case C-325/08 *Bernard* [2010] ECR I-2177, para 39.

[39] Case C-325/08 *Bernard* [2010] ECR I-2177, paras 48–50.

compensation set out in the FIFA Regulations on the Status and Transfer of Players is considered to remain within these limits, this bodes well for this aspect of the transfer system.[40]

Secondly, the Court of Arbitration for Sport ("CAS") has confronted a number of disputes on the maintenance of contractual stability between professional footballers and clubs. Article 17 of the FIFA Regulations on the Status and Transfer of Players deals with the consequences of unilateral breach of contract without just cause. The provision provides that the party in breach shall always pay compensation. In addition, a sporting sanction shall also be imposed, consisting of a four or six month restriction on playing in official matches, if the breach takes place within the protected period.[41] In the case of *Webster*, involving a Scottish player who moved from Hearts to Wigan after he had served three years of his four-year contract and only after he had been sidelined by Hearts in the preceding months for not agreeing to extend his contract, CAS awarded Hearts a compensation of £150,000, an amount corresponding to Webster's salary for one season, and upheld the two week suspension the FIFA Dispute Resolution Chamber had imposed.[42] This modest compensation fee stands in stark contrast to the compensation CAS awarded in *Matuzalem*. In that dispute, a Brazilian football player, Matuzalem, moved to Real Zaragoza despite a still running contract with Shakthar Donetsk in Ukraine. It was undisputed that the unilateral breach occurred outside the protected period. However, in this instance, CAS imposed a compensation fee of almost €12 million to be paid to the Ukrainian club, taking into account not only the salary of the player but also his market value and the club's lost earnings, i.e., the missed transfer fee.[43] On appeal on 28 March 2012, the Swiss Federal Court ruled that CAS had committed a serious and manifest infringement of the rights of the Brazilian player. Much legal uncertainty about Article 17 FIFA Regulations remains and one must always be careful not to draw too many general conclusions or precedent about fact-specific arbitration awards. A CJEU ruling on the conformity of Article 17 with EU law might be necessary. Does another *Bosman* await?

## 6.7 Nationality Clauses, Post-*Bosman* and Today

*Bosman* also had a significant impact on the use of nationality clauses in sport. It must however not be forgotten that *Bosman* was not the first judgment of the CJEU in which it expressed itself on nationality discrimination in sports. In *Walrave*, the

[40] See further Van den Bogaert 2010.

[41] The protected period amounts to a period of two or three years after the signing of the contract, depending on whether the player was over or under 28 years old at the time of signing the contract.

[42] CAS 2007/A/1298-1300 *Webster, Hearts & Wigan Athletic FC*.

[43] CAS 2008/A/1519-1520 *Matuzalem, FC Shakhtar Donetsk (Ukraine) & Real Zaragoza SAD (Spain)*.

Court adopted a hands-off approach in relation to matches between national teams, ruling that the free movement provisions "do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only."[44] It immediately added, though, that the "restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity" from the scope of the Treaty.[45] Conversely, in *Donà*, the Court for the first time ruled out nationality discrimination in sport, holding that a rule allowing only nationals to take part in matches organised by the responsible national federation was contrary to Articles 18, 45 and 56 TFEU.

The Court's subsequent dismissal of the "3+2" nationality clauses in *Bosman* appears to close the door for sporting federations to treat domestic players more favourably than foreign players with the nationality of a country belonging to the EU or the European Economic Area.[46] The *Bosman* decision forced the sporting associations to fully liberalise the EU sports employment market for sportsmen from EU/EEA countries. In the wake of the *Bosman* ruling, entire hordes of EU/EEA athletes have made use of their free movement rights. In football, foreign players nowadays take up a significant portion of the total number of players in any given league in Europe. Sport can be considered as a paradigm of migration in Europe. As a result, a typical team squad in many a sporting discipline is nowadays composed of a mixture of national players, EU citizens and also third-country nationals.

Be that as it may, to be perfectly clear, the Court's ruling in *Bosman* did not signal the end of nationality clauses at club level. The judgment only concerned the Treaty rights of EU/EEA citizens. Many sporting associations decided to cling to quota with regard to third-country nationals. In 2003, the Court was invited for the first time to express its opinion on the legality of such nationality requirements. *Kolpak* involved a professional handball goalkeeper of Slovak nationality who played in the German second division and who challenged the rule of the German handball federation, stipulating that clubs were entitled to field only two non-EU/EEA nationals in official matches.[47] At the material time, Slovakia was not yet an EU Member State. The Court concluded that Kolpak, who was legally employed in Germany, could legitimately invoke Article 38(1) of the Association Agreement concluded between the European Communities and Slovakia, which conferred the right to equal treatment to Slovak nationals as regards working conditions, remuneration and dismissal in the EU in relation to the host Member State's

[44] Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 8. See also Case 13/76 *Donà v Mantero* [1976] ECR 1333, para 14 and Case C-415/93 *Bosman* [1995] ECR I-4921, paras 76 and 127.

[45] Case 13/76 *Donà v Mantero* [1976] ECR 1333, paras 14–15 and Case C-415/93 *Bosman* [1995] ECR I-4921, paras 76 and 127.

[46] Case C-415/93 *Bosman* [1995] ECR I-4921, paras 115–120.

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

nationals.[48] Again, the CJEU showed no inclination to accept the arguments to justify the contested rule, which were grossly the same as in *Bosman*.[49]

The potential impact of this decision is far-reaching: the EU have concluded international agreements containing a similar equal treatment clause with a large number of third-countries and, arguably, a lot of them seem to fulfil the criteria for direct effect.[50] Admittedly, the dispute in *Kolpak* concerned a national from a country that was, at the time of the proceedings, on the verge of becoming an EU Member State. The impression could therefore not entirely be discarded that the final outcome, in particular the CJEU's stance on the justification issue, might have been different had the case involved a sportsman from a non-accession country. After *Kolpak*, the situation was thus not completely clarified yet. An excellent occasion to settle the issue presented itself two years later.

In *Simutenkov*, a Russian footballer playing for Tenerife complained about the fact that the Spanish football federation had issued a licence as a non-Community player, subjecting him to the quota for non-EU/EEA nationals.[51] In its judgment, the CJEU followed exactly the same line of reasoning as in *Kolpak*, enabling Simutenkov to base his claim for an EU licence directly on Article 23(1) of the Partnership Agreement concluded between the EU and Russia. The Court refrained from entering into an in-depth analysis of the justification issue, seemingly conveying the message that the hard line it had previously adopted with regard to nationality discrimination of EU/EEA nationals is to be extended to privileged third-country nationals. For these non-EU/EEA sportsmen to be able to challenge nationality clauses, it suffices that they are legally employed in a host EU Member State and can rely upon a directly effective equal treatment provision included in an international agreement establishing a partnership between the EU and their country of origin, regardless of whether accession to the EU is envisaged or not. In strict legal terms therefore, the lifeline of nationality clauses at club level in sport appears now thinner than ever, certainly bearing in mind the well-established practice in some (southern) European countries to relatively easily offer third-country nationals (especially South Americans) a national passport and thus also EU citizenship status through a quick naturalisation procedure.

Nevertheless, many sporting federations still have not abandoned the idea of nationality clauses altogether and this despite the fact that a radical reversal of the Court's approach with regard to nationality requirements also appears unlikely at this point. FIFA has for quite some time continued to debate the introduction of a "6+5" rule, according to which clubs must start official matches with 6 players eligible to play for the national team of the club's country. The rule received strong backing in football circles, but as it is clearly at odds with the *Bosman*

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[48] Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135, para 58.

[49] Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135, paras 53–57.

[50] See the contemporaneous case notes by Dubey 2005 and Van den Bogaert 2004.

[51] Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura and RFEFl* [2005] ECR I-2579.

judgment, FIFA has so far refrained from introducing it.[52] Within Europe, the European football association, UEFA, has adopted a home-grown rule, providing that each club must have a certain number of domestically trained players under contract. This rule applies only for matches in UEFA competitions, but UEFA encourages the national federations to apply it domestically. According to this "4+4" rule, a minimum four players out of a squad of maximum 25 must have received their training at the club itself; another four must have been trained by other clubs from the same country. At first sight, UEFA's home-grown rule appears to be favouring local players and therefore inevitably runs the risk of being qualified as indirectly discriminatory. Nonetheless, there is large—and also significant political—support for this rule, including at an EU level. Certainly, if this rule were to be challenged it would provide the CJEU with another excellent opportunity to clarify the position of the EU on nationality clauses.

Interestingly, so far, little attention had been paid to nationality discrimination in individual sports. A recent study for the European Commission on equal treatment of non-nationals in individual sports has shown that in many, if not most, individual sports regulations in the 27 EU Member States, instances of nationality discrimination, direct or indirect, still occur.[53] A lot of work thus remains to be done in this field.

## 6.8 Conclusion

*Bosman* may not have been the first sports-related judgment of the CJEU, but it was certainly the first that caught everyone's attention. *Bernard* illustrates that more than fifteen years, many judicial proceedings, legislative activities and policy documents later, *Bosman* remains the point of departure and centre of gravity—the Alpha and Omega if you like—of an entire body of law that has moved beyond merely transfer rules and nationality clauses and can now safely be termed European sports law. In sum, *Bosman* is still good law but it will be interesting to see whether that will still be the case in ten years or so ….

## References

Bogusz B, Cygan A, Szyszczak E (eds) (2007) The regulation of sport in the European Union. Edward Elgar Publishing, Cheltenham

Dubey JP (2000) La libre circulation des sportifs en Europe. Bruylant, Brussels

[52] An "Expert Opinion" by the Institute for European Affairs in Dusseldorf concluded that the "6+5 Rule" could be seen to be compatible with EU Law. The report is available online at http://inea-online.com/download/regel/gutachten_eng.pdf. Accessed 31 July 2012.

[53] See further TMC Asser Institute et al. 2010.

Dubey JP (2005) Case note on *Kolpak*. Common Market Law Rev 42:499–522
O'Keeffe D, Osborne P (1996) L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché Unique Européen. Revue du Marché Unique Européen 1:17–44
Parrish R, Miettinen S (2008) The sporting exception in European Union law. TMC Asser Press, The Hague
Poiares Maduro M, Azoulay L (eds) (2010) The past and future of EU law—the classics of EU law revisited on the 50th anniversary of the Rome Treaty. Hart, Oxford
Thill M (1996) 'L'arrêt "Bosman" et ses implications pour la libre circulation des sportifs à l'intérieur de l'Union Européenne dans des contextes factuels différents de ceux de l'affaire "Bosman". Revue du Marché Unique Européen 1:89–117
TMC Asser Institute et al (2010) Study on the equal treatment of non-nationals in individual sports competitions, Tender No EAC/19/2009. Commissioned by the European Commission, Directorate-General for Education and Culture, Brussels
Van den Bogaert S (2000) The Court of Justice on the Tatami: Ippon, Wazari or Koka. Eur Law Rev 25:554–563
Van den Bogaert S (2004) And another uppercut from the Court of Justice to nationality requirements in sports regulations. Eur Law Rev 29:267–275
Van den Bogaert S (2005) Practical regulation of the mobility of sportsmen in the EU post Bosman. Kluwer Law International, The Hague
Van den Bogaert S (2010) De zaak Bernard: het Hof van Justitie van de EU laat opleidingsvergoedingen toe in het Voetbal. Nederlands Tijdschrift voor Europees Recht 8:265–272
Van den Bogaert S, Vermeersch A (2006) Sport and the EC Treaty: a tale of uneasy bedfellows? Eur Law Rev 31:821–840
Van Staveren H (1989) Proceedings of the 18th colloquyum on European law: sport and the law. Council of Europe, Strasbourg
Weatherill S (1999) "European Football Law" in Collected courses of the Academy of European Law, vol VII, Book I. Kluwer Law International, The Hague, pp 339–382
Weatherill S (2003) 'Fair Play Please': recent developments in the application of EC law to sport. Common Market Law Rev 40:51–93