

## *The New Transfer Fee System in Professional Soccer: An Interdisciplinary Study*

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### Background

As the new millennium starts to unfold few would dispute the proposition that professional sport in general and soccer in particular is experiencing a rapid process of commercialisation which is so profound that the description “big business” is far from an exaggeration<sup>1</sup>. Sport now accounts for approximately 3 per cent of global trade<sup>2</sup> and, of more direct relevance for the purposes of this article, the latest authoritative survey on the finances of English soccer clubs<sup>3</sup> reveals that in season 1999-2000 they collectively generated in excess of £1 billion in total revenues with a confident projection that the top 20 Premiership clubs may well, largely on the back of a lucrative new TV rights deal, generate total revenues of around £1.5 billion by season 2002-2003. While it will almost certainly be the case that an increasing proportion of these revenues will be accounted for by TV revenues, merchandising and sponsorship, transfer fee income and spending will doubtless continue to figure prominently in the world of soccer finance. First, despite *Bosman* and the further liberalisation of the transfer fee system which the ruling triggered, transfer fee spending spirals inexorably upwards: a total of £340 million during season 1999-2000<sup>4</sup>. Secondly, for the smaller clubs transfer fee receipts from Premier League clubs can be vital for financial survival in the context of a business environment where profits are rare and the bleak reality for many clubs is continual struggle to limit losses to tolerable levels<sup>5</sup>.

Following in the wake of commercialisation has been “juridification”, by which we mean more pervasive and deeper legal intervention in spheres of sport which have hitherto enjoyed relative autonomy<sup>6</sup>. The European Union has been at the forefront of this development and it is the transfer fee system which has arguably attracted the closest scrutiny. Condemned in its

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<sup>1</sup> A development which has been judicially recognised, see: *Jones v The Welsh Rugby Union*, *The Times*, March 6 1997. For commentary see: N Rose and L Albertini, *Jones v The Welsh Rugby Union: New Law for the New Era* (1997) 5(1) *Sport and the Law Journal* 20.

<sup>2</sup> Directorate – General X, European Commission, *The Development and Prospects for Community Action in the Field of Sport* (Commission Staff Working Paper, Brussels 29 September 1998). p3.

<sup>3</sup> G Boon and D Jones (Eds), *Deloitte and Touche Annual Review of Football Finance* (August 2001, Manchester) p7.

<sup>4</sup> *Supra* p27.

<sup>5</sup> *Supra* p29 where the “trickle down” effects of transfer spending from Premiership to Football League clubs is described as “a fundamental part of the lifeblood of the Football League” though there are some commentators who maintain that the evidence for this is partial.

<sup>6</sup> For full discussion of this concept see further: S Gardiner et al, *Sports Law* (Cavendish, London, 2<sup>nd</sup> Ed, 2001) pp 93-97.

pre *Bosman* guise as a “ latter day version of the slave trade”<sup>7</sup> the football governing bodies arrogantly shrugged off pressure for reform from the European Commission until their hand was forced by the bombshell dropped by Jean- Marc Bosman and the European Court of Justice<sup>8</sup>. It is not our intention to add to the vast literature on that ruling<sup>9</sup>, suffice to say that the European Court insisted that professional soccer players who are EU (and EEA) nationals out of contract may invoke the same rights of freedom of movement bestowed on them by the Treaty of Rome as other employees. The ruling is predictable and entirely unexceptional in doctrinal terms, but it has served as a catalyst for the incremental liberalisation of the transfer fee system<sup>10</sup>, culminating in tortuous negotiations between UEFA- FIFA and the European Commission which has produced a refurbished transfer fee system intended to operate not merely in Europe but throughout the world<sup>11</sup>. Predictions of doom, especially for smaller clubs, in the immediate aftermath of *Bosman* appear to be unfounded. Conventional financial economics theory, supported by tentative empirical evidence, postulates that market actors have adapted intelligently to *Bosman* by placing their best or most promising assets on longer term contracts<sup>12</sup>, and it is likely that in the future revenue streams accruing from the sale of

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<sup>7</sup> J Janssen Van Raay, *Report drawn up on behalf of the Committee on Legal Affairs and Citizens' Rights on the freedom of movement of professional footballers* (European Parliament, 1 March 1989) p5.

<sup>8</sup> Case C-415/93, *URBSFA v Bosman* [1996] All ER (EC) 97 (ECJ); D McArdle, *From Boot Money to Bosman: Football, Society and the Law*, (Cavendish, London, 2000) p58.

<sup>9</sup> See for example: PE Morris, S Morrow and P Spink, *EC Law and Professional Football: Bosman and its Implications* (1996) 59 MLR 893; S Weatherill, *Annotation on the Bosman case* (1996) 33 CM L Rev 991; A Campbell and P Sloane, *The Implications of the Bosman case for Professional Football* (1997) 2 SLPQ 230; D Osborne and P Keefe, *The European Court Scores a Goal* (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations* 111; S Gardiner and R Welch, *The Winds of Change in Professional Football : The Impact of the Bosman Ruling*( 1998) 3 *Contemporary Issues in Law* 289; M Beloff et al, *Sports Law* ( Hart, Oxford , 1999) pp75-80; R Blainpain and R Inston , *The Bosman Case : The End of the Transfer System ?* (Peters/ Sweet & Maxwell, Leuven, 1996); K Middleton, *European Community Law in WJ Stewart* (Ed), *Sport and the Law: The Scots Perspective* (T&T Clark, Edinburgh, 2000) Chap 5, pp79-85; and D McArdle, *They're Playing R. Song. Football and the European Union after Bosman* (2000) 3 *Football Studies* 42.

<sup>10</sup> Thus for instance the immediate reaction of the UK authorities was to apply *Bosman* to both domestic and cross- border transfers but to limit it to transfers for out of contract players over the age of 24; a cut off point not recognised either in the ruling or the Treaty of Rome: P Spink, *Post- Bosman Legal Issues* (1997) 42 JLSS 108; P Spink, *Blowing the Whistle on Football's Domestic Transfer Fee* 1999 JR 73.

<sup>11</sup> FIFA, *Principles for the amendment of FIFA rules regarding international transfers* (Zurich, March 2001). For the detailed substantive regulations see: FIFA, *FIFA Regulations for the Status and Transfer of Players* (Buenos Aires/ Zurich, July 2001); and FIFA, *Regulations governing the Application of the Regulations for the Status and Transfer of Players* (Buenos Aires/Zurich, July 2001).

<sup>12</sup> P Antonini and J Cubbin, *The Bosman Ruling and the Emergence of a Single Market in Soccer Talent* (2000) 7 *European Journal of Law and Economics* 157; A Caiger and J O' Leary, *A New Rainbow? The Promise of Change in Professional Football* (1998) 3 *Contemporary Issues in Law* 314; G Boon (Ed), *Deloitte and Touche Annual Review of Football Finance* ( Manchester , 1998) p28; and G Boon ( Ed), *Deloitte and Touche Annual Review of Football Finance* ( Manchester , 2000) p25. At Premiership level 5 year contracts

TV rights (including the imminent proliferation of pay-per-view) will have a far more potent effect than transfer fee income on the market for soccer talent<sup>13</sup>.

Nevertheless the transfer fee system is likely to remain an integral part of the professional soccer industry: the agreement brokered between UEFA, FIFA and the European Commission guarantees its *de facto* survival for the foreseeable future, especially now that FIFPRO, the international players trade union, has abandoned its threat to launch a “Bosman II” style legal challenge to its perceived objectionable features. Moreover, key decision-makers in the industry such as club Chairmen and Managers continue to regard astute dealing in the transfer market as an indispensable means of team building and achieving on the field success<sup>14</sup>. The preservation of in-contract transfer fees, which in England at least still account for 90 per cent of all transfers<sup>15</sup>, by the new regime (albeit tempered by explicit rights of notice conferred on players) means that the transfer market, although of declining importance in relative commercial terms, will remain a crucial vehicle for delivering playing success. That said the essentially political compromise represented by the agreement is still vulnerable. As we demonstrate below, its central tenets are difficult to square both with EC law relating to anti-competitive practices and free movement of labour. In addition it should be borne in mind that, at least in common law jurisdictions or “mixed” systems subject to significant common law influence, the restraint of trade doctrine represents a potent legal resource for challenging virtually any regulation which unreasonably interferes with a player’s right to pursue his trade<sup>16</sup>. Even though at the quasi-political level the agreement is protected by a powerful “praetorian guard” of the European Commission, FIFA, UEFA, national governing bodies, clubs and players’ trade unions this is no guarantee against a future successful legal challenge by a maverick (or heroic, depending on one’s perspective on the transfer fee system *per se*) player or agent disgruntled by its application in their particular case. In other words irrespective of how much political<sup>17</sup> and administrative muscle there is supporting the new system, in the final analysis this can always be trumped by a latter day Jean- Marc Bosman determined and resourceful enough to assert his legal rights in court.

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are becoming increasingly prevalent: Caiger and O’Leary supra p323. Recent transfers involving Steve McManaman from Liverpool to Real Madrid and Sol Campbell from Tottenham Hotspur to Arsenal highlight the obvious point that even extended contracts are not a panacea to the problem of player “free agency” established by *Bosman* and its aftermath: a determined “star” player can exploit this freedom by simply serving out his contract and negotiating a lucrative “free” transfer to a club of his choosing. Newspaper reports suggest in this type of transfer the acquiring club channels a proportion of the transfer fee saved into a significantly higher salary, signing on fee, loyalty and performance bonuses etc.

<sup>13</sup> Antonini and Cubbin supra p170.

<sup>14</sup> D Sheepshanks, No transfer collaboration until players are on side, *Electronic Telegraph*, 15 March 2001.

<sup>15</sup> Antonini and Cubbin n12 supra pp168-169.

<sup>16</sup> For discussion of the restraint of trade doctrine in the context of transfer fees see: Gardiner et al n6 supra pp227-230, 540-546; and E Grayson, *Sport and the Law* (Butterworths: London, 3<sup>rd</sup> Ed, 2000) pp73-78.

<sup>17</sup> In the UK and Germany support for the re-modelled transfer system appears to exist at the very highest level of government: Joint Statement by Chancellor Gerhard Schroeder and Prime Minister Tony Blair (German Chancellery Press Release, 10 September 2000).

Aside from its exposure to individual legal attack the agreement is likely in the longer term to be revisited. The European Union lacks specific competence to legislate for sport. Furthermore, its institutional arrangements for the formulation of sports policy remain fragmented and uncoordinated: sport is a ubiquitous phenomena which is impacted upon by (frequently disparate) policies pursued by eighteen out of a total of twenty four Directorates-General. While formal responsibility for sport rests with Directorate General X (and is thus subsumed under the broad template of culture) the task of promoting a coherent sports policy across the entire Commission (and administering the Union's sports funding programme) is entrusted to a dedicated Sports Unit located within Directorate General X. It is probably fair comment at this juncture to observe that the Unit has a long way to go in achieving its ultimate objective of a structured, co-ordinated and consistent policy on sport within the European Union. There are signs however that sport is beginning to move up the political and policy agenda of the Union. The Commission has articulated a European Model of Sport designed to act as a counter-weight to excessive commercialisation and safeguard distinctive characteristics of sport in Europe, including the social, educational and public health functions of sport, institutionalised systems of promotion and relegation, pyramidal governance structures and principles of solidarity, transparency and re-distribution which may, *inter alia*, encompass the search for alternatives to traditional transfer fee systems.<sup>18</sup> The Treaty of Amsterdam has appended to it a Declaration asserting the social significance of sport. At the recent European Council IGC in Nice the Council supported preservation of the values of cohesion and solidarity inherent in European sport as well as urging a satisfactory conclusion to the negotiations which eventually produced the new transfer fee system<sup>19</sup>. It may well transpire that the Union will eventually equip itself with specific competence in regard to sport<sup>20</sup> followed up by a comprehensive legislative programme which could include placing the transfer fee system on a firm legal footing. Obtaining the necessary political consensus amongst the Member States will however be a formidable task, and the ultimate goal of conferring on sport a distinct status in the European Union's legal order remains at the current juncture a long term aspiration rather than a realistic prospect.

Before any future legislative initiative does occur however, there remains a fundamental question which is hotly debated but still unresolved: why should professional soccer persist

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<sup>18</sup> European Commission, *Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework*, COM (1999), 644 final. For a perceptive critique see: S Weatherill, *The Helsinki Report on Sport* (2000) 25 *Eur Law Rev* 282. This Model is itself, at least in the context of soccer, vulnerable to the forces of commercialisation which have spawned an elite group of clubs whom threaten to become financially dominant: A Brown, *Football and the European Union: Governance, Participation and Social Cohesion: Towards a Research Agenda* (2000) 1 *Soccer and Society* 129, 136-137.

<sup>19</sup> European Council Presidency Conclusions at the Nice Summit (7-9 December 2000) Annex IV: [http://europa.eu.int/Comm/sport/doc/econ/decl\\_nice\\_2000](http://europa.eu.int/Comm/sport/doc/econ/decl_nice_2000).

<sup>20</sup> Committee on Culture, Youth, Education, the Media and Sport, *Report on the Helsinki Report on Sport* (European Parliament, 18 July 2000) p11 contains a firm proposition to this effect. See also to the same effect: Committee on Culture, Youth, Education, the Media and Sport, *Draft Opinion on the Treaty of Nice and the Future of The European Union* (European Parliament, 23 March 2001) p5.

with even a modernised and liberalised transfer fee system which inevitably impinges on the employment freedoms of players? The response is usually a vague plea that sport is somehow “special” though this has yet to be articulated into an intellectually convincing thesis<sup>21</sup>. In specific terms the transfer fee system is often depicted as an incentive for the training and development of young players and a means of preserving the viability of smaller clubs dependent on the re-distributive effects of the transfer fee system<sup>22</sup>. There is certainly recognition of the former in *Bosman*<sup>23</sup> and some sympathy for this view in the Commission<sup>24</sup>. A starting point for the formulation of such a thesis must however be recognition that the special nature of sport lies in the importance of competitive equilibrium. Any commercially astute employer will invest in training and development irrespective of the industry in which they operate, and the traditional transfer fee system is a very arbitrary mechanism for compensating smaller clubs which do this, since the (market-based) transfer fee is wholly unrelated to the actual training and development costs incurred<sup>25</sup>.

The alternative perspective is that professional sport is not intrinsically different from other forms of economic activity and that transfer fees represent an iniquitous fetter on players’ freedom of movement which no other occupational group labours under. This perspective insists that a more efficient and fairer means of incentivising player development and provision of financial support for smaller clubs is via an explicit wealth distribution model whereby the richer clubs commit themselves to the re-distribution of a proportion of their revenues derived from TV, merchandising, sponsorship and gate receipts etc to the smaller clubs<sup>26</sup>. While this may be the final and logical destination on the road from *Kingaby*<sup>27</sup> to *Eastham*<sup>28</sup> to *Bosman* to the UEFA-FIFA Commission agreement, this is by no means certain. For the history of professional football and its contemporary relentless commercialisation suggests that naked self-interest amongst the wealthier clubs will probably prevail over the imperative for measured altruism in the wider interests of the sport<sup>29</sup>.

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<sup>21</sup> S Weatherill, Resisting the Pressures of “Americanisation”: The Influence of European Community Law on the European Sport Model, in S Greenfield and G Osborne, *Law and Sport in Contemporary Society* (Frank Cass, London, 2000) Chap 9, pp158-159

<sup>22</sup> G Boon (Ed), *England’s Premier Clubs* (Deloitte and Touche, Manchester, April 2001) p3.

<sup>23</sup> Advocate General Lenz Opinion para 239; ECJ Judgment para 106 n4 supra.

<sup>24</sup> Vivienne Reding, *Commission’s Investigation into FIFA’s transfer rules* (Statement to the European Parliament, Strasbourg, 7 September 2000)

<sup>25</sup> S. Weatherill, Do sporting associations make law or are they merely subject to it? (1998) 9 *European Business Law Review* 217; S. Morrow, Rethinking the football transfer system, *Business am*, 6 November 2000; and Weatherill n21 supra p166.

<sup>26</sup> See for example HF Moorhouse et al, *Time for a New Approach: The International Player Transfer System* (A FIFPRO Report to the European Commission, February 9 2001); Advocate- General Lenz, Opinion paras 226-234 n4 supra.

<sup>27</sup> *Kingaby v Aston Villa Football Club* (1912) *The Times* 28 March.

<sup>28</sup> *Eastham v Newcastle United Football Club* [1964] Ch 413.

<sup>29</sup> D McArdle, One Hundred Years of Servitude: Contractual Conflict in English Professional Football before *Bosman* [2000] *Web Journal of Current Legal Issues* pp1-14, 2.

Bearing this context in mind we now critically evaluate the key features of the new system. We begin by assessing the validity of aspects of the new system by reference to EC Law, in particular the free movement of workers guarantee and anti-restrictive practices mechanism in the Treaty of Rome. Next we focus on the commercial ramifications of the new regime, in particular the effects on human resource accounting policies employed by clubs (i.e. putting players on the balance sheet) and financing issues such as raising capital including stock market flotations. We then conclude by assessing the medium term prospects and likely long-term durability of the new regime.

### **The 2001 Agreement**

In March 2001, after six months of fractious negotiations, FIFA and UEFA reached agreement with the Commission on new rules for the international transfer of professional footballers<sup>30</sup>. As a consequence, the Commission vacated proceedings to adopt a negative decision in the competition procedure opened against FIFA, on the proviso that the principles of the new agreement are properly implemented<sup>31</sup>. In the context of this apparent consensus the casual observer may deem the matter settled. However, a detailed analysis of the legality of the new system is by no means a futile exercise. Neither Commission acquiescence nor even positive assent is a reliable guarantee of compliance with EU law, the ultimate arbiter of which is the European Court. Moreover, such does not prejudge the system's conformity with national law. From another perspective, while the Commission has powers to exempt, on tightly circumscribed grounds, certain agreements from prohibition under Article 81 EC<sup>32</sup>, it is arguably outwith the mandate of the Commission to attempt to sanction a scheme clearly in *prima facie* breach of the free movement provisions of the Treaty<sup>33</sup>. Accordingly, the provisional endorsement of the Commission is not the final word on the new transfer system's legality.

Initially the players' international trade union, FIFPRO, rejected the agreement<sup>34</sup>. In particular, the union criticised the new sporting sanction mechanism, which entails the imposition of playing-bans on footballers moving in non-consensual breach of contract. In May 2001 FIFPRO raised an action in the Tribunal de Premiere Instance in Brussels<sup>35</sup>. Then in July 2001 FIFA's Executive Committee<sup>36</sup> adopted a revised set of Regulations for the Status and Transfer of Players<sup>37</sup> and a companion set of Application Regulations<sup>38</sup>. In a startling change of position in late August 2001, FIFPRO accepted the new system and withdrew its legal challenge. The full story behind this unexpected consensus, achieved after secret negotiations to which not even FIFA General Secretary Michel Zen-Ruffinen was

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<sup>30</sup> n11 supra. For the full text see <http://www.fifa2.com>.

<sup>31</sup> See Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers: EU Press Release IP/01/314, 6/3/2001.

<sup>32</sup> Ex Article 85 EC (renumbered by the Amsterdam Treaty).

<sup>33</sup> In particular Article 39 EC, ex Article 48 EC (renumbered by the Amsterdam Treaty).

<sup>34</sup> No Transfer Celebration Until Players Are Onside, *The Daily Telegraph*, 8 March 2001: see <http://www.telegraph.co.uk>.

<sup>35</sup> Transfers Challenge Piles Pressure On Blatter, *The Daily Telegraph*, 26 May 2001; supra.

<sup>36</sup> At the FIFA Congress, Buenos Aires, 5 July 2001.

<sup>37</sup> Otherwise and hereafter referred to as the Basic Regulations: for the full text see <http://www.fifa2.com>; n11 supra.

<sup>38</sup> Regulations governing the Application of the Regulations for the Status and Transfer of Players: for the full text see <http://www.fifa2.com>.

initially privy, has to date proved elusive<sup>39</sup>. In any event, the agreement thereafter entered into force across Europe on 1 September 2001.

Notwithstanding FIFPRO's eleventh hour conversion, there is a good chance that the high stakes, competing interests and day to day travails of professional football will eventually generate a situation which may provoke a player, agent, or even club to challenge the new system in court. Furthermore, it should be noted that some aspects left undeveloped in the March 2001 agreement were unilaterally expanded in the regulations ultimately adopted by FIFA. This is enough to cause concern in itself; but FIFA failed even to reproduce the Commission-sanctioned version in all substantive respects<sup>40</sup>. In addition, and perhaps most ominous of all, as part of the deal struck between the parties, FIFA President Sepp Blatter is widely reported to have assured FIFPRO that, although he could not change the actual words of the regulations, he would ensure that their interpretation "would be a lot more practical."<sup>41</sup> Boding ill for the spirit and integrity of the endorsed version of the agreement, this assurance will certainly not be well received at the Commission.

Therefore there is also a risk, a palpable risk given the traumatic history of dealings between the parties, that the Commission itself may find fault, either with the implemented version, or more likely with its interpretation and application. In anticipation of a challenge, from whatever direction it may come, what follows is an appraisal of the new transfer system and its compatibility with EU law. The essential features of the agreement are as follows:

- (i) Compensation is payable to a former club (or clubs) for 'training and education' costs from age 12 to 21 on every transfer of a player (from amateur to professional status, or professional to professional status) which occurs before the end of the football season in which the player's 23rd birthday falls<sup>42</sup>.
- (ii) Player contracts have a minimum and maximum duration of respectively 1 and 5 years, subject to provisions of national law<sup>43</sup>.
- (iii) Sporting sanctions (against clubs, players and/or agents) are to be applied and compensation shall be payable by defaulting parties in the event of unilateral breach of contract without just cause or sporting just cause during the first three years of contracts signed up to the 28th birthday of the player<sup>44</sup>. The same sanctions are applicable during the first two years of contracts signed after the 28th birthday of the player<sup>45</sup>.
- (iv) A 'solidarity mechanism' is established to redistribute a proportion of any compensation paid to the previous club to all other clubs, including amateur clubs, formerly involved in the training and education of the player in proportion to the

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<sup>39</sup> See Inside Sport: Confusion as Taylor wins shock U-turn for players' union on new transfer rules, *The Daily Telegraph*, 27 September 2001: <http://www.portal.telegraph.co.uk/>.

<sup>40</sup> FIFA Circular no. 769, 24 August 2001: see <http://www.fifa2.com>.

<sup>41</sup> See n39 supra.

<sup>42</sup> See Arts 13, 14 and 15 Basic Regulations.

<sup>43</sup> See Art 4(2) Basic Regulations.

<sup>44</sup> See Art 21(1)(a) Basic Regulations.

<sup>45</sup> See Art. 21(1)(b) Basic Regulations.

number of years the player was registered with each club between the age of 12 and 23<sup>46</sup>.

(v) International transfers of players aged under 18 are permitted if the player's family moves to the new country for reasons unconnected with football, or if the player has at least attained the national minimum working age (of the new country) and suitable arrangements for their sporting training and academic education are guaranteed by the new club<sup>47</sup>. The adopted regulations provide that such transfers will be governed by a code of conduct established and enforced by the football authorities.<sup>48</sup>

(vi) Transfers are restricted to taking place in one of two 'transfer windows' per year<sup>49</sup>. These comprise of a main out-of-season transfer period and a mid-season window that the agreement provides will be strictly confined to transfers for "sport-related reasons" and "exceptional circumstances". No further definition or clarification of these criteria is offered by the agreement.

(vii) Transfers are limited to one per player per season<sup>50</sup>.

(viii) A voluntary arbitration system is established, without prejudice to the right of either party to seek recourse through the national courts<sup>51</sup>. The first stage is independent mediation. If no solution is found within one month either party is permitted to bring the case before FIFA's Dispute Resolution Chamber (DRC), which is to be independently chaired<sup>52</sup>, with members chosen in equal numbers by players and clubs<sup>53</sup>. If the parties so agree, this part of the dispute may be submitted to a similarly constituted national sportive arbitration tribunal instead of the DRC<sup>54</sup>. In either case, decisions are subject to appeal to the Arbitration Tribunal for Football.

### **Analysing the New System**

It is submitted that the new transfer system is susceptible to legal challenge on a variety of fronts. In particular, it will be exposed to scrutiny under the formidable labour mobility and competition matrices of EU law, the latter of which are now faithfully reproduced on a national level in most EU Member and Associate states. In this context alone, with the single probable exception of point (viii) above, it is possible to construct a compelling *prima facie* case for the illegality of each of the aforementioned elements of the new agreement.

That said, some aspects of the adopted system are clearly more pregnable to litigation than others. Individually, some of the arguments that may be invoked against the new regulations are inspired by a purposive, perhaps tenuous, interpretation of EU law, and are both theoretically and substantively lean in nature. However, other clauses central to the new

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<sup>46</sup> See Art. 25 Basic Regulations.

<sup>47</sup> See Art.12 Basic Regulations.

<sup>48</sup> See Art 12(1)(b) Basic Regulations.

<sup>49</sup> See Art 5(2) Basic Regulations; Art. 2 Application Regulations.

<sup>50</sup> See Art 5(2) Basic Regulations.

<sup>51</sup> See Art. 42(1) Basic Regulations.

<sup>52</sup> See Art. 42(1)(b)(i) Basic Regulations; Art. 15 Application Regulations.

<sup>53</sup> See Art. 42(1)(c) Basic Regulations.

<sup>54</sup> See Art. 42(1)(b)(i) Basic Regulations.



system appear to be cast, without discernible justification, in manifest breach of first principle. Moreover, when the regulations are weighed *collectively*, and assessed in the context of the business of professional football rather than in the abstract it appears all the more fragile.

In evaluating the system's compatibility with EU trade law it is prudent to receive with some caution the siren song of those seeking to espouse the Corinthian ideals of sport in the hope of establishing a special case for its exemption. It is true that the interdependence between the socio-cultural and economic aspects of football makes it difficult to apply the competition and free trade rules to the range of economic activities in which the sport participates. Moreover, football is unique in the sense that the competing undertakings rely upon each other in order to create the market and the product. The margins of economic competition must be tempered to ensure the healthy survival of a sufficient number of clubs to maintain the vibrant sporting competition that constitutes the product. However, there is no obvious mechanism or provision for treating the new system as anything other than an ordinary cartel and this is not by oversight.

There have been many attempts to obtain a special exemption from the competition and free movement provisions of the Treaty for professional sport. The football authorities, somewhat paradoxically backed by powerful commercial forces, have been in the vanguard of this lobby, but to date, in the face of considerable pressure, mere sympathetic platitudes have been offered by the EU. Whilst the Helsinki Report on Sport<sup>55</sup> acknowledged that the development of positive measures to reconcile the social and educational function of sport with the increase in its economic dimension was desirable, no substantive exemption or reform was proposed. UEFA and FIFA argued for a protocol at the EU's Nice summit in December 2000, but had to be content with a declaration carrying no legal weight<sup>56</sup>. UEFA then proceeded to raise the cause with the Swedish EU Presidency in early 2001, but the issue was allocated to a working party and effectively indefinitely postponed. Football was indeed prioritized during the Belgium Presidency at the end of 2001, but only in the context of co-ordinating measures to combat hooliganism.

Top-flight football clubs are well resourced, commercially oriented corporate entities while lower division clubs typically aspire to achieve that status. Consider, for example, the plethora of criticism levelled at clubs for mercenary pricing policies on match tickets and replica strips<sup>57</sup>. Clubs are increasingly, particularly in the premier leagues, pursuing profit for growth and return on investment though we may still be some way from clubs reflecting conventional businesses where this is the dominant objective. Evidence of this stronger commercial focus is the increasing tendency to emphasise pursuit of entry into lucrative World or European competition over progress in better established domestic cup equivalents.<sup>58</sup> Hazy notions of sporting and cultural development cannot dilute that

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<sup>55</sup> n18 supra.

<sup>56</sup> n19 supra.

<sup>57</sup> Soccer fans count the cost of showing their true colours, *Electronic Telegraph*, 17 May 1998, see: <http://www.telegraph.co.uk>.

<sup>58</sup> The then English FA Cup holders Manchester United withdrew from the 1999/2000 FA Cup competition, preferring to participate in the nascent, but highly remunerative World Club Championship staged in Brazil in January 2000. It is now common practice, in particular in the English Premiership, to sacrifice a place in a cup competition to avoid fixture congestion etc impacting on a club's league performances. See, for example, Treble Joy for Ferdinand

fundamental truth. In light of this sharper business philosophy it is difficult to concede that football should in some sense be treated as a special case in the leisure market. As unprecedented income streams from television and sponsorship have enriched the game, friction has developed between its competing business and sporting facets. Football has tried to live in both worlds and exploit the best of each, but its commercial persona is now unequivocally the dominant force. In the face of a legal framework that makes no allowance for, or concession to, the putative special circumstances of sport it is no surprise that conflict has emerged.

It is useful at the outset to consider the conclusions of Advocate General Lenz in his well-argued and comprehensive Opinion in *Bosman*<sup>59</sup>. In finding that a transfer system would have to satisfy two fundamental requirements to achieve compatibility with EU law, or at least with the Article 39 EC free movement provisions, AG Lenz has been interpreted as establishing the basic parameters for lawful activity in this field<sup>60</sup>. His thoughts certainly exerted considerable influence on the negotiations that led to the current agreement. AG Lenz argued that: (i) transfer fees must be limited to the amount actually expended by the previous club for the player's training; and (ii) a fee should only be payable in the case of a first change of clubs where the previous club has trained the player.

The acid test of the new system will lie in its interpretation and application, but some broad observations on general principle and conformity with EU law can be made at this early stage. In the following analysis, we focus on the key provisions and most likely avenues of challenge in the context of the free market provisions of the Treaty of Rome.

#### **(i) Compensation payments**

Central to the new system is the principle that clubs should be compensated for their investment in the training and education of young players between 12 and 21 years of age<sup>61</sup>. A compensation fee is payable if such a player is thereafter the subject of a professional transfer before the end of the football season in which his 23rd birthday falls. The transfer fee to be paid is calculated by reference to flat training rates, which will set by FIFA each year<sup>62</sup>. To this end, four categories are established. In the Annex to the original agreement it was claimed that clubs would be grouped in accordance with "their financial investments in the training of players"<sup>63</sup>. However, arguably at odds with this stated aim, the adopted formula proceeds to categorise clubs solely by reference to their position within their national league system. Category 1 clubs are defined as all clubs of the first division of the national

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and Worthington Cup: Jansen happy to ensure Arsenal's exit, *Daily Telegraph*, 11 December 2001: <http://www.portal.telegraph.co.uk/>. (In the first case Tottenham Hotspur beat a lacklustre reserve team fielded by Bolton Wanderers 6-0 in the Worthington Cup and in the latter in the same competition a below-strength Arsenal were beaten 4-0 by Blackburn Rovers. Both losing sides opted to field weak teams in order to rest key players for Premiership matches).

<sup>59</sup> See for perceptive comment from a labour mobility perspective O'Keefe and Osborne n8 supra.

<sup>60</sup> Para 239, Opinion of AG Lenz, Case C-415/93, n9 supra.

<sup>61</sup> See Art. 13 Basic Regulations.

<sup>62</sup> See Art. 16 of the Basic Regulations and for detail see: Art.6 of the Application Regulations.

<sup>63</sup> For the full text see <http://www.fifa2.com>.

association; category 2 clubs include those of the second division of the national association and of the first division of all other countries having professional football; category 3 clubs include third division clubs of the national association and second division clubs from professional leagues in other countries; category 4 clubs include fourth and lower division clubs of the national association, third and lower division clubs of countries with professional football and all clubs of countries having only amateur football<sup>64</sup>.

It is difficult to accept the assertion that this classification is based purely on the level of financial investment in training. On the contrary, the application of a category system which scales fees by reference to a club's position within the national league structure ensures that the amount payable will reflect the current competitive success of the club to the exclusion of effort and expenditure on training and development<sup>65</sup>. If we are to accept FIFA's claims for the system, it is necessary to concede that all clubs base their training policies on their league status; that all first division clubs invest equally at a rate that is higher than all second division clubs; that second division clubs invest at higher level than all third division clubs and so on. These are by no means reliable assumptions and may prove counterproductive. There is little evidence that it costs a premier league club significantly more to train a player than a second division club, or that it costs a second division club more than a third division club.

It could be argued that the category system incorporates another type of discrimination into football: the bigger the club the bigger the fee, the smaller the club, the lower the compensation payable. Again in apparent opposition to the much-vaunted objective of capital-redistribution, the new regulations impose a system that will directly discriminate against lower division clubs. Given that finance is now the most important factor in sustained league performance, this aspect of the new system can only serve only to fortify the top leagues against those languishing below. The system embraces many of the characteristics of a cartel in this respect. One might conclude that FIFA's claim that fees are based solely on training is no more than window dressing; a superficial attempt to pay lip-service to a central characteristic of the elusive EU law-compliant transfer system envisaged by AG Lenz in *Bosman*. In substance, given the new system's preoccupation with league position, fees are arrived at on the basis of considerations outwith the ambit of those deemed acceptable by AG Lenz.

Furthermore, there seems to be no principled justification for grading foreign clubs in a category lower than domestic equivalents. It is doubtful, for example, that Middlesborough's investment in training should be rated as higher than that of top-flight foreign clubs such as Barcelona, AC Milan or Bayern Munich. Given that this mode of classification would engineer a situation in which a smaller fee would be payable to a foreign club than to a club in the equivalent domestic league for an equivalent player transfer, the new system appears to impose a direct competitive disadvantage on any club qualifying as domestic and selling a player in a market which includes broadly equivalent overseas players. Moreover, a club qualifying as foreign will be entitled to a smaller fee, for selling a broadly equivalent player to Manchester United than a domestic club such as Arsenal F.C. would receive. In addition, and from the other perspective, a footballer wishing to transfer from Arsenal FC to Liverpool FC is put at a disadvantage as against a similar player from Inter Milan who is competing for

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<sup>64</sup> See Art 6(2) of the Application Regulations.

<sup>65</sup> For comment see: Christopher Heaton-Harris MEP, Written Question to the Commission, 19 April 2001, (2001/C340E/211).

transfer into the same position at Liverpool, because the training undertaken by the Italian club is rated at a lower value. The Italian player would have a lower price tag. Arguably, these scenarios would constitute either or both *prima facie* Article 39 EC restrictions on free movement and breaches of Article 81 of the Treaty. Article 81 EC prohibits those agreements that may affect trade between Member States and which, in particular, “apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage”. Brevity precludes the exercise here, but other anomalous effects and potential distortions in the traffic of players are easy to identify against this template.

The Regulations provide that it is for FIFA and UEFA to establish and quantify a “player factor” for each of the aforementioned categories<sup>66</sup>. The “player factor” determines the ratio between the number of players who need to be trained to produce one professional player. The cost of training of one player is multiplied by the average player factor for each category, giving a flat rate for annual training expenses for each category. The figure produced by the above calculation is then multiplied by the number of years of training from 12 to 21 to derive the training fee payable by the purchasing club<sup>67</sup>.

The accompanying Circular<sup>68</sup> which fleshes out the adopted Regulations suggests that only “effective training” will be taken into account in calculating a transfer fee. Unfortunately the meaning of effective training is not defined in the Regulations<sup>69</sup>. Although the Circular encourages the inference that once a player is a first team regular, training is deemed to be at an end, and that salaries paid to any player with first team caps should not be included for the purposes of calculating training costs<sup>70</sup>. If this interpretation is accurate, it may implicitly acknowledge a criticism expressed by AG Lenz in *Bosman*. In that celebrated case, the argument that (pre-*Bosman*) transfer fees amounted to no more than compensation for training and development was raised by numerous parties but rejected out of hand by AG Lenz. He dismissed the assertion on the simple ground that the amount of a fee payable on transfer was linked not to development costs but to the player’s earnings. Few fair-minded commentators would have the temerity to suggest that either pre- or post-*Bosman* fees qualify as exclusively or even essentially compensatory in nature, given that by the mid-1990s star players were being transferred for £10-20 million and even fairly nondescript premier league players could command seven figure fees<sup>71</sup>.

Returning to first principle, it can be argued that the concept underpinning the adopted system, namely that a professional football club actually deserves compensation for training its players, is itself fundamentally flawed. If there is one universal commercial truth it is that *all* companies train their staff. Many undertakings invest heavily in staff development, the nature and quality of which varies depending on the industry or sector in question. In the non-football world it is accepted as a normal, and essential, business expense. Employers in the non-football world do not expect, and certainly would not attempt to insist upon, compensation for training their own staff. It is self-evident that a good employer is compensated for the cost of its staff training and development programme by coterminous

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<sup>66</sup> See Art. 6(3) Application Regulations.

<sup>67</sup> See Art. 7(1) Application Regulations.

<sup>68</sup> FIFA Circular no. 769, 24 August 2001; see: <http://www.fifa2.com>.

<sup>69</sup> See Art. 13 Basic Regulations.

<sup>70</sup> See FIFA Circular no.769 point 2(b).

<sup>71</sup> In July 2001, setting a new world record, Juventus sold Zinedine Zidane to Real Madrid for approx £48m: Real unveil Zidane, *Daily Telegraph*, July 9 2001; <http://www.telegraph.co.uk>.

improvements in performance and productivity yielded by that programme. By the same token, player training and development is an entirely ordinary, indeed inevitable, expense of a professional football club. It is expenditure that is wholly in the interests of the training club and which a player recompenses on the pitch by way of enhanced day-to-day match play. It is difficult to formulate an argument that differentiates football from other commercial sectors in this regard.

As discussed, in *Bosman*, AG Lenz concluded that a transfer system would have to satisfy two basic requirements to achieve compatibility with Article 39 EC. To recap, he argued that: (i) a transfer fee must be limited to compensation for the player's training; and (ii) fees should only be payable in the case of a first change of clubs where the previous club trained the player. These conditions are in part met by the new system. In terms of condition (i), some effort has been made to tie the transfer fee calculation back to training costs. However, individual fees are referable to a division average and not to the amount actually spent on a particular player. This is not what was envisaged by AG Lenz and is a formula highly susceptible to manipulation. That said, leaving the foregoing analysis aside, this deviation from the Lenz model does at least embrace the advantages of transparency, objectivity and certainty. The system should reduce the management costs of participation in the transfer market considerably, and therefore yield benefits that could be passed on to the consumer. Administration should also be relatively straightforward. The new system obviates the task of ascertaining individual training costs on a case by case basis, something which would presumably entail largely subjective, and therefore in themselves legally pregnable, evaluative processes. The overburdened European Court and their national counterparts, to say nothing of an understaffed Commission, would not relish the cloudy financial investigations necessary to verify individual figures, or the consequent litigation predicated thereon. It is therefore submitted that this dimension of the new system is not necessarily offensive to EU law *per se*, although in combination with other factors it may well be. The arguments are finely balanced.

From another perspective, it is difficult to argue that a "one-formula-fits-all" system will produce a compensation figure that is appropriate or justifiable in every case. Age 21/23 is an arbitrary and artificial cut-off point foisted on a training and development process that continues, in the real world of football, until the day a player retires. In *Bosman*, AG Lenz appeared to accept the idea that the early training phase of a professional player: (a) could be identified and isolated; and (b) merited special consideration for compensation. It is submitted that this approach, albeit pragmatic, rests on an unduly simplistic, unrealistic and perhaps tenuous point of view. Football careers are affected by various factors and there is no such thing as a typical footballer or typical career development path. While some players take a long time to develop, others are first team regulars by age 18. Talent is not something that crystallises at a certain age. The training and development of a player is a variable and fluctuating process, one that is not susceptible to standardisation. It should also be noted that maintenance of match fitness is a fundamental component and product of training, and essential to a player's day-to-day performance throughout his career. Arguably, match fitness is at least as important as the more nebulous qualities of talent and technique. It is certainly a product of training that increases in significance, perhaps eventually superseding technique-based training in emphasis, as a player grows older, accumulates injuries and loses some of the exuberance and stamina of youth. The very fact that FIFA and UEFA are prepared to accept that a cut-off point should be established undermines the fundamental rationale supporting the survival of compensation fee, and damages the intellectual argument for exemption. There is nothing in substance, quality or significance to differentiate between

training that takes place before age 21 and that which takes place after. Indeed, in light of the foregoing analysis it can be argued that post age-21 training is, if anything, more important. In closing on this issue one further point should be made before it is submerged in the minutiae of debate: it sets a dangerous and, in terms of the protective canopy afforded by the Treaty, quite incongruous, precedent to allow age to dictate the extent of an adult worker's rights.

Returning to the Lenz criteria set out above, in a manner reminiscent of the agreement's partial assimilation of condition (i), the *spirit*, if not the *letter* of condition (ii) is broadly reflected in the age 23 cut-off point for compensation payments. Although the cut-off point may itself be susceptible to challenge for failing to reflect the on-going nature of player training and development, it does at least signal an intent to restrict compensation to those clubs involved in the nurturing of young talent and this is a laudable object in itself. That said, AG Lenz's proposal to restrict payments to a player's first change of clubs would not necessarily provide a fair compensation or equitable redistribution mechanism, especially in light of the dramatically increased mobility of younger players in today's game. Between age 15 and 23 a typical player might move club two or three times and each club may have a reasonable claim to have contributed to some extent to his development. It could therefore be argued that in affording each club the opportunity to benefit, the new system offers in this regard a more equitable mechanism. Against this sentiment we can set concern that the cut-off may create anomalies in the transfer market as clubs rush to secure a fee before players reach the age of 24, and the fear that otherwise broadly equivalent players may be treated quite differently due to the accident of their categorisation under the regulations. However, if the base rationale for compensation is conceded then it would seem appropriate to reward *all* the clubs that participated in a player's early development.

It has been argued above that in some narrow respects the new agreement may provide a fairer system than its predecessor: but is it the *best* system available? Assuming that the European Court could be persuaded that football clubs actually deserve compensation for staff training, which would be a major achievement in itself, one relatively straightforward, but nonetheless crucial question would remain to be answered. Under the Article 81(3) EC derogation matrix the Court is required to ask whether the object of facilitating youth development and training could be achieved by less restrictive means? This simple question presents a stern test for the new agreement. Undeniably there are other options. For example, it may be possible to establish a central fund by "top-slicing" TV and sponsorship income<sup>72</sup>. This fund could then disburse youth development money to football clubs of league and perhaps non-league status. This would facilitate an even distribution of funds among training clubs and provide a reliable and predictable source of income, avoiding the pitfalls of the past system, which yielded lottery-sized windfalls for the few lucky clubs that happened upon the young superstars of tomorrow, but precious little for the rest. Perhaps more importantly, this would permit the abolition of the transfer fee: footballers would be treated like ordinary employees, enjoying rights of labour mobility while remaining subject to common place contractual obligations. It would even be possible to fund regional training centres and/or centres of excellence to offer further support and co-ordinate training activities between clubs on a national basis and scale. Surely professional football could only benefit from such an approach?

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<sup>72</sup> Prior to their conversion to the new regime, FIFPRO argued cogently in favour of a solidarity pool mechanism, on which see further Moorhouse et al n26 supra.

In summary on this issue, the age 21/23 cut off point for compensation is the product of uncomfortable compromise between competing interests. It certainly does not sit well in either camp. In common with other compromises orchestrated on grounds of pragmatism or as a sop to industry, it is unlikely to be legally robust. It is difficult to insulate strained compromise from targeted litigation. The system is incongruous and unwieldy: it founders when the alternatives are considered, and considered they must be.

## **(ii) Player Contracts**

Player contracts are restricted to a minimum and maximum length of 1 and 5 years respectively, subject to national law. Despite a caveat which permits contracts for a different period where such are consistent with national law<sup>73</sup>, which curiously appears to undermine the whole basis of this provision, this term is fundamentally anti-competitive and potentially restrictive of the employment freedoms enjoyed by both player and club. In no other ordinary employment context would such restraint on freedom of contract be deemed reasonable. The agreement purports to justify the restrictions on the grounds of “contractual stability”. However, this clause does nothing to address the real cause of instability within the football industry, which is the increasingly prevalent tendency, manifested not just in players, but also by clubs and managers, to disregard contractual obligations and to do so in a frequently cavalier manner.

Consider the impact of these terms on the day to day business of football. First, it is in the nature of the game that players become available for short-term contracts throughout the season. Some, in particular those in the twilight of their careers, embark on temporary or even monthly contracts, often at smaller clubs. Such players deserve the right to seek employment without the fetter of a minimum one-year term. Secondly, and from the other perspective, injury-struck clubs are occasionally forced to employ additional players to provide temporary cover mid-season. A club that loses, for example, both its first team and reserve goalkeeper to injury for the remainder of a season must have the contractual freedom to appoint a suitable replacement on a temporary basis. The regulations restrict that liberty and impose considerable rigidity on a market mechanism that must surely remain flexible enough to cope with the common vicissitudes of the sport.

Although there is an expectation that the new system will be adopted for domestic application by national leagues in the EU, on its face it applies only to international transfers. There is a provision in the Preamble to the Basic Regulations obliging each national association to implement a similar system for domestic transfers.<sup>74</sup> However, unless or until this aspiration is honoured in all Member and Associate states, domestic contracts will be unrestricted in length. Consequently, it will be possible for Manchester United to sign a home goalkeeper to provide temporary injury cover, but if the club wishes to sign from overseas it would have to commit itself to a minimum one-year contract. This discriminates against inter-state labour mobility and is fundamentally offensive to Article 39 EC. Furthermore, a discrepancy between the rules for international and national transfers in this respect, which may be construed as an attempt to partition the active market in short-term player contracts along national lines, will inevitably create competitive distortions in player transfers contrary to

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<sup>73</sup> See Art. 4(2) Basic Regulations.

<sup>74</sup> These will be subject to approval by FIFA: Clause 3, Preamble to the Basic Regulations.

Article 81 EC.

### (iii) Sporting Sanctions

Of all the potentially contestable aspects of the new system, this issue has proved the most controversial. It is the threat of sporting sanction that FIFPRO focussed on in their early attacks on the proposed regulations and it is submitted that this is the most objectionable aspect of the entire system. The sanctions mechanism constitutes an attempt, albeit arguably a ham-fisted one, to buttress the contract system and counter the increasing tendency of players to break their contracts in pursuit of ever more lucrative financial rewards. The point is that although it maybe difficult to sympathise with the decision of a “star” player to abandon a £40,000 per week contract to sign with a bitter rival for £50,000 per week, or to manage a proliferation of such decisions on a European scale, that is precisely the freedom conferred by the Treaty.

If a breach occurs, without just cause or “sporting just cause”<sup>75</sup>, in the first two years of a contract a player may be subject to suspension from participation in “any official football matches”, except those for his former club, for a period of four months, or for a period of up to six months where aggravating circumstances exist<sup>76</sup>. In the case of a club breaching a contract or inducing such a breach, there will be a prohibition on registering *any* new player, either domestically or internationally, until the expiry of the second transfer window following the date of effective breach<sup>77</sup>. This may amount to a period of up to 12 months. Given that there are two transfer windows per year, one mid-season and one out-of-season, this would typically entail a minimum 5 month ban on the registration of new players. Again, this may cause real difficulties if a key player, such as a goalkeeper, is suddenly lost through injury, and it is as well to remember the occurrence of unpredictable injury is the very stuff of the game.

Any club signing a player who has unilaterally breached a contract during its “protected period” will be presumed to have induced the breach. Other sanctions of a “sporting nature” may be imposed on clubs including (but not limited to): fines; deduction of points; and exclusion from competition. In all circumstances under the new transfer regulations there is a right of appeal to the Football Arbitration Tribunal. Any agent involved in a breach is also subject to sanction, in accordance with FIFA’s Licensed Players’ Agents Regulations<sup>78</sup>. Although not a focus of this study, it should be noted that these regulations are also pregnable to litigation founded on the Treaty of Rome. For example, by art 15 an agent’s license can be withdrawn completely for various technical transgressions and by art 17 players can be suspended up to 12 months for engaging the services of an unlicensed agent. These penalties can scarcely be regarded as proportionate or legitimate.

The Basic Regulations and supporting paraphernalia are scrupulous in referring to the above

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<sup>75</sup> This will be established on a case by case basis. By Article 12 of the Application Regulations a player is entitled to terminate his contract with his club unilaterally for sporting just cause where he can show at the end of a season that he was fielded in less than 10% of the official matches played by his club. See also Art. 24 Basic Regulations.

<sup>76</sup> See Art. 22 Basic Regulations.

<sup>77</sup> See Art. 23(2)(a) Basic Regulations.

<sup>78</sup> For the full text see <http://www.fifa2.com/scripts/runisa.dll? M2: gp: 67173+PA/reg/index+E>.



penalties as “sporting sanctions”. Perhaps in formulating the new system the parties had one eye on the coetaneous (December 2000) conclusions of the EU working party on the specific nature of sport<sup>79</sup>. The Commission took that opportunity to indicate it would not interfere with genuine “sporting rules”. These were defined as rules inherent in a sport, those necessary for its organisation, or for the organisation of competitions. However, neither the previous Helsinki Report on Sport nor the subsequent Nice Declaration on Sport gave formal or specific support to the notion that sport should be awarded exemption from either the labour mobility or competition frameworks, and to date none exists.

Those seeking to champion the new system may also draw confidence from the approach of the European Court in *Deliège*<sup>80</sup>, where selection rules were applied by a judo federation to authorise the participation of athletes in international competition. These rules inevitably limit the number of participants, but were found not to restrict the freedom to provide services because the rules derived from an inherent need in the organisation of the event in question. However, it is not appropriate to draw an analogy between the rules in *Deliège* and the transfer system. In contrast to the rules applicable in *Bosman*, the selection rules at issue in *Deliège* did not determine the conditions governing access to the labour market by professional sportsmen. It is essential, both for the administration of high level sporting competition and for the maintenance of the quality of the competition, that rigorous qualifying filters be applied to limit the number of participants. As a consequence, the Court’s ruling in *Deliège* was predictable and justified. Contrary to *Deliège*, the new transfer agreement imposes not a qualitative entry threshold for competition, but direct economic restrictions on players, clubs and agents, and in the case of the “sporting sanctions” mechanism, an absolute prohibition on economic activity.

*Lethonen*<sup>81</sup> represents another recent judgment in which the specific characteristics of sport were deemed to qualify it for special treatment. It is similarly relied on by the proponents of a general exemption for sport, but it can be distinguished in like manner. In *Lethonen* the court stated that certain obstacles (e.g. rules preventing clubs from playing basketball players from other Member States in championship matches when these players’ names are entered after a given date) can be justified by reasons that are not of an economic nature but which relate to the particular nature and context of such sporting events and are thus of sporting interest only. However, as in *Deliège* the rules in this case were found to be administrative in nature and essential for the functioning of the sport, they were not imposed to restrict access to the labour market.

In order to obtain derogation from the Article 81 prohibition it is necessary to satisfy the criteria established by Article 81(3). These include, *inter alia*, Article 81(3)(a), which requires that a measure does not ‘impose on the undertakings concerned restrictions which are not indispensable to the attainment of (its) objectives’. The so-called “sporting sanction” arguably constitutes a draconian and disproportionate measure. If the object of the measure is to promote contractual stability, a more effective and proportionate response would be:

- (i) the universal adoption and implementation of punitive break clauses yielding traditional compensatory damages; and
- (ii) a points-penalty against the suitor club.

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<sup>79</sup> [Http://www.europa.eu.int/comm/sport/doc/ecom/a\\_doc\\_en.html](http://www.europa.eu.int/comm/sport/doc/ecom/a_doc_en.html).

<sup>80</sup> Joined Cases C-51/96 and C-51/97(Judgment 11 April 2000).

<sup>81</sup> Case C-176/969(Judgment 13 April 2000).

It is therefore submitted that it is unnecessary to restrict the economic freedom of any party in pursuit of the stated aim. Indeed, it could be said that the only true *sporting* sanction would be a points deduction from the culpable club. It is only this penalty that has a consequence that can be measured in sporting terms. All the other suggested penalties constitute economic sanctions that, with the exception of ordinary damages for breach of contract, are difficult to justify in the context of EU enshrined freedoms.

The most obvious criticism is nonetheless therefore a powerful one. In the wider commercial world loyalty is rewarded by contractual fidelity bonuses and, the universal remedy regarding unilateral termination of an employment contract is the right to sue for damages for breach of contract<sup>82</sup>. In the early days of its challenge, before it was lured back into the fold, FIFPRO indicated that its members would be quite prepared to accept the ordinary civil consequences of breach of contract<sup>83</sup>. There is no mainstream employment precedent to support the imposition of additional sanctions, including in particular the penalties embodied in the transfer rules, which may amount to what is effectively an absolute ban on an ex-employee working in his profession. To say nothing of the manifest infringement of Articles 39 and 81 EC<sup>84</sup>, this is also an egregious common law restraint of trade. A playing ban would be particularly serious because match fitness is an elusive condition that is achieved by playing first team matches on a regular basis. A lengthy suspension would have deleterious impact on the player's condition and this may affect his performance after the expiry of the ban. An entire season may be affected, and it is easy to forget that one season represents almost ten per cent of an average top class playing career. It is also inevitable that a player's chances of national team selection, and thus consequent career enhancement, will be prejudiced by the imposition of such a ban. When these serious penalties are balanced against the survival of a transfer "free-for-all", which may or may not inflict marginal negative effects on the game, one conclusion is hard to resist: the punishment does not fit the "crime". *Afortiori* all this is offensive to the proportionality principle that so profoundly influences the interpretation and application of the Treaty. One returns to draw the simple conclusion that if a football club wishes to retain a player it is on a contract, not a cartel, that the club should rely<sup>85</sup>. It is in broad theme of the European Court's judgment in *Bosman* that the organisation of the labour market in professional football should correspond to that of any other labour market<sup>86</sup>.

#### (iv) Transfer Windows and Restrictions

The regulations provide that transfers are restricted to taking place in one of two "transfer windows" per year. These comprise of a main out-of-season transfer period<sup>87</sup> and a mid-

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<sup>82</sup> That said, in practice, in most commercial sectors even this compensatory mechanism is routinely under-utilised or ignored as a matter of course.

<sup>83</sup> See Moorhouse et al n26 supra.

<sup>84</sup> For supporting comment on the likely illegality of restricting mid-contract transfers see: M. Thill, L'arret Bosman et ses implications pour la libre circulation des sportifs a l'interieur de l'U. E. dans des contextes factuels differents de ceux de l'affaire Bosman [1996] *Revue du Marche Unique Europeen* 89, 108-110.

<sup>85</sup> For supporting comment see Weatherill n25 supra pp.217-220 at 219.

<sup>86</sup> See generally on this: Weatherill n21 supra.

<sup>87</sup> Art. 2(1)(a) of the Application Regulations provides that the main registration period will start, at the earliest, when the national championship has ended and finish at the latest, before the subsequent national championship begins. This period should, in principle, last for no longer than six weeks.

season window<sup>88</sup> that the regulations stipulate will be strictly limited to transfers for “sport-related reasons” (such as technical adjustments to a team or the replacement of injured players) and “exceptional circumstances”<sup>89</sup>. As no further definition or clarification of these criteria is offered, further guidance on policy will presumably be formulated by FIFA. According to supporters of the new regime, the window system is designed to prevent “the constant merry-go-round of transfers”<sup>90</sup>, but it is easier to identify the anti-competitive aspects of these provisions than it is to prove the damaging effects of a liquidity in playing staff that they are supposed to prevent.

There has long been general concern and comment about the “harm” inflicted on the game by its overactive transfer market<sup>91</sup>. Unfortunately, amid vague blandishments concerning the disruption and malaise of criss-cross transfers, few specific problems are ever identified. In practice it is difficult to isolate the precise nature of the harm suffered and therefore it is hard to argue that the new regulations constitute an effective remedy. In turn, it is therefore difficult to measure the proportionality, benefits, or distribution mechanism of the implemented system. However, that is exactly what is required under the Article 81(3) derogation template.

Today’s professional football clubs sustain squads of ever increasing size, team selections change from one week to the next, especially at leading clubs and often reflecting the deliberate policy of a manager aiming to maintain a healthy air of competition for key positions and first team places. When other distortions, such as the impact of injury, are factored in, it is doubtful that a healthy transfer market contributes much to the general flux of the game. If both player and suitor club are convinced that the move is in their interests, harmful distortion or disruption seems a remote possibility: just how long does it take to change your shirt?

The second major restriction implemented in this context by the new system is that transfers are limited to one per player per season. Given the mercurial nature of the game and the relationships that underpin it, this is a daunting prospect for players who are in dispute with their manager or coach soon after a transfer. If a player is dropped from first team football it could be almost 12 months before he is permitted to exercise his right to of labour mobility. This constitutes an affront to commonsense, equity and the personal economic freedoms enshrined in the Treaty of Rome. The hiatus caused by this all too predictable scenario would inflict untold damage on any player’s career. Again it is pertinent to observe that one season is equivalent to approximately ten per cent of a typical player’s first class shelf life.

Both forms of transfer restriction may also impact negatively on clubs. Players, in one sense – ironically a sense that has been roundly criticised in other contexts in this analysis - are undoubtedly a club’s most valuable and easily disposable assets. It is a hard fact of the game that financially weak clubs and many small clubs occasionally need to be able to liquidate such assets at short notice to alleviate pressing cash flow problems or similar difficulties. The

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<sup>88</sup> Art. 2(1)(b) of the Application Regulations provides that the mid-season window should occur approximately in the middle of the season. This period should, in principle, last for no longer than four weeks.

<sup>89</sup> See Art. 2(1)(b) Application Regulations.

<sup>90</sup> Criticised, *inter alia*, by Mario Mantovani MEP, Written Question to the Commission, 20 December 2000 (OJ 2001/C174E/245).

<sup>91</sup> See for example, Football’s Crewe Cut, *Time Europe*, November 13 2000.

imposition of transfer windows and other restrictions will therefore restrict an economic freedom that is essential to the survival of many clubs.

Left unfettered, the transfer market is unlikely to overheat: there is a significant natural brake in the open system. There is a limit on the number of times that any given player will be susceptible to the advances of suitor club. Often players are people too, with young families and social investment in their local community. Most transfers will entail considerable personal upheaval and domestic disruption and they are unlikely to be entered into lightly, or with great (er) frequency.

### **Synthesis**

It is self-evident that professional football needs to provide the best possible training and development programs for its young players. The debate is about how best to advance this objective. Football's obsession with survival and reinvigoration of the transfer fee has clouded the search for a new improved system. Proposals to establish a central fund, or solidarity pool, carry with them distinct advantages over the status quo, in particular in terms of furnishing a mechanism for efficient, predictable and equitable distribution. More importantly, such a fund could achieve these aims without restricting the economic liberty of footballers in any way. The new system, whether Commission-sanctioned or not, appears legally vulnerable in this light.

In closing this analysis it is difficult to resist a slightly mischievous observation. It can be argued that the so-called "transfer merry-go-round" is in fact one of the most valuable assets of the football industry. For many years, and increasingly over the past decade, professional football has benefited from literally billions of pounds worth of free media exposure in the form of press speculation and coverage relating to its vibrant transfer market and the latest "big deal". This angle has fuelled interest in the game and enhanced the profile of its players. In turn this has provoked an increase in the price tag attached to football and helped to elevate the game to an unprecedented and unparalleled position on the world's sporting, media and marketing stage. More importantly, this tremendous level of exposure has helped football to gain a tentative foothold on the wider socio-political and pan-cultural stage, with access to influence and markets hitherto denied. To suppress the movement of players would, it could be argued, be to deny the game the oxygen of publicity, though it is doubtful whether this intangible benefit warrants incursions into the fundamental employment rights of players.

### **Commercial Ramifications of the New Regime**

In addition to its legal implications, the new transfer system will have substantial commercial implications for professional football clubs, both in terms of substance - clubs' underlying financial position – and form - how that position is reported in the financial statements.

#### **Financial substance**

Before considering likely commercial implications arising from the new transfer system, it is worth reflecting on the commercial implications of *Bosman*. Contrary to some expectations, transfer market activity did not diminish following the judgment in December 1995. Rather, evidence suggests that spending on player acquisitions has continued to increase, both in

absolute terms<sup>92</sup> and as a percentage of clubs' total income<sup>93</sup>. Arguably, however, this growth is reflective more of changes in clubs' earning capacities as opposed to conditions surrounding the operation of the labour market. In particular the unprecedented levels of television income now being earned by clubs in leagues like the FA Premiership<sup>94</sup> has encouraged top clubs to continue to bid up the cost of players.

Notwithstanding these comments it can be argued that the new system is likely to have a deflationary effect on future transfer fees. At present fees are determined through the operation of a market<sup>95</sup>. While in the past some economists have assumed that the transfer fee is established at the selling club's reservation price<sup>96</sup>, recent empirical work lends credence to the view that transfer fees are in fact the outcome of a bargaining process<sup>97</sup>. This process is dependent on the attributes of the player concerned as well as the characteristics of the buying and selling club. The evidence suggests that observed transfer fees in fact tend to exceed the selling club's reservation price, with the selling club being able to capture part of the differential between its reservation price and the buying club's maximum bid price.

Under the new system, there is likely to be downward pressure on the level of transfer fees as this bargaining process is replaced by more predictable and transparent compensation for breach of contract. This is to be determined by reference to objective criteria such as the financial conditions of the current contract and any unamortised fee paid previously by the former club in respect of the same player<sup>98</sup>. However, not all pressure, is likely to be downward. The compensation criteria set out in Article 22 apply only where a compensation amount has not been specifically provided for in the contract<sup>99</sup>. One rational response by clubs, therefore, may be to insert a clause into a player's contract specifying the minimum compensation payable in the event of a player unilaterally breaching his contract. Player contracts in countries like Spain already include a breach compensation figure which applies to any transfer which takes place during the contract period<sup>100</sup>. Furthermore, the regulations say nothing about a mutual agreement between a player and his existing club to terminate his contract prematurely thus allowing him to join a new club. In this situation the new club may be happy to recompense the player for buying out his contract; to all intents and purposes a transfer fee<sup>101</sup>.

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<sup>92</sup> In 1995/96, the season in which the Bosman judgment was published, total spending on transfers by English clubs was £213m. By 1998/99 this had risen to £317m, reaching £340m in 1999/2000. See: Boon and Jones n3 supra p27. Net transfer fees paid by the Scottish Premier League clubs have risen from £12m in 1995/96 to £40m in 1999/2000. See: *The Pricewaterhouse Coopers Financial Review of Scottish Football for Season 1999/2000* (October 2001, Glasgow).

<sup>93</sup> Total spending on transfers by English clubs in 1999/2000 constitutes a record 31.5% of clubs' total income, Boon and Jones n3 supra p27.

<sup>94</sup> For example see: S. Morrow, *The New Business of Football*, (Basingstoke: Macmillan, 1999), pp. 4-8; S Dobson and J Goddard, *The Economics of Football* (Cambridge University Press, Cambridge, 2001), pp. 80-84, 436-437.

<sup>95</sup> Morrow supra pp. 30-34.

<sup>96</sup> S Szymanski and R Smith, *The English Football Industry: Profit, Performance and Industrial Structure* (1997) 11 *International Review of Applied Economics* 135

<sup>97</sup> Dobson and Goddard n94 supra pp. 231-236.

<sup>98</sup> See Art. 22 Basic Regulations.

<sup>99</sup> See Art. 22 Basic Regulations.

<sup>100</sup> J Porquera. and AL Jurado., *Adapting to the Ruling: A New Scenario in the Players' Market* (paper presented at the European Football Finance Conference, Milan, 2001). For example, the buy-out fee in Rivaldo's contract with Barcelona is £106 million. See Football in crisis over transfer deadline, *The Times*, 22 September 2000.

<sup>101</sup> R Simmons, *Making sense of the FIFA/UEFA Proposals to Reform the Football Transfer System: Singer & Friedlander Review 2000-2001 Season 8* (2001).

One implication of the new system is that clubs may find it more difficult to raise funds. Funding decisions made by markets and bankers rely on judgment, both of quantitative factors (e.g. will the business have sufficient cash to meet its interest payments as they fall due; will it have sufficient profit to pay dividends) and qualitative factors (e.g. the quality of a club's directors)<sup>102</sup>. However, a further factor is (asset) security of lending. In the past, for example, it was not uncommon for banks to put in place covenants with clubs whereby the bank was entitled to a fixed percentage of future transfer fees. One consequence of the new transfer system is that clubs now effectively have less security in the form of assets to offer to banks or other lenders, making it potentially more difficult to raise funds in the short term. Arguably, however, this provides an opportunity for clubs. By their nature transfer returns are uncertain or contingent. Forcing directors to focus on more sustainable income sources can only be beneficial for the long-term financial health of clubs. Less beneficial for long term sustainability, however, is the anticipated upward pressure on players' wages. As was demonstrated post-*Bosman*<sup>103</sup>, deregulation of football's labour market combined with the decreasing need for clubs to pay transfer fees is likely to result in top players capturing the economic rents available in the form of increased wages and signing on fees. In other words, there will be an increase in funds flowing out of the industry.

The new system at present applies only to international or cross-border transfers. However, it is expected that national associations should implement a similar system for domestic transfers<sup>104</sup>. This could have potentially serious implications for many smaller clubs in particular. One issue of concern is the condition that, in administrative terms, loan players are to be treated the same as transferred players<sup>105</sup>. As a player can only be registered once per annum, the implication of this requirement is that loans must be for twelve months. A second issue of concern is the requirement that transfers can only take place during stipulated transfer windows<sup>106</sup>. The potential implications are illustrated by recent events at the Scottish First Division club, Airdrieonians. The club was placed in provisional liquidation in February 2000. While in provisional liquidation, in one afternoon in March 2001, the club signed no less than twelve players plus two trialists<sup>107</sup>. Domestic compliance with the new system would have meant that these players could only have been signed during one of the transfer windows and moreover could only have been signed if they had not had their registration transferred from one club to another, whether on a permanent transfer or on loan, throughout the previous 12 months. In practice, therefore, it is likely that Airdrieonians would have been unable to fulfil its fixtures and hence would have been expelled from the Scottish Football League.

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<sup>102</sup> S. Morrow Accounting for Football Players. Financial and Accounting Implications of 'Royal Club Liégeois and Others versus Bosman' for Football in the United Kingdom (1997). 2 *Journal of Human Resource Costing and Accounting* 55.

<sup>103</sup> Boon and Jones n3 supra p. 17. The compound annual growth rate of wages and salaries in the 4 seasons since the Bosman judgment has been 30.4% for the FA Premiership and 21.9% in The Football League, compared to compound growth rates for turnover of 22.2% and 15.7% respectively.

<sup>104</sup> These will be subject to approval by FIFA: Clause 3, Preamble to the Basic Regulations.

<sup>105</sup> See Art. 5(2) Basic Regulations.

<sup>106</sup> See Art. 2(1) Application Regulations.

<sup>107</sup> See, for example, Great Expectations: The Man in Charge of Airdrie's Revival, *The Sunday Herald*, 7 October 2001.

## Financial reporting form

The increased investment in players discussed previously has also had a substantial impact on clubs' balance sheets. Financial Reporting Standard (FRS) 10 *Goodwill and intangible assets* was introduced by the Accounting Standards Board in 1997. Although it was introduced to standardise the way in which multinational companies accounted for intangible assets like brand names and goodwill arising out of the acquisition of other companies, FRS 10 has also had major implications for football clubs' financial statements.

Prior to the introduction of FRS 10, the majority of clubs simply charged or credited transfer fees to the profit and loss account in the year in which the transfer took place (i.e. transfer fees were treated as income or expenses of the period)<sup>108</sup>. In accordance with FRS 10<sup>109</sup>, where a club signs a player, it is required to recognise the cost of acquiring that player's registration as an intangible asset on its balance sheet. This amount is then amortised (ie incrementally depreciated over a specified period) or written off through the profit and loss account over the length of his contract. FRS 10 does not, however, permit the recognition of home grown or internally generated players on clubs' balance sheets<sup>110</sup>, though the accounting policy adopted by some major clubs involves the recognition of costs associated with acquiring and retaining football personnel as intangible fixed assets<sup>111</sup>.

A likely consequence of the new transfer system is that it will result in the balance sheets of several clubs being depleted. Where compensation is payable, then in accordance with FRS 10, the club acquiring the player's registration will recognise that amount as an intangible asset, rather than as previously recording the asset at the market determined transfer fee. However, many players, both home-grown players and players who move clubs at the end of their contracts, will not in future be recognised as assets on clubs' balance sheets, instead being treated similarly to fixed term contract employees in other organisations. Until now football players have been the exception rather than the rule in terms of employees' services being recorded on corporate balance sheets. While debate about recognising human resources as assets in the financial statements has a long history in the academic literature,<sup>112</sup> to date regulatory bodies such as the Accounting Standards Board have shown scant enthusiasm for encouraging human resource accounting in practice.

One risk for clubs flowing from depleted balance sheets concerns UEFA's proposed football licensing system, scheduled to be introduced in the 2002-03 season. Under current proposals, clubs will only be licensed to participate in UEFA's competitions such as the Champions' League if they meet certain financial criteria set out in the UEFA Club Licensing Manual<sup>113</sup>. One criteria is that clubs must be able to forecast positive net assets at the end of the season<sup>114</sup>. Based on their year 2000 accounts, however, seven of the 20 FA Premier League clubs along with one of the 10 Scottish Premier League clubs would have reported net liability positions were it not for the amounts recognised on their balance sheets as intangible

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<sup>108</sup> Morrow n94 supra 124-132.

<sup>109</sup> FRS 10 *Goodwill and intangible assets*, para. 9.

<sup>110</sup> FRS 10 *Goodwill and intangible assets*, paras. 2, 14. See Morrow n94 supra pp. 129-130.

<sup>111</sup> For example, this policy was adopted by Celtic plc in its accounts for the year ended 30 June 2001.

<sup>112</sup> See, for example, E. Flamholtz, *Human Resource Accounting* (Dickenson Publishing Press, Encino, California, 1974), J.S. Hekimian and C. Jones, Put People on Your Balance Sheet (1967) Jan-Feb *Harvard Business Review* 110, J.E. Grojer and U. Johanson, *Human Resource Costing and Accounting* (Joint Industrial Safety Council, Stockholm, 1991).

<sup>113</sup> <http://www.uefa.com/uefa/Regulations/licensing.html>

<sup>114</sup> UEFA Club Licensing Manual Article IV. See <http://www.uefa.com/uefa/Regulations/licensing.html>

fixed assets in respect of players' registrations<sup>115</sup>. A further three clubs, two English and one Scottish, were already in a net liability position. Furthermore, in the wider economic environment the diminution of reported assets may restrict the ability of some clubs to raise capital via, for example, stock exchanges. The problem of financial reporting failing to adequately reflect corporate assets is not, of course, unique to football clubs<sup>116</sup>. For example, a large proportion of the assets of "new economy" companies or research and development-based companies are also intangible in nature.

As discussed previously, a further feature of the new system is that an objective mechanism now exists which relates compensation to clubs for players who are transferred, to the original investment made by a club or clubs in training and developing those players<sup>117</sup>. Consequently clubs might be expected to maintain fuller records of their investment in training players. In accounting terms, this investment in training and development is made in the expectation of generating future revenues, either through the players performing their trade (playing football) and hence helping to generate revenues through ticket sales, television income, merchandising etc. or through the player being transferred and compensation being received. Arguably therefore this investment is an (intangible) asset of the football club. Treating this training investment as an asset would improve matching between costs incurred and revenue generated for clubs and would also improve their likelihood of reporting positive net asset positions on their balance sheets.

However, it is questionable whether the original investment could be recognised as an asset under existing accounting rules given that it fails to meet the specific criteria for recognition set out in FRS 10 paragraphs 2 and 10. Specifically, an internally developed intangible asset may be recognised only if it belongs to a homogeneous population of assets that are equivalent in all material respects and that an active market, evidenced by frequent transactions, exists for that population of assets<sup>118</sup>. There is however another accounting standard which deals with intangible assets, namely Standard Statement of Accounting Practice (SSAP) 13 *Accounting for Research and Development*, which potentially offers a route to improved financial reporting of home grown players. Under SSAP 13 a company may defer development expenditure to be matched against revenue of future periods if that expenditure complies with certain restrictive conditions set out in paragraph 25 of that standard. A key condition for deferral is that the outcome of a particular project has to have been assessed with reasonable certainty as to its ultimate commercial viability. If these conditions are met then development expenditure may be recognised as an asset on the balance sheet and amortised over future periods, rather than immediately writing it off as an expense through the profit and loss account.

In football clubs, investing in training players remains a very uncertain process, both in footballing and financial terms. The fact that a club invests heavily in training young players does not necessarily mean that it is training them to a high standard. Nor does it mean that these players will ultimately provide economic benefits to the training club. In the case of developing football players, clubs are clearly not in a position to assess with reasonable certainty whether investment in any one player might create a commercially viable asset. Furthermore, despite the objective compensation system, external evidence of this value

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<sup>115</sup> Boon and Jones n3 supra, Pricewaterhouse Coopers n92 supra.

<sup>116</sup> See, for example, C. Vance, *Valuing Intangibles: A Discussion Paper* (The Institute of Chartered Accountants in England and Wales, London, 2001).

<sup>117</sup> See Arts. 5-9 Application Regulations.

<sup>118</sup> Morrow n94 supra p. 129.



added component remains reliant on aspects of an imperfect transfer market, namely the quality and competence of individual managers and directors to identify which players are worth buying and for how much.

However, in terms of improving the financial reporting of the investment made by clubs in training young players, it is important to remember that the new compensation system does not work on an individual player basis. While some effort has been made to tie the transfer fee calculation back to training costs, individual fees are referable to a divisional average and not the amount spent on a particular player. Hence perhaps the way forward is for clubs to be permitted to recognise their investment in training and development of young players collectively as an intangible asset, in a manner similar to that set out in SSAP 13 for development expenditure on individual projects. This asset like any other would then be subject to amortisation with any compensation received on the transfer of a player being treated as a part-disposal of that (collective) asset.

## **Conclusions**

The UEFA-FIFA Commission brokered agreement represents an uneasy compromise between the basic employment rights of players and the need for stability and continuity in the organisation of professional soccer. As we have shown it is vulnerable to challenge in several respects in terms of EU law (challenges which would almost certainly succeed) and the all pervasive restraint of trade doctrine represents an additional or alternative legal weapon for players and agents in England and Scotland. This exposure aside there is a strong prospect that the new system will represent the settled framework for player movement for the foreseeable future if only because of the powerful political forces which have rallied to its support. Its long term future however seems doubtful given the continued failure of its supporters to convincingly resolve the fundamental issue as to precisely why professional soccer players should continue, almost uniquely, to be burdened by these restrictions in the labour market.

In the meantime much will depend on the manner in which the detailed implementing regulations are interpreted and applied in concrete cases. It is here that the new dispute resolution machinery will have play a vital role in developing a transfer fee system jurisprudence which over time provides clubs, players, agents and legal advisers with sorely needed clarity and predictability on several aspects of the regulations. Indeed if the personnel of the Arbitration Tribunal for Football are of the same calibre in terms of sports law acumen and experience as those sitting in the Court of Arbitration for Sport<sup>119</sup> professional soccer will have established a high quality dispute resolution forum which could perhaps eventually embrace a wide ranging jurisdiction within the industry.

While the agreement preserves a transfer fee system, clubs which have adopted an ethos of

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<sup>119</sup> For an overview of the jurisdiction, powers, procedures and jurisprudence of this body see further: P Morris and P Spink, *The Court of Arbitration for Sport: A Study of the Extrajudicial Resolution of Sporting Disputes* in WJ Stewart (Ed) n9 supra Chap 4; Gardiner et al n6 supra pp252-262.

human resource accounting are now confronted with the need to reappraise their accounting practices and, more seriously for those whose shares are quoted or seeking loan finance, with the prospect of possible significant diminution in the values of their playing squads. The longer-term commercial implications of the new regime are hard to predict at this juncture but it is probable that some clubs may adopt a more conservative acquisitions policy in the transfer market.

Finally, it may be that the enduring legacy of the new regime will prove to be explicit incorporation of a limited redistribution mechanism in the form of the solidarity fund. Recognition of this in the context of the transfer fee system is important given that such a model is often commended as striking a more appropriate balance between the labour mobility of players and the wider interests of the sport, in particular preserving the continued existence of smaller clubs and with it a comprehensive professional structure, than the rather “hit and miss” traditional market based transfer fee system. Since recognition of the special status of sport in the EU constitutional superstructure appears a remote prospect at the current juncture, the most likely long term scenario is that the new regime will represent a staging post on the journey towards the total abolition of the transfer fee system and its replacement by a wealth redistribution model which limits payments consequent upon a player moving clubs to specified training and development costs incurred earlier in his career. In other words the new regime is almost certainly the latest chapter in rather than the end of a long running saga.