

## Extra Time

**Are the new FIFA transfer rules doomed?**  
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Abstract: With the Bosman decision, the European Court of Justice (ECJ) forced Fédération Internationale de Football Association (FIFA) to change its transfer rules. These new rules, adopted in July 2001, were supposed to answer the ECJ concerns about the restriction of the free movements of players. In July 2005, the rules were again modified. Since their enactment, there has been little legal analysis done of them. This paper looks at the 2001 and 2005 transfer rules in the light of the Bosman decision and tries to determine if they really are a long term solution or a quick fix until the next lawsuit. Analysing the rules in the Bosman perspective seems to show that FIFA did try to provide an appropriate answer to the ECJ's concerns. In Bosman, the ECJ declared that a system restricting the free movement of players could be legal if it helped maintain the competitive balance between the clubs and if it encouraged the recruitment and training of young players. Both the 2001 and 2005 rules seem to fail to meet these conditions. The main concern is the determination of the costs of training to be paid by the National Associations or the Confederations. If these amounts are too low, it will not prevent rich clubs from buying the best players and will not give enough incentives to clubs to develop young players. Additionally, the players under twenty-four years of age are still submitted to a restriction of movement. Although these rules are a step forward, they are still far from perfect.

The *Bosman*<sup>1</sup> decision of the European Court of Justice (ECJ) transformed the rules of international soccer<sup>2</sup> transfers, giving more freedom to the players. It also placed Fédération Internationale de Football Association (FIFA), soccer's international governing body, in a difficult situation. They were forced to revise their rules on international transfer in order to align them to the ECJ ruling. After a lot of bargaining and dealing the new rules came in effect in September 2001. In 2005, FIFA changed the rules again, in the hope to make them more robust and prevent future contestation. The purpose of this paper is to examine these new rules and to determine if they violate article 39 of the Treaty establishing the European Community (Treaty) by restricting the free movement of persons and if so, would they meet the test for legality of such rules created by the ECJ in the *Bosman* case.

### **What are transfer fees?**

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<sup>1</sup> *Union Royale Belge des Sociétés de Football Association and Jean-Marc Bosman*, C-415/93.

<sup>2</sup> Being Canadian I will use in this paper the term most familiar to me, soccer, for what the rest of the world knows as football.

This question may seem superfluous for the soccer fan, but for the reader that does not necessarily know the ins and outs of this sport, a short explanation may be needed. There are two ways for a soccer club to get the rights on a player. First it can train him from the beginning via academies or related amateur soccer clubs. The second way is to “buy” the rights to field a player from another club, this is called a transfer. The money that is paid from the buying club to the selling club is called a transfer fee. The North American sports fans are familiar with the concept of trades where teams trade players for other players. However soccer’s tradition is to transfer players for money.<sup>3</sup>

### **Bosman, much a do about nothing ?**

There is a lot of literature on the *Bosman* decision. I do not intend in going in a detailed analysis of the case, but I consider that a short history of it and an analysis of its impact on the soccer transfers necessary to help the reader understand the context that lead to new transfer rules.

### **History of the case**

Mr. Bosman was a promising young Belgian soccer player, at the expiration of his contract he ended up in a contractual dispute with his current club. In consequence he asked to be transferred to a new club. A deal was made between Bosman, his old club and a French club for his transfer. However, the old club had doubts about the financial strength of the French club and stopped the transfer procedures. Bosman had to obtain a court order to be able to sign a contract of employment with another club. In the proceedings, Mr. Bosman asked for a permanent injunction and compensation from his old club. His main argument was that the transfer system was a violation of the right of free movement of persons within the EU and a violation of the EU competition laws. The matter was referred to the ECJ by the Belgian court<sup>4</sup>. The ECJ therefore had to determine the legality of the transfer system. It decided that the transfer fees charged for a player that had ended his contractual relationship with the club was an illegal restriction of the free movement of persons. Regarding the competition law and

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<sup>3</sup> Even in North America the transfer of players for money has been allowed and used in the past, the best known example being the sale of George Herman “Babe” Ruth to the New-York Yankees by the Boston Red Sox in 1920.

<sup>4</sup> The judicial war between Bosman and his club gave rise to multiple actions, motions and appeals. The following summary only looks at the most important legal aspects of that saga.

the possible restriction of the market for players, the ECJ refused to consider it, since it was unnecessary for their ruling.<sup>5</sup>

However, before the ECJ decision, the Belgian appeal court had ruled: that the transfer regulations were decisions of associations by which the clubs restrict competition for players between themselves, that transfer fees were dissuasive and tended to depress the salary of players and that the restrictions on competitions might constitute abuses prohibited by Article 86 (now 82).<sup>6</sup> One could argue that if the ECJ did not correct this reasoning, it means that the Court implicitly agrees with it. But I think that using freedom of movement was the simplest solution for the ECJ and it had the feeling that it would give the best results without having to address the competition law questions.

### **The impact of *Bosman* on the transfer system in soccer**

#### **Before *Bosman***

Clubs would get a fee for the transfer of a player every time they transferred him to another club. There was always a value attached to the players the club could not lose them for nothing when the contract had expired. However, this could lead to situations in which the price asked for a player would be higher than what the other clubs were ready to pay. The player would then suffer from this situation, having to accept the unilateral contractual offer of his clubs that usually included a sharp decrease in revenues or be willing to strike until he was able to get transferred. This is exactly what happened to Mr. Bosman and it forced him to sue his former club. This was not a new problem since there were English cases before *Bosman* in which the players sued their clubs to get transferred, the first one dating back to 1912.<sup>7</sup>

*Eastham v. Newcastle United* was the first successful challenge of the English transfer rules. The court ruled that the transfer fees affecting Mr. Eastham were:

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<sup>5</sup> The ECJ wrote at paragraph 138: “Since both types of rules (transfer fees and national clauses) to which the national court’s question refers are contrary to Article 48 (now 39, free movement of persons), it is not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty (now 81 and 82, EU competition law).”

<sup>6</sup> *Bosman*, paragraphs 45 to 47, see footnote 1.

<sup>7</sup> *Kingaby v. Aston Villa* (unreported), *Aldershot Football Club v. Banks* (unreported) and *Eastham v. Newcastle United* [1964] Ch. 413, for the unreported cases see: Greenfield, S.; *The Ties that Bind: Charting Contemporary*

“(N)ot binding on the plaintiff and are unreasonable restraints of trade”<sup>8</sup>.

So thirty years before the *Bosman* case, freedom was granted to the English soccer players. However, the clubs were able to maintain control on the players because of the absence of a strong players association and of solidarity between players.<sup>9</sup> This situation prevented the player to use the decision as an efficient leverage during the negotiation. New rules were drafted but they gave extra advantages to the good players and almost none to the marginal players.<sup>10</sup> So the opportunity to liberate the soccer players from the restrictive transfer system existed before *Bosman*. But the *Eastham* case had little impact, mainly for the reason that it did not have a pan-European effect like *Bosman*. Also, it was not based on antitrust law but on the Common law contract doctrine of “restraints of trade”. The decision was therefore hard to import in the continental Europe jurisdictions. However, I find it notable that such a decision was not given more publicity in the soccer world; it could have brought big changes for the players.

### **After *Bosman* or organized chaos**

The ruling of the ECJ was sharply denounced by the football community, even if it touched only about 10% of the active soccer players in Europe, the ones at the end of their contracts.<sup>11</sup> They were now benefiting from a strengthened negotiation position and they could “test the market” to get paid at their real value. The rest of the players were still affected by the transfer rules and did not gain more freedom.<sup>12</sup> During this period, players and clubs adjusted their behaviors in order to make the best out of the situation. Clubs that wanted to make sure that they would get something if a player left preferred to transfer players before their contract ended and receive a transfer fee instead of receiving on the field performance and the associated revenues from the player during the remainder of his contract. Additionally the clubs signed their valuable players with long term contracts. This behavior ended up being

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*Sporting Contractual Relations* in: Greenfield, S. and Osborn, G.; *Law and Sport in contemporary society*, Frank Cass Publishers, 2000, London, Ch.8.

<sup>8</sup> *Eastham*, paragraph 160, see footnote 7.

<sup>9</sup> The situation of professional sports players in Europe is strange since none of them seems, contrary to the North American players, to benefit from the protection of a strong player’s union.

<sup>10</sup> Greenfield, S.; p. 137, see footnote 7.

<sup>11</sup> Antonioni, P. and Cubbin, J.; *The Bosman Ruling and the Emergence of a Single Market in Soccer Talent*, *European Journal of Law and Economics*, 9:2, 157-173 (2000).

<sup>12</sup> If you only take into consideration the abolition of the transfer fees and not the abolition of the national clauses for EU residents.

exactly as investment theory and the Coase theorem would predict.<sup>13</sup> So the forecasted apocalypse did not arrive and soccer survived.

### **The birth of the new system**

In 2001, FIFA implemented new rules to regulate transfer fees. These rules were the object of negotiations with the European Commission. Its Competition Commissioner, Mario Monti, was reported to have been personally implicated in the drafting of the rules, so most observers call them the Monti rules.

We can find the legal justification for some regulation on transfers of players in the *Bosman* decision. In paragraph 106 the ECJ writes:

“In view of the considerable social importance of sporting activities and in particular (soccer) in the Community, the aims of maintaining a balance between the 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.”

(My underlining.)

In that statement, the ECJ says that it would be possible for the clubs to behave contrary to the free movement of persons and, I submit, to the antitrust laws, if these measures allow FIFA to achieve both these goals.<sup>14</sup>

These two justifications, maintaining competitive balance and encouraging the training of young players, also happen to be the traditional economic justifications for the transfer fees. Traditional economic theory of the transfer fees in soccer states that with this mechanism, the richer bigger clubs are prevented from buying all the good players. This results in a more equal repartition of soccer talent between the clubs. By having to pay a transfer fee, the cost of acquiring the player is higher and it prevents the richer clubs to “buy” a championship team every year. Also, the transfer fees allow the selling club to pay for new players or to give

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<sup>13</sup> For the model and more explanations see Antonioni and Cubbin cited at footnote 11.

<sup>14</sup> Assuming that these are legitimate goals, which is questionable. For more on that see S. Weatherill, *Sport as Culture in EC Law* in R. Craufurd Smith *Culture and European Union Law*, Oxford University Press, 2004, Oxford.

better salaries to the remaining ones. Always according to the traditional theory, the transfer fees also induce the clubs to invest in the training of the players since they will get a return on their investment. Professional soccer clubs are usually responsible, through football academies and amateur clubs, of the development of young players. In addition, they have to take care of the development of the players that are currently on their roster. The transfer fee is seen as the mean to get back the costs of training the player that was transferred and the costs of training of the players that did not become professional players. So the costs of the single player should be adjusted to include the costs of all the players that did not succeed to access the professional level.<sup>15</sup> According to the traditional soccer economic theory, the situation after the *Bosman* decision gave clubs the incentive to under-invest in the training and the development of players since there is no guarantee that they would be able to get compensated for the money invested, the player being free to leave at the end of his contract. Also, this would destroy the competitive balance of the game since the price of players for the rich clubs was reduced.

The ECJ seems not to agree with the traditional sports' economic reasoning in the case of the players at the end of their contracts. It rightly judged that the competitive balance was not helped with the existence of transfer fees, since the evidence presented by Bosman's lawyer showed that the rules did not prevent the richest club from getting the best players or helped the poorer clubs. As for the second argument, the ECJ found that since the transfer fees were contingent, uncertain and totally unrelated to the actual costs of training a player. Consequently, the prospect of receiving such fees could not be an incentive for any club to invest in the development of players. Finally, it found that the same aim could be achieved at least as efficiently by less restrictive methods, which impeded less on the free movement of persons.<sup>16</sup> The ECJ with this short commentary rebuked the traditional explanation of the transfer fees proposed by the sports' economists. This conclusion of the ECJ still does not make unanimity.<sup>17</sup> However, seeing the results of the negotiation between the European Commission and FIFA on the new transfer rules, one must conclude that the view of the ECJ won, at least partially.

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<sup>15</sup> Feess, E. and Mühlheuser, G.; *Economic Consequences of Transfer Fee Regulation in European Football*, European Journal of Law and Economics, 13: 332-237, 2002, p.230.

<sup>16</sup> *Bosman*, paragraphs 107 to 110, see footnote 1.

<sup>17</sup> Feess and Mühlheuser, see footnote 15, develop a good model and arguments showing that there was nothing wrong with the pre-Bosman transfer system and at the other end, Antonioni and Cubbin, see footnote 11, show that there is no major fundamental difference between the pre and post-Bosman situations.

Even more recently, in 2005, the FIFA executive committee adopted a new set of rules that are supposed to correct the problem that were raised by some member clubs with the adoption of the Monti rules.

### **The Monti rules**

These rules have not convinced the authors that studied them, they consider that they could lead to the worst possible economic result<sup>18</sup>: an under-investment in training and a destruction of the competitive balance in the leagues. However, since the same allegations were made after the *Bosman* ruling, the new rules should be examined in detail to determine if the doomsayers are right. The new FIFA rules cover both amateur and non-amateur players, but for the purpose of this analysis I will only describe and analyze the non-amateur transfer rules.

### **The 2001 transfer rules<sup>19</sup>**

The first aspect of these rules regulates the length of professional players' contracts. According to paragraph 4 (2) of the Regulations for the Status and Transfer of Players (Transfer Regulations), contracts should have a term of between one and five years. This is intended to prevent clubs from signing their players for unreasonably long periods of time.

Articles 13 to 20 of the Transfer Regulations contain the provisions that regulate the compensation for the training and education of young players. To make sure that the transfer fees are related to the costs of training of a young player and that they are given to the clubs that really contributed to that training. Also it designated the years between the age of twelve and twenty-one as the years in which the education of a young player occurs and that a compensation for the costs of training the player should be paid if he is transferred between the age of twelve and twenty-three. But there is an inconsistency with that goal in article 13. The article states that if it is evident that a player has already terminated his training period before the age of twenty-one, compensation shall be due until the player reaches the age of twenty-three. But the calculation of the fee shall be based on the years between twelve and the

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<sup>18</sup> Feess and Mühlheuser, see footnote 15 and Feess, E. and Mühlheuser, G.; *Transfer Fee Regulation in European Football*, IZA Discussion Paper no. 423, February 2002.

<sup>19</sup> *Regulations for the Status and Transfer of Players* (Transfer Regulations), FIFA Executive Committee, July 5 2001 and *Regulations governing the Application of the Regulations for the Status and Transfer of Player* (Application Regulations), FIFA Executive Committee, July 5 2001.

age at which it is determined that the player ended his training period. So instead of having a hard set rule, we have a soft criterion that leaves a lot of discretion to the clubs since they will most likely be the ones that determine if and when a player ended his training period. Clubs could be tempted to use that article in order to capture most of the future transfer fees attached to this player for themselves. Clubs could unilaterally declare the training period of a player over in order to capture most of the transfer fee for themselves. So article 13 could prove very problematic in the future.

Then articles 15 and 16 state that a fee should be paid every time a player changes club until the end of the season in which he reaches the age of twenty-three and that fee should be distributed between the clubs that participated in the training and education of the player. Finally article 17 outlaws any other type of compensation or transfer fee for players under twenty-four except for the amount prescribed by the Transfer Regulations.

The formulation of the Transfer Regulations is very general and we need to look at the Application Regulations (AR) in order to completely understand the process. However, these additional regulations do not make the mechanism crystal clear, many points are still vague.

Article 6 of the AR explains how to calculate the compensation. First it establishes four categories that determine the compensation to be paid for a player. These are:

Category 1- division 1 clubs of major soccer countries

Category 2- division 2 clubs of major soccer countries and division 1 clubs of other countries

Category 3- division 3 clubs of major soccer countries and division 2 of other countries

Category 4- All the other clubs

The determination of the club category shall be made by the National Associations of the various countries in partnership with the players' representatives to make sure that the right clubs are placed in the right categories. The National Associations are granted a lot of power in the determination of the compensation for training and education. This power was probably a sweetener put in by the commission and FIFA as the result of the loss of the "obligatory transfer" prices that the National Associations had imposed prior to the *Bosman* decision.<sup>20</sup> Each year, for each category, except category 1 where it shall be based on the real costs of

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<sup>20</sup> *Bosman*, paragraphs 6 to 11, see footnote 1.

training a player, the National Associations shall determine a ceiling for the training costs of a player. So to determine the fee, the costs of training in that category of club will then be multiplied by the number of years the player stayed with the club of that category. Then all the years of training in all the clubs are added together to give the total compensation payable for the transfer of the player.

Article 8 of the AR then regulates how the compensation is distributed between the clubs that contributed to the training and education of the player. If the transfer is made from a club of the category 4 or 3 to a club of a higher category, then 75% of the amount shall be distributed to the clubs that trained the player, pro-rated by the years passed in each such club. It diminishes to 50% if the transfer is from a Category 2 club to a club of Category 1 and to 10% in the case of a player transferred between clubs of the same category. The rest of the transfer fee goes to the club that transferred or “sold” the player, in addition to what it can claim as compensation for the training of the player.

Also, Chapter IX of the Transfer Rules creates a solidarity mechanism that adds itself to the transfer system: 5% of the total compensation will be paid to all the other clubs that trained the player, in a proportion determined by the age of the player at the time he was with that club.<sup>21</sup> So there is a double compensation for the clubs that trained the player, first through the amount that is paid directly to them according to Article 8 AR and then from the amount received from the former club through a “solidarity tax”.

Finally, it is interesting to note that the transfer fees are not declared illegal for the players that are above twenty-three years of age. These players are still subject to the post-Bosman rules, and they are likely to be transferred based on their total economic value. Also, if they are without a valid contract of employment, then they can freely negotiate their services to all clubs. So we can safely assume that this segment of the players’ market will not be directly affected by the new transfer rules.

### **Analysis of the 2001 transfer rules**

It is clear, reading the 2001 regulations that the *Bosman* case weighed heavily in their conception. However, it is very surprising to see the number of holes and vague terms that

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<sup>21</sup> Application Regulations, Article 10.

were still present in the regulations. The authors that had the opportunity to study the rules from an economic stand point, mainly examining the incentives for training brought by the rules, found few positive points about them. In their opinion it is a system inferior to both the pre and post-Bosman situation.<sup>22</sup>

However, there seems to be a problem of under investment to train and educate young players. Some kind of intervention seems to be needed to make sure that the optimal level of investment in training and education is reached. The need to invest in the training and education of the players is in the interest of all clubs. It allows them to replace the players that must retire and raises the level of competition since there is a limited number of players that a club is allowed to field. If the number of players fielded stays the same but the number of “fieldable” players grows, there will be a better quality of players in all the clubs, making the matches more exciting. This should generate more demand for the professional soccer product and consequently more revenues for all clubs, or at least for the industry as a whole<sup>23</sup>. The intervention of FIFA, as regulator, seems a good idea following the logic of the European Commission as stated in the Helsinki report,<sup>24</sup> since it aims to correct a market failure.

In The Helsinki report, the European Commission tried to make sense of *Bosman* by stating that it understood that they were three types of rules that were involved in sport:

- 1- The “rules of the game” that are excluded from application of competition rules
- 2- The rules that are in principle prohibited by the competition rules
- 3- The rules that are likely to be exempted from the competition rules<sup>25</sup>

The “rules of the game” are: the ground rules, the rules of the National Associations determining national teams and the rules necessary for the organization of competition. As confirmed by the ECJ in *Deliege*<sup>26</sup>, the goal of these rules is not to distort competition in sport but to allow it. Transfer fees do not seem to fit in that category.

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<sup>22</sup> Feess and Mühlheuser, see footnote 15.

<sup>23</sup> Assuming an equitable revenue distribution.

<sup>24</sup> *Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sports within the Community framework* (Helsinki report), COM (1999) 644 final, 10/12/1999.

<sup>25</sup> Helsinki report, see footnote 24.

<sup>26</sup> *Christelle Deliege v Asbl Ligue francophone de judo and others*, C-51/96 and C-191/97 (joined).

The rules that are in principle prohibited are defined as: restrictive practices in the economic activities generated by sport and closing one type of market. The Commission comments that:

“(T)he systems of international transfers based on arbitrarily calculated payments which bear no relation to training costs seem to have been prohibited ”<sup>27</sup>.

The rules that could be exempted, according to the Commission, would be the ones that meet the *Bosman* exception of the ECJ. The Commission then adds that what is needed is:

“a system of transfers (...) based on objectively calculated payments that are related to the costs of training (...)”<sup>28</sup>.

Again we see that it will be very important that the training and education costs implemented in the 2001 FIFA transfer rules have to be objectively determinable.

The Monti system tries to give more incentives to the clubs to train and educate new players. There are incentives on two fronts, first the money received each time a player is transferred and second the cost of the player to a club that decides to acquire him instead of trying to “grow” new talent. Nevertheless this system does not guarantee additional investment in training and development.

In order for the new transfer rules to be effective, the fees received by the clubs must be sufficiently high and frequent to:

- 1- Compensate the actual cost of training the player
- 2- Compensate the costs of training the proportionate number of other players that will not reach the professional level, to the number of payers that do
- 3- Be proportionally and sufficiently higher than the positive externality to third party clubs coming from the investment made in training by the club <sup>29</sup>

If the new rules achieve these conditions, they will create an incentive for the teams to invest in training. However, the transfer fees should not be too high and prevent all transfers, since

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<sup>27</sup> Helsinki report, 4.2.1.2., see footnote 25.

<sup>28</sup> Helsinki report 4.2.1.3., see footnote 25.

<sup>29</sup> This has sometimes been referred to as the positive externality of training.

the efficient level of transfer is not zero. If the fees are under the efficient investment level, the rich clubs could decide to free ride on the investment of the others clubs. But if the fees are at the efficient level, then all clubs that want to maximize their amount of player talent will be induced to invest in the training of players in order to “grow” some of the talent that they need and sell excess talent. By allowing transfers we allow the allocation of the players from the clubs that are the most efficient to train them, or have an excess of talent, to the clubs that value them the most. The incentive game is subtle and the amount of the transfer fees should be decided with great care.

The AR require that each National Association limits the fees a club may obtain for the training of a player via a compensation fees ceiling.<sup>30</sup> This compensation ceiling should be determined using the real costs of training a player, taking in consideration the ratio of players that will never play in the professional ranks.<sup>31</sup> There is nothing in the rules that prevent the clubs to agree on a fee under the ceiling. Nevertheless, a rational club would not agree to anything but the maximum amount of money possible to transfer a player, since agreeing for a lesser amount may affect all the transfers of that year and penalize it by signaling that the costs of training are lower than those determined by its National Association. So even if the wording of the article seems to give the National Associations only a power to restrain the costs of the compensation, in fact it gives them the power to determine the amount payable per year for each different category since, assuming that all clubs are rational<sup>32</sup>, there is no other choice for them than to agree to the maximum amount that the National Association allows. That situation will make the players from some countries, where the training costs are lower or determined to be so by the National Association, much less expensive. So the players are more likely to be transferred to the rich clubs in countries where training is expensive. This may create an incentive for such rich clubs to under-invest in training. Giving the power to the National Associations to determine the price of a year of training may make it very difficult to induce clubs to invest in the training and education of players more than the average national cost of such training and education. Even if clubs are allowed to internalize some of the positive externality of training for the other clubs via the transfer fees and the solidarity system, it is not sure that the amount determined by the National Association will give them sufficient incentive to invest in training.

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<sup>30</sup> Application Regulations, paragraph 7(5).

<sup>31</sup> Application Regulations, paragraph 6(3).

<sup>32</sup> Unless a particular club has at a particular time a disproportionate amount of excess talent.

By letting the National Associations and not the market decide the costs of the compensation for training and education, FIFA puts the burden on them to find the efficient level of compensation that will allow the optimal level of training. It is a difficult task and it would seem a better idea to let the market decide the value of a year of training in a club of a particular category or division in a particular country. Negotiation between the clubs would make it possible to find what the market value of that year of training is. Two clubs could be in the same category but the expertise of one could make a year in that club a lot more valuable. Some kind of supervision would be needed from FIFA and the National Associations to make sure that there is no abuses in the system and to provide a conflict resolution system. Nevertheless, by leaving all the weight of the decision on the National Associations, the 2001 Transfer rules run the risk of under-valuing the costs associated with the training of the players.<sup>33</sup>

It is also very unfortunate that the 2001 Transfer rules, in Article 5(5) of the AR, still require compensation for a young player without a contract. It seems to be in contradiction with the *Bosman* ruling. Although the ECJ said that some kind of restrictive behavior may be acceptable to incite clubs to invest in the training of players, the vagueness of the AR, that ask to “take into consideration” the absence of contract, but without prejudice to the other clubs that were implicated in the training of the player, is very dangerous. It is hard to know what the impact of this provision will be since there are a lot of ways to take something “into consideration”. It also puts in doubt the validity of the new regulations since the ECJ clearly stated in *Bosman* that the legality of a total restriction on the movement of players without contract is, at best, doubtful. It is difficult to believe that it had been impossible to create a precise criterion, like a discount percentage, that would allow a clear and objective evaluation of the absence of contract for a young player’s transfer fee. By being vague, FIFA runs the risk of seeing their rules struck down again by the ECJ.

It is my opinion that if the ECJ was asked to rule on the legality of Article 5(5) of the AR, it would declare it illegal, saying that it is contrary to Article 39 of the Treaty because of the wide discretion that is left to the clubs or the National Associations. It is my opinion that, although FIFA has tightened up its rules in the case of the compensation due for the training and education of the player, they are still not a satisfying answer to the *Bosman* ruling. To correct this situation, FIFA should add provisions that determine, with relative precision, the

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<sup>33</sup> Feess and Mühlheuß, see footnote 15 and Antonioni and Cubbin, see footnote 11

impact of the absence of contract on the compensation for training. A discount of 25% to 50% of the transfer fee, depending on the age of the player, could be a solution to make a player more attractive for the other clubs and facilitate the transfer of young players by preventing another *Bosman*-like situation. This would have the advantage of making the situation clear for all those involved in the transfer process. I find it surprising that such an obvious problem is still present in the 2001 rules. Apart from that they meet the *Bosman* exception by at least appearing to induce the clubs to invest in the training and education of players and by having objectively determined transfer fees. However this will depend on the ceilings decided by National Associations, if they do not reflect the real costs of training and education, there is a potential problem.

Regarding the second part of the test set up by the ECJ on the validity of the rules that restrict the market for players, I do not see how the new rules will help to maintain the competitiveness of the game in the commercial private clubs market. Rich clubs will always be able to pay the compensation for training in order to get the players that they want assuming that no means to reduce the gap in revenues between the clubs is implemented. As long as the revenues of the bigger soccer clubs continue to grow exponentially, the transfer fees that they are willing to pay will continue to rise. However, even if the commercial private clubs' competitive balance remains unaffected, the greater freedom for the player could benefit the national soccer teams. Milanovic<sup>34</sup> argues that the quality of international soccer has improved since national players are allowed to play in better foreign leagues. Again, in deciding which competitive balance to promote, FIFA must choose the type of soccer that it wants to encourage, since it supervises competition on both club and international levels. With the current system, the question if the level of competition at the international level will be affected at all remains open. But Milanovic seems to show empirically that the competitive balance at the international level is getting better the more liberal the rules on transfer of players are at the club level. Are the current rules liberal enough to fit in Milanovic's model? The question remains open. Also, it is uncertain whether the ECJ would accept that view since in *Bosman* it mainly looked at the competitive balance at the club level. But the argument is not without merits and should be considered.

So the compensation for training seems, at first glance, safe. But we have to take into consideration the weaknesses regarding the methods to determine the costs of a year of

training in the club of a certain category. The process will need to be very strict; otherwise there is a risk that the ECJ will find it unsatisfactory. Some may find peace in the fact that the regulations were approved by the Commission<sup>35</sup>, but this is no guarantee of validity since the rules that were invalidated by *Bosman* had also been approved by the Commission.<sup>36</sup>

### **The 2005 transfer rules<sup>37</sup>**

They should be considered more an adjustment than a new set of rules. In force since 1<sup>st</sup> July 2005, they attempt to fix some of the problems that were found in the 2001 rules and exposed earlier in that paper.

### **The changes**

Regarding the legal length of a player's contract, the 2005 rules keep the same duration than the 2001 transfer rules, but they add a provision regarding contracts with minors: they are now limited to three years in duration.<sup>38</sup>

The transfer fees are now called *training compensation*. There are two cases that allow a club to get training compensation for a player. The first case is when the player signs his first professional contract and the second one when the player is transferred between clubs in two different national associations.<sup>39</sup>

When the player signs his first professional contract, the training compensation will, according to the 2005 rules, be paid to all the clubs that trained the player, at the pro-rata of the years he passed in the said club. The training period stays the same as in the 2001 rules, the years between twelve and twenty-one.

In the second case, the transfer of a player that is already a professional, the club that acquires the player (the new club) will pay training compensation only to the former club for the duration that this club trained the player.<sup>40</sup> There is no complex kickback scheme like in the 2001 rules. It is important to notice that the 2005 rules do not exclude additional payments or

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<sup>34</sup> Milanovic, B.; *Globalization and goals: Does soccer show the way*, Carnegie Endowment for International Peace, 7/12/2003.

<sup>35</sup> And even that fact is debatable, see S. Weatherill at footnote 15.

<sup>36</sup> *Bosman*, paragraphs 17 to 27, see footnote 1.

<sup>37</sup> *Regulations for the Status and Transfer of Players* (2005 Transfer rules), FIFA Executive Committee, December 2004

<sup>38</sup> 2005 Transfer rules, paragraph 18 (2)

<sup>39</sup> 2005 Transfer Rules, Annex 4, section 2 (1)

fees on top of the training compensation when a player under the age of twenty-four is transferred.

For the training compensation in the case of transfer within an association, the National Association is in charge of determining it, subject to the approval of FIFA.<sup>41</sup> The associations have until 2007 to adopt these rules and submit them to FIFA. The only guideline that can be found in the 2005 rules is that the national rules must be compatible with the ones of FIFA.<sup>42</sup>

The 2005 rules also add a provision that abolishes any obligation to pay training compensation when a transfer happens between two clubs of the fourth category<sup>43</sup> and in an additional provision, if it is impossible to know or to find one of the clubs that trained the player, then the amount will be given to the National Association of the country in which the player acquired his training. This money should be earmarked by the association for the training and development of young players.<sup>44</sup>

Also, the method of classification of the clubs in the different categories and the determination of the cost of training for one category also changed. The costs of training are now determined on a confederation basis, each of them determining the costs of one year of training.<sup>45</sup> The confederations should base the training compensation on the real training costs of clubs, multiplied by the ratio of the number of players needed to produce one professional player. As for the categories, FIFA will publish the number of categories that the country needs to divide their professional clubs into.<sup>46</sup> National Associations may have only a restricted number of categories like Canada with two (the third and the fourth) or have access to all four like Germany, France, Brazil and England.<sup>47</sup> In order to prevent abuses, clubs that train a player between the age of twelve and fifteen will automatically be considered category four clubs.<sup>48</sup> The costs of training will be determined as if the new club had trained the player himself. The training compensation is determined by the category of the new club and then multiplied by the number of years the player has been trained.

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<sup>40</sup> 2005 Transfer Rules, Annex 4, paragraph 3 (1)

<sup>41</sup> 2005 Transfer Rules, paragraph 1 (2)

<sup>42</sup> 2005 Transfer Rules, paragraph 26 (3)

<sup>43</sup> 2005 Transfer Rules, section 2 (2) ii)

<sup>44</sup> 2005 Transfer Rules, paragraph 3 (3)

<sup>45</sup> 2005 Transfer Rules, Article 4

<sup>46</sup> 2005 Transfer Rules, paragraph 4 (1)

<sup>47</sup> FIFA Circular 959 annex

### **Special changes for Europe**

In the hope of avoiding another *Bosman*, Annex 4, Article 6 of the 2005 transfer rules creates special provisions for Europe.

Paragraph 6 (1) states that when a player is transferred to a club of a higher category, the training compensation will be calculated using the average between the costs of both clubs. If the player is transferred to a lower category, then the training compensation will be the one of the new club in the lower category.

Paragraph 6 (2) reproduces the strange 2001 rule that allowed a club to determine the end of the training period of a player. It is surprising to see that one of the main problems from a legal point of view of the 2001 rules was kept only for the market where the risks of legal challenge are the largest, the European Union. Again, the purpose that this provision will serve is unclear, it could allow clubs to manipulate the training compensation and could bring the entire rules into a potential legal pitfall.

Paragraph 6 (3) seems to solve the problem of the restriction of movement of players under twenty-four without a valid contract. If a player is without a valid contract, then no training compensation is due to his last club, unless the club can justify that he has a right to such compensation. However, this does not affect the right of the other training clubs; they will have a right to the training compensation.

The great change of the 2005 rules is that the 5% solidarity tax will be charged in all cases where a non-training compensation fee is paid for the player at any time during his career. This confirms that the transfer fees for the economic value of the player are not illegal. They are now even legal in the case of a transfer of a player under twenty-three years of age since Article 17 of the 2001 rules that prohibited them was not reproduced in the 2005 rules. This tax will apply to all international transfers and then be kicked back, according to a defined scale, to all clubs that participated in the training of the player.<sup>49</sup>

### **Analysis of the 2005 system**

The 2005 transfer rules are now more in line with the *Bosman* decision than the 2001 ones. They also introduce a simplified system that allows a simple calculation of the transfer fees

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<sup>48</sup> 2005 Transfer Rules, Annex 4, paragraph 5 (3)

due for training and development of a player. It is refreshing to see that at least now we have an objective table to determine the costs of training in the annex of Circular 959. But the question about the incentives given to clubs by these determined amounts remains. Are these numbers realistic? Would they be considered objectively calculated and related to the costs of training in case someone would contest them in front of a tribunal? Finally, would they affect the competitive balance between the clubs?

It is strange to see that in the table published for 2005 the cost of training a player in the UEFA category four clubs is more than five times higher than in the rest of the world. Considering the variety of countries included in the UEFA, these amounts may be inefficient, giving too many incentives to the poor countries clubs and too little to the rich ones. Is it realistic to consider that the training costs in all the countries of the UEFA that include Germany, Sweden, Russia and Albania, are the same? The same may be said about the countries of the CONCACAF, which include the United States, Central America and the Caribbean. Why not let the market decide about the costs of training and its value for the acquiring clubs with some sort of supervision from FIFA? There is a dispute resolution system included in the 2005 rules that could play that role, there is already a jurisdiction on the conflicts regarding the transfer fees and their payment.<sup>50</sup> Also since the international transfers need to be reported to FIFA, it could have been easy to create a system to prevent abuses.

The risk of under- and overvaluation of the costs of a year of training is very present with the confederation wide training costs system. From the incentive point of view, it is even worse than letting the National Associations determine the compensation. At least, the National Associations were closer to the real costs of training of clubs than the confederations. With the current system, there are great risks that we end up with a situation in which some clubs will have an over incentive to invest in training and others an under incentive. This situation will be inefficient.

It is a relief to see that the complete restriction clause contained in 5(5) AR of the 2001 rules was modified. This visible contradiction of the *Bosman* decision is now replaced by a less restrictive system. According to paragraph 6 (3) of the 2005 rules the current club does not have the right to a compensation for training if the player does not have a valid contract. If the

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<sup>49</sup> 2005 Transfer Rules, Annex 5, Article 1

club wants the compensation, it has now the onus to prove that it has nevertheless the right to such compensation. But there are no real criteria in the 2005 rules that help determine what could give the right to a club to ask for compensation in the case of a player without a valid contract. The rules are vague, there are no criteria to base the judgment on in order to determine if a compensation for training should be given to the clubs. Will the clubs be forced to prove the real costs of training the player? If this turns into a system in which the clubs have a very huge discretion, then the 2005 rules are in trouble. With time, we will hopefully be able to see some criteria come from the dispute resolution system, but they may not respect the *Bosman* test. Also, the costs of previous training of the old clubs will always follow the player, since they are never affected by the contractual situation of the player. So the players will not really be free agents until they are twenty-four years old. Additionally, the possibility to ask for additional fees on top of the training compensation looks like flirting with disaster and inviting a *Bosman II*. This is a huge failure of the 2005 rules.

Empirical studies will be needed to determine if the amount of money offered by the confederations for the training and development is enough to give the right incentive to train and develop young players. Are those numbers related to the actual costs that clubs have to pay? An audit conducted in 1991 by Ernst & Young evaluated that major league baseball teams spent an average of 7,2 million dollars each year on scouting and development costs. It would be interesting to make the same exercise about soccer and see if the numbers determined by the confederations are sufficient to compensate for the real costs.

Finally, the 2005 rules, like the previous ones, do not seem to have any significant impact on the competitive balance problem of soccer. In their actual form, the 2005 regulations stand a better chance of resisting a legal assault than the 2001 ones, but they are far from safe.

## **Conclusion**

It may take a long time for the new rules to come under the scrutiny of the courts again. In the past, the absence of a strong players' union to attack the restrictive rules was what mostly prevented contestation of the transfer rules. The first English case attacking the transfer rules dates from 1912 so there could be numerous soccer seasons played before the current rules are tested. The absence of a strong players' union at the European level also presents a problem

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<sup>50</sup> Transfer Rules 2005, Article 24

since FIFA does not have a single interlocutor for the players. Despite the declarations by FIFA that FIFPRO was involved in the creation of the new rules, this organization lacks the mandate, the strength and the representative recognition of the North American players' unions. The absence of a strong players' union prevented the "under the shadow of the law" negotiations present in many North American professional sports that could have led to a stronger system. Far from having resolved the problem, the 2005 version of the rules only raises more detailed questions. We still appear to be in extra time of a game that FIFA is likely to lose.