

THE FRAGMENTED REGULATION OF TRANSFER SYSTEM IN SPORTS – A HALF-WAY TO SLAVERY?

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Abstract: This article deals with remaining restrictions of free movement of players between sports clubs due to specifics of the transfer system. The article argues that the famous Bosman case has not liberated players yet. They remain assets of clubs. The transfer system is a product of sports associations' regulations. Transfer rules are binding for players by virtue of their contracts. Athletes are members of sports associations and have no choice but to accept their quasi-legislative rules. The article describes the environment of excessive compensations required for transfers of players in football and ice-hockey, restricting their free choice to find another alternative club. These situations are evaluated from the European, international and national perspective.

Keywords: Bosman, transfer fee, FIFA, football, ice-hockey, sports law, EU law

I. INTRODUCTION

Regulations made by sports governing bodies of sports associations and their interpretation by the Court of arbitration for sport (CAS) evolve into non-state transnational law.² Sports governing bodies function in a monopolistic position with strong enforcement power by means of disciplinary proceedings. Athletes are members of sports associations and *have no choice but to accept the association's regulations*.³ Sports sector's regulation very often conflicts with the general law and rights of athletes. Indeed claimed autonomy by sports governing bodies and their freedom of association is not without limits.⁴ In other words, unchecked associations risk producing the very tyranny, inertia and moral abuse that freedom of association is supposed to provide an antidote for.⁵

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² About development and nature of transnational law in sport see DUVAL, A. The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman. In: Antoine Duval, Ben Van Rompuy (eds.). *The Legacy of Bosman, Revisiting the Relationship between EU Law and Sport*. Hague: T.M.C. Asser Press/Springer-Verlag GmbH, 2016, pp. 82–116.

³ VAN ROMPUY, B. The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations. *Maastricht Journal of European and Comparative Law. Special issue: 20 years after Bosman: the new frontiers of EU Law and sport*. 2015, Vol. 22, No. 2, p. 206.

⁴ According to Chappelet, autonomy is not self-evident right, see CHAPPELET, J. L. The autonomy of sport and EU. In: Jack Anderson, Richard Parrish, Borja García (eds.). *European Law and the governance of sport. Handbook on EU Sports Law and Policy Research*. Cheltenham/Northampton: Edward Elgar Pub. Handbooks in European Law series, 2018, p. 171.

⁵ GEERAERT, A. The Autonomy of the Olympic and sport movement. In: Dikaia Chatziefstathiou, Borja García, Benoit Séguin (eds.). *Routledge Handbook of the Olympic and Paralympic Games*. London: Routledge, 2021, p. 252.

This article evaluates surviving restrictions in case players wish to transfer between two clubs. The inflated transfer market and the possibility to receive significant financial reward for the transfer of a player is driving unsavoury practices, which may lead to the exploitation of player.⁶ Should professional player be banned from any football related activity until he pays excessive compensation over eleven millions EUR because he wanted to change his employer? Is it reasonable, if parents have to buy their own child's transfer to another club of their choice, because the new club cannot afford to pay the transfer fee? These few examples are result of the operation of transfer systems. According to Beloff at al. transfer rules “impose a scheme of player registration such that a player becomes registered with a particular club upon joining it. Registration confers the right to play and must relate to a single club at any one time. Any other club wishing to employ that player must pay the first club a transfer fee in order to purchase the player's registration.”⁷ In other words, “registrations are held or owned by the club, not the players themselves.”⁸ Transfer systems may differ in their detail from one sport to another but they all share common features described above.⁹

Origins of the transfer system come from English football established in 1880s and the system went global and was adopted by leagues and governing bodies world-wide.¹⁰ Sports officials defend transfer system for variety of reasons. The football federations wanted to guarantee a reasonable competitive balance among the clubs in a league by preventing the concentration of all playing talent in a few large-market clubs.¹¹ Another objective of transfer system is to encourage the recruitment and training of young players. According to FIFA small clubs would stop investing in players for fear that they would lose players to large market clubs without any type of compensation once the player was of contract age.¹²

In 1995 in the Court of Justice of EU (CJEU) came arguably the most important sports law decision of all time.¹³ In the famous *Bosman* case¹⁴ CJEU decided, that EU law of free movement of persons precluded payment of transfer, training or development fees at the

⁶ KOS, D. *Technical Paper, FIFA Transfer system reform – analysis and recommendations*. Council of Europe. May 2021, p. 32.

⁷ BELOFF, M., KERR, T., DEMETRIOU, M., BELOFF, R. *Sports Law*. 2nd edition. Oxford and Portland: Hart Publishing, 2012, p. 98.

⁸ BOYES, S. Human rights at the intersection of EU law and sport. In: J. Anderson – R. Parrish – B. García (eds.). *European Law and the governance of sport. Handbook on EU Sports Law and Policy Research*, p. 132.

⁹ BELOFF, M., KERR, T., DEMETRIOU, M., BELOFF, R. *Sports Law*. London: Hart Publishing, 2012, p. 98.

¹⁰ See GARCÍA, B. He was not alone: *Bosman* in Context. In: A. Duval – B. Van Rompuy (eds.). *The Legacy of Bosman, Revisiting the Relationship between EU Law and Sport*. p. 16, citing McARDLE, D. *From Boot Money to Bosman: Football, Society and the Law*. London: Cavendish, 2000.

¹¹ KÉSENNE, S. In: W. Andreff – S. Szymanski *Handbook on the Economics of Sport*. Cheltenham/Northampton: Edward Elgar, 2006, p. 636.

¹² EHLERT, A. *Education Fee System Feasibility Study*. IIHF, 2010, p. 58 (unpublished material, copy with the author).

¹³ SCHWAB, B. When We Know Better, We Do Better: Embedding the Human Rights of Players as Prerequisite to the Legitimacy of Lex Sportiva and Sport's Justice System. *Maryland Journal of International Law*. 2017, Vol. 32, No. 1, p. 23.

¹⁴ Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463.

end-of-contract of professional football players, nationals of one Member State of EU, when moving to a club from another Member State of EU. The football's transfers required world-wide alteration and this is what occurred.¹⁵ In the light of competition law, the European Commission oversaw this process of creation of new transfer rules – The 2001 FIFA Regulations on the Status and Transfer of Players (RSTP).¹⁶ The global application of RSTP, striving to balance freedom of movement of players and aims of the transfer system under the supervision of European Commission, is the main reason why football examples shall prevail in this article in order to learn lessons for other sports.

For comparison, attention shall be paid to ice-hockey, which illustrates a more fundamental problem noted by Weatherill, that arises if cross-border transfer fees are outlawed, while domestic fees are permitted, because the *Bosman* case did not preclude transfer fees paid within one Member State of EU.¹⁷ Wise and Meyer also warned that the *Bosman* decision would likely have repercussions on ice-hockey, including scenario that post-contractual transfer fees shall come under further attack according to competition law at national level.¹⁸

This article submits arguments, that the consolidated spillover of the *Bosman* case to advance the freedom of movement of players has not been complete yet. Gaps remain. Moreover, despite “EU exports its norms,”¹⁹ CAS went its own way, namely interpreting the level of compensations for the breach of ongoing contract according to RSTP, because the *Bosman* case covered only scenario, when player's contract with his former club expired. Finally, the *Bosman* case concerned only professional players.

Players therefore remain the main asset of clubs, both in terms of their sporting value in the service for the teams for which they play and from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club.²⁰ Players often must continue using different national, European and international jurisdictions with various levels of thresholds to confront the transfer system.²¹ This brought players to very dif-

¹⁵ WEATHERILL, S. *Principles and Practice in EU Sports Law*. Oxford: Oxford University Press, 2017, pp. 225–6.

¹⁶ In detail about creation of RSTP see DUVAL, A. *The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman*. pp. 82–116. The latest updated version of 2021 RSTP: In: *digitalhub.fifa.com* [online]. January 2021 [2021-09-30]. Available at: <<https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-january-2021.pdf?cloudid=g1ohngu7qdbxyo7kc38e>>.

¹⁷ WEATHERILL, S. *Collected Papers. European Sports Law*. The Hague: T.M.C. Asser Press, 2007, p. 107.

¹⁸ WISE, A., MEYER, B. *International Sports Law and Business. Volume 2*. Alphen aan den Rijn: Kluwer Law International, 1997, p. 1118, 1056.

¹⁹ WEATHERILL, S. *Principles and Practice in EU Sports Law*. Oxford: Oxford University Press, 2017, p. 225 (citing A. YOUNG's *The European Union as a Global Regulator? Context and Comparison* JEPP, 2015).

²⁰ CAS 2007/A/1359 *FC Pyunik Yerevan v. E., AFC Rapid Bucuresti & FIFA*, award of 26 May 2008. Players can be defined as intangible assets according to International Accounting Standard 38, see BENGTTSSON, M., WALLSTRÖM, J. Accounting and disclosure of football player registrations: Do they present a true and fair view of the financial statements? A study of Top European Football Clubs. Master's thesis within accounting. Jönköping University Business School. In: *diva-portal.org - Jönköping University Business School* [online]. 2014 [2021-05-07]. Available at: <<http://www.diva-portal.org/smash/get/diva2:721716/FULLTEXT01.pdf>>, p. 2, citing MORROW, S. Accounting for Football Players. Financial and Accounting Implications of 'Royal Club Liégois and Others v Bosnian' for Football in the United Kingdom. *Journal of Human Resource Costing and Accounting*. 1997, Vol. 2, No. 1, pp. 55–71.

²¹ Boyes compares the level of thresholds according to EU and human rights law in BOYES, S. *Human rights at the intersection of EU law and sport*. 2018, p. 121.

difficult life situations, which need to be resolved and this article attempts to contribute to this uneasy goal.

II. THE ORIGINAL SPORTS NETWORK

In order to understand the transfer system, it is necessary to describe the environment of its operation and the original pyramid structure of sports. In general, the norms governing sports bodies, the relationship between members and between the members and the body itself, and other matters, are set forth in the formation documents and in the statutes/bylaws.²² These rules usually include, among others: rules of the game and access to the competitions, definitions of disciplinary offences and sanctions enforced by an independent sports tribunal.²³

In the introduction to this article it was mentioned that transfer rules originated in England. The same is true for the governance of international sports associations. A world governing body FIFA, modeled on the English FA, was established in 1904 to standardize conduct and promote international competition.²⁴ It included the system of promotion and relegation, which is practiced when leagues are structured in clearly defined hierarchies and league rules require that worst-performing teams, based on some agreed measure, are automatically sent down to their immediately junior league at the end of the season, to be replaced by the best-performing teams in that junior league.²⁵ Other team sports in Europe and elsewhere adopted the system.²⁶

Currently European model of sport is built as a pyramid with tradition of promotion and relegation as stated above. The traditional pyramidal structure of sport governance put governing bodies firmly at the top.²⁷ Then come the professional clubs, along with other interested actors within individual countries, the 'grass roots' which include regional associations and amateur bodies.²⁸ Athletes were relegated mostly to the bottom of the structure, without a major say in strategic decisions.²⁹ In other words, 'a tightly woven network of rules is applicable from the top to the bottom of the pyramid of the sports organizations.'³⁰ An important feature of the pyramidal structure is so called *Ein-Platz Prinzip*,

²² EHLERT, A. *Education Fee System Feasibility Study*. p. 15. Ehlert explains that the relationship established in these documents is contractual in nature and either expressly or impliedly binds all stakeholders of the "contract" to the sport body's rules and regulations.

²³ See in detail BELOFF, M., KERR, T., DEMETRIOU, M., BELOFF, R. *Sports Law*. p. 30.

²⁴ ROSS, S., SZYMANSKI, S. *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers*. Stanford: Stanford University Press, 2008, p. 122.

²⁵ *Ibid.*, p. 41.

²⁶ *Ibid.*, p. 122.

²⁷ GARCÍA, B., De WOLFF, M. European Law and the Governance of Sport. In: J. Anderson – R. Parrish – B. García, Borja García. (eds.). *European Law and the governance of sport. Handbook on EU Sports Law and Policy Research*. p. 292.

²⁸ WEATHERILL, S. *Collected Papers. European Sports Law*. 2014, p. 265.

²⁹ GARCÍA, B., De WOLFF, M. *European Law and the Governance of Sport*. p. 292.

³⁰ BADDELEY, M. The Extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn. *International Sports Law Journal*. 2020, Vol. 19, No. 1–2, p. 5. See FOSTER, K. Can Sport be Regulated by Europe? In: A. Caiger – S. Gardiner (eds.). *Professional Sport in the EU: Regulation and Re-regulation*. Den Haag: T.M.C. Asser Press, 2000, p. 57.

which entails that only one federation on the national and international level can represent a certain sport.³¹ This system is therefore more global with a hierarchy of governance and regulation up to an international sports federations based on national governing bodies.³²

Recently the General Court of EU condemned conflict of interest exercised by the International Skating Union (ISU) when ISU rules provided for severe penalties for athletes taking part in speed skating events not recognised by ISU.³³ The trend should therefore be for the future, as Geeraert described, “de facto transformation of the pyramid into governance network.”³⁴ One more observation should be emphasized in relation to the operation of transfer system and its aims mentioned above, namely competitive balance and the need to encourage the recruitment of young players. According to Weatherill European model expects some vertical solidarity to support the grass roots by the elite level of competitions but this commitment to vertical solidarity may be only skin-deep in modern professional sports.³⁵ This will be evident in the article below as well.

On the other hand the North American professional leagues are separate self-governing “capitalist venture”, having very little relation with international governing bodies.³⁶ The North American model is different. In simple terms the divide is that North American competitions tend to be closed with the same teams contesting the championship in a league in each season whereas in Europe an open system of promotion and relegation between divisions is the norm.³⁷ There is no way in for a club in North America – except by buying up a franchise, and moving the club from one city to another.³⁸ It was mentioned above by Weatherill that the European model expects some vertical solidarity to support the grass roots by the elite level of competitions. The North American sport mentality is focused on parent contributions for education and training of minors until they contract top clubs and there are no compensation transfer fee systems when players move among clubs, resp. some scholarship funds may exist.³⁹ As far as professional sports environment is concerned, labour markets in North America are highly regulated with restrictions such as player drafts and salary caps, and product market restrictions such as revenue sharing, whereas in Europe these types of restrictions have been either entirely absent or much

³¹ Van KLEEF, R. The legal status of disciplinary regulations in sport. *The International Sports Law Journal*. 2014, Vol. 14, No. 1-2, p. 25. Example of football pyramid is as follows: FIFA is an association governed by Swiss law. Members of FIFA are national associations, which are groupings of amateur or professional football clubs. National associations may also form confederations. One of them is UEFA, which is association of national football associations in Europe. Specific associations of professional leagues can be established by professional clubs.

³² FOSTER, K. *Can Sport be Regulated by Europe?* p. 57.

³³ Case T-93/18 *International Skating Union v Commission* EU:T:2020:610.

³⁴ GEERAERT, A. *The EU in International Sports Governance. A Principal-Agent Perspective on EU Control of FIFA and UEFA*. London: Palgrave Macmillan, 2016, p. 54.

³⁵ WEATHERILL, S. *Principles and Practice in EU Sports Law*. pp. 133–4.

³⁶ FOSTER, K. *Can Sport be Regulated by Europe?* p. 57.

³⁷ BORLAND, J. The production of professional team sports. In: W. Andreff – S. Szymanski (eds.). *Handbook on the Economics of Sport*. pp. 24.

³⁸ WEATHERILL, S. *Principles and Practice in EU Sports Law*, pp.133–4.

³⁹ EHLERT, A. *Education Fee System Feasibility Study*, p. 50.

less prevalent.⁴⁰ Such player restrictions are exempt from antitrust laws when they are set forth in collective bargaining agreement between management and players unions (subject to certain conditions set forth in case law).⁴¹

This article will continue describing the topic of transfer restrictions within the European model of sport and the North American model was mentioned here just for the sake of completeness. Some bridge between both worlds exists for the players. All of the professional sports leagues in the United States have entered into agreements with foreign leagues or athletic organizations, that regulate the international movement of players.⁴² For example in ice-hockey the International Ice Hockey Federation (IIHF) acts as a mediator, allowing the National Hockey League (NHL) and IIHF member bodies to negotiate players transfer agreements amongst themselves.⁴³

III. IN SEARCH OF BALANCED TRANSFER SYSTEM

Since EU is now by far the largest trading block in the world, its multi-national rules are a very important part of international law.⁴⁴ Especially the interpretation of EU Law in the Court of Justice's jurisprudence. It is well established principle of EU trade law that both the ends pursued and the means employed by restrictive measure must be justified.⁴⁵ This balancing took place in *Bosman* case. According to CJEU the transfer rules must pursue a legitimate aim compatible with the Treaty and justified by pressing reasons of public interest, resp. application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose.⁴⁶ The CJEU admitted, that in view of the considerable social importance of sporting activities and in particular football in the EU, the aims of maintaining a balance between the clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.⁴⁷ The Court was plainly receptive to an adjusted regime, which addressed the legitimate concerns it had mapped in the ruling.⁴⁸ Only the system of which *Bosman* had fallen foul was damned.⁴⁹ When *Bosman's* contract expired, he had

⁴⁰ BORLAND, J. *The production of professional team sports*. pp. 24–25.

⁴¹ See WISE, A., MEYER, B. *International Sports Law and Business*. Volume 2. p. 1085.

⁴² KURLANTZICK, L. The Tampering Prohibition and Agreements between American and Foreign Sports Leagues. *Columbia Journal of Law and the Arts*, 2008-2009, Vol. 32, No. 3, p. 299.

⁴³ ZDROJESKI, K. International Ice Hockey: Player Poaching and Contract Dispute. *Case W. Res. J. Int'l L.* 2010, Vol. 42, No. 3, p. 781.

⁴⁴ CAMERON, G. III. *International Business Law Cases and Materials*. Van Rye Publishing, 2015, p. 68.

⁴⁵ WEATHERILL, S. *Collected Papers*. *European sports law*. p. 96.

⁴⁶ Para 104.

⁴⁷ Para 106.

⁴⁸ WEATHERILL, S. Never let a good fiasco go to waste: why and how the governance of European football should be reformed after the demise of the 'SuperLeague.' In: *Asser International Sports Law Blog* [online]. 21. 4. 2021 [2021-04-30]. Available at: <<https://www.asser.nl/SportsLaw/Blog/post/never-let-a-good-fiasco-go-to-waste-why-and-how-the-governance-of-european-football-should-be-reformed-after-the-demise-of-the-super-league-by-stephen-weatherill>>.

⁴⁹ WEATHERILL, S. *Principles and Practice in EU Sports Law*. p. 94.

to either accept a new offer from his club RC Liège for lower pay he disagreed with or transfer to another club, conditioned by the payment of excessive transfer fee to his previous club. This fee was approximately four times higher than what RC Liège had paid in obtaining him.⁵⁰ Significantly, Article 5 of Bosman's contract stipulated that his Belgium club RC Liège was entitled to withhold the player's registration certificate under any circumstances (a common term in most contracts between soccer clubs and players).⁵¹ Despite Bosman found the French club, which was willing to employ him, clubs did not agree on conditions of Bosman's transfer. Because Bosman could not transfer to the new club and refused to sign a reduced deal with Liège, he was caught in limbo.⁵² Bosman was suspended and he could not exercise his profession. According to CJEU the above described aims of transfer system can be achieved at least as efficiently by other means which do not impede freedom of movement of workers.⁵³

FIFA and EU searched for “a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships.”⁵⁴ It is important to keep this objective in mind during the search for a reasonable transfer system. Essentially, the FIFA rules modified the international transfer system by restricting its full operation to players under the age of 23.⁵⁵ Training compensation must be paid to a player's training clubs when a player signs his first contract as a professional before the end of the season of his 23rd birthday and on each transfer of a professional until the end of the season of his 23rd birthday.⁵⁶ With these rules, young players will not really be free agents until their twenty-fourth birthday.⁵⁷ CJEU in *Bernard* case confirmed the aim of encouraging education and training of players as legitimate.⁵⁸ The CJEU affirmed hereby, the prin-

⁵⁰ IRVING, J. G. “Red Card: The Battle over European Football's Transfer System.” *University of Miami Law Review*. 2002, Vol. 56, No. 3, p. 678. Under the association rules, the price was based on the annual income of the player multiplied by a figure between two and fourteen (depending on the players age), see McHARDY, D. Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance Within the European Soccer Market? *Seton Hall Journal of Sports and Entertainment Law*. 2008, Vol. 18, No. 1, p. 125.

⁵¹ McHARDY, D. *Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance Within the European Soccer Market?* p. 125.

⁵² McHARDY, D. *Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance Within the European Soccer Market?* p. 124.

⁵³ Para 107-109.

⁵⁴ Commission closes investigations into FIFA regulations on international football transfers. Statement IP/02/824 of 5 June 2002. In: *European Commission* [online]. 5. 6. 2002 [2021-09-30]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_02_824>

⁵⁵ GARDINER, S., WELCH R. Player trades, free agents and transfer policies in professional sport, p. 6. In: *Research-Gate* [online]. September 2016 [2021-04-29]. Available at: <https://www.researchgate.net/publication/320584631_Player_Trades_Free_Agents_and_Transfer_Policies_in_Professional_Sport>.

⁵⁶ DE WEGER, F. *The Jurisprudence of the FIFA Dispute Resolution Chamber*. The Hague: T.M.C. Asser Press, 2008, p. 117. More details about training compensations see Art.20, Annex 4 of RSTP. On top of training compensations 5% solidarity payment mechanism to training clubs was established, see Art.21, Annex 5 of RSTP.

⁵⁷ DROLET, J. Ch. Extra Time: Are the New FIFA Transfer Rules Doomed? In: S. Gardiner – R. Parrish – R. Siekmann (eds.). *EU, Sport, Law and Policy. Regulation. Re-regulation and Representation*. The Hague: T.M.C. Asser Press, 2009, p. 182.

⁵⁸ Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC*, ECLI:EU:C:210:143.

ciple that training costs may be calculated on the basis of the so-called ‘player factor’, i.e. the number of players that need to be trained in order to produce a professional player.⁵⁹

However then we get into the fog related to another aim of transfer system, the competitive balance, resp. contractual stability and compensations for transfers of players above the age, when their education and training ended. As stated in the introduction to this article, the *Bosman* case quashed transfer fees paid on the expiry of the professional player’s contract. Restraints imposed on professional players while under the contract became difficult issue. Under what terms the ongoing contract can be terminated?

IV. ONGOING CONTRACTS – AN ONGOING CHALLENGE

In the ever going social experiment that constitute the regulation of transfer fees, FIFA, trying to kill two birds with one stone created rules to force the players to respect the contract that they signed and to prevent them to abuse the freedom that they gained with the *Bosman* ruling by breaching contract unilaterally in order to be able to negotiate a new more lucrative one, with another club.⁶⁰ Indeed according to RSTP a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.⁶¹ There is a narrow exception from this rule. A contract between a player and a club can be prematurely and unilaterally terminated before its end with *just cause* for some valid reason, free from compensation or other sporting sanctions (suspension from the the games).⁶²

Players may serve a suspension from playing football only if they terminate contract in its early stages.⁶³ This early stage of contracts is known as the Protected period. With the introduction of the Protected Period, FIFA intended to protect a certain period of the contract by discouraging players and clubs from terminating the contract during this period.⁶⁴

It is possible to terminate the contract due to a *sporting just cause*, when an „established professional“ in the course of the season appeared in fewer than ten per cent of the official matches in which his club has been involved and compensation may be awarded.⁶⁵

⁵⁹ Noted by WEATHERILL, S. *Principles and Practice in EU Sports Law*. p. 220. Weatherill explained this is the correct understanding of *Bernard* case (the CJEU did not spell that out clearly), resp. he argues that were compensation confined exclusively to the costs of training players who succeed in developing a professional career, the inducement of clubs to invest in training would be small and uncertain.

⁶⁰ DROLET, J. Ch. *Extra Time: Are the New FIFA Transfer Rules Doomed?* p. 183.

⁶¹ Art. 13 RSTP.

⁶² FIFA RSTP Commentary, 2006 edition, p. 39.

⁶³ PEARSON, G. *Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football Transfer System*. p. 221.

⁶⁴ WEGER, F. Webster, Matuzalem, De Sanctis...and the future. *International Sports Law Journal*. 2011, No. 3-4, p. 43. The protected period lasts first three or two years of the contract, depending on the age of the player. In the case of a contract signed up to the player’s 28th birthday, termination of the contract during the first three years results into the imposition of sporting sanctions as well as financial compensation. The same principle applies to contracts signed after the 28th birthday of the player, but if contract is broken only during the first two years.

⁶⁵ FIFA RSTP 2006 Commentary, p. 43.

The most controversial category turned out to be the termination of player's contract *without cause*. Under the Article 17 para 1 of RSTP once the Protected period has expired, a player is able to terminate his contract in order to join a new club provided compensation is paid to his current club.

V. VALUE OF "THE SERVICES PROVIDED BY A PLAYER AND NOT THE HUMAN BEING AS SUCH"⁶⁶

According to Podzun "courts cannot develop the law for the (sports) industry and correct the excessive parts appropriately. They simply lack the material and experience for establishing standards or guidelines."⁶⁷ Sports cases moved to sports arbitration decided by experts in the sports law field. At the same time Podzun warned that this arbitration then must pass the test to see whether it can equally protect the interests of athletes and associations.⁶⁸

At CAS in post-*Bosman* era the saga of Brazilian professional player Francellino Matuzalem determined conditions of premature termination of ongoing contract *without cause*. Matuzalem left FC Shachtar Donetsk in 2007 to move to Spanish club Real Zaragoza SAD. Ukrainian club brought the case to FIFA Dispute Resolution Chamber, which decided in favor of FC Shachtar. The case was appealed to CAS. In determining amount of compensation for the breach of contract arbitrators applied the "Positive Interest" (resp. expectation interest) approach: the judging authority will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur.⁶⁹ RSTP in art. 17 para 1 provides objective criteria for determination of compensations. One of them is the remuneration and other benefits due to a player under the existing and the new contract. The market value of Matuzalem was determined by CAS according to his *new* contract (according to arbitrators existing contract may provide only a first indication of Matuzalem's value).⁷⁰ CAS also increased the compensation in the light of specificity of sport which is another criteria of Art. 17 of RSTP.⁷¹ CAS in general paid special attention to the „interests of the whole football community.“⁷² As a result of CAS calculation, Matuzalem had to pay EUR 11,858,934.00 with interest at 5% from the middle of 2007 (strictly liable for the payment with his new club).⁷³

⁶⁶ CAS 2008/A/1519 and 1520 – *Matuzalem CAS award of May 19, 2009*. Para. 103.

⁶⁷ PODSZUN, R. The Pechstein Case: International Sports Arbitration versus Competition Law. How the German Federal Supreme Court Set Standards for Arbitration, pp. 6–7. In: *SSRN* [online]. 28. 8. 2018 [2021-05-06]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246922>.

⁶⁸ PODSZUN, R. *The Pechstein Case: International Sports Arbitration versus Competition Law. How the German Federal Supreme Court Set Standards for Arbitration*. pp. 6–7. About independence of CAS, see RIGOZZI, A. Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond. In: Christoph Müller, Sébastien Besson, Antonio Rigozzi (eds.). *New Developments in International Commercial Arbitration 2020*. Bern: Stämpfli Editions, 2020.

⁶⁹ CAS 2008/A/1519-1520. Para. 86. This principle is according to arbitrators similar to the praetorian concept of *in integrum restitutio*.

⁷⁰ *Ibid.* Para. 92.

⁷¹ Additional damages were awarded – club's legitimate expectation for player's services was lost (para. 161) and the former club relied on Matuzalem to qualify into the UEFA Champions league (para. 172).

⁷² *Ibid.* Para. 153.

⁷³ The Swiss Federal Tribunal in judgment 4A_320/2009 of 2nd of June 2010 upheld the CAS verdict.

VI. CONTROVERSY OF THE UNLIMITED BAN OF THE PROFESSIONAL ACTIVITY

Matuzalem and his new club Real Zaragoza were unable to pay high amount of money determined by CAS, therefore disciplinary proceedings were initiated against them according to the FIFA Disciplinary Code. Matuzalem and Zaragoza appealed unsuccessfully to CAS once again, this time against the decision of FIFA Disciplinary Committee, which banned Matuzalem from any football related activity until the compensation for the breach of contract is fully paid.⁷⁴ The SFT famously stepped into the sports law scene and annulled the CAS award.⁷⁵ This was the first time that the SFT has overruled a CAS award based on substantive public policy and not just procedural mistakes.⁷⁶ According to the SFT the abstract goal of enforcing compliance by football players with their duties to their employers is clearly of less weight than the occupational ban against the player, unlimited in time and worldwide for any activities in connection with football.⁷⁷

VII. PAY OR NOT TO PAY THE COMPENSATION? IF YES, HOW MUCH?

The verdict of SFT does not mean that Matuzalem does not have to pay the damage compensation and will not be sanctioned at all.⁷⁸ FIFA may only select to impose less severe disciplinary sanction (The SFT condemned the extra disciplinary sanction as a service of private enforcement of the decision granting damages. Shakhtar could still select to enforce the payment by way of general law – The New York Convention).⁷⁹

At the same time the means of counting the compensation by CAS remain controversial as well. *Matuzalem* overruled *Webster* case where CAS reasoned the opposite: “there is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit”.⁸⁰ CAS in *Webster* explained that the potentially high amounts of compensation involved would in effect bring the system partially back to the pre-*Bosman* days.⁸¹ The panel of CAS arbitrators in *Webster* preferred predictable level of compensation

⁷⁴ CAS 2010/A/2261 *Real Zaragoza SAD v. FIFA* and CAS 2010/A/2263 *Matuzalem Francellino da Silva v. FIFA*.

⁷⁵ Judgment of the Swiss Federal Tribunal in 4A 558/2011, of 27th March, 2012.

⁷⁶ LEVY, R. Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem. *The International Sports Law Journal*. 2012, No. 3-4, p. 35.

⁷⁷ Judgment of the Swiss Federal Tribunal in 4A 558/2011, of 27th March, 2012, para. 4.3.4.

⁷⁸ LEVY R. *Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem*. p. 37.

⁷⁹ *Ibid.*, p. 37. It has not been reported, if Matuzalem paid at the end at least some share of the compensation. According to CAS both the professional and his new club are strictly liable for the compensation to avoid any debate and difficulties of proof regarding the possible involvement of the new club in a player's decision to terminate his former contract. This brought some problems in practice in other cases. For example Czech professional player Martin Hašek unilaterally terminated his contract with Sparta Prague in March 2020. The club brought the case to the Czech FA's Arbitration Commission demanding compensation of 2 million EUR. Months later Hašek negotiated with some other elite clubs, unconnected with the case, to continue his career, but without any success. Potential new employers did not want to be strictly liable for damages. CAS should therefore distinguish the principle of strict liability in the future in situations like this. It would enable the player to find his new employer, to earn money and to pay back what he eventually owes to the previous club.

⁸⁰ CAS 2007/A/1298, 1299 & 1300, para. 141. CAS award of January 30, 2008.

⁸¹ *Ibid.* Para. 146.

equal to the remuneration remaining due to the player under the employment contract upon its date of termination (known as residual value of the contract).⁸² The *Webster* case brought therefore the system in line with that intended by the European Commission.⁸³ *Matuzalem* then created uncertainty of the level of compensations. As Weatherill pointed out: “what will be needed – and what is so far missing from the interventions of both CJEU and the CAS – is a close explanation of just what the functions and therefore the limits of compensations really are.”⁸⁴

VIII. CONTINUED EFFORT TO IMPROVE RSTP FOR THE FUTURE

As it was seen above, CAS now plays crucial role in interpretation of RSTP.⁸⁵ Nevertheless the CAS’ role in the development of the transfer system has ultimately hampered EU attempts to liberalise the player market and could raise wider concerns about the ability of existing sports arbitration to effectively work within the gap of autonomy granted to governing bodies.⁸⁶ CAS judges will therefore need a clear framework and aids of statutory interpretation as well.⁸⁷ In 2018 FIFA amended some provisions of RSTP. Among others it covered abusive situations where the stance of a party (either a player or a club) is intended to force the counterparty to terminate or change the terms of the contract. This may include the player’s removal to the team’s reserve.⁸⁸ Unfortunately amendments do not seem to resolve *Matuzalem*-like situations. The Task Force of FIFA Football Stakeholders Committee currently works on another transfer system reform.⁸⁹ The common denominator of the new initiatives is to ensure greater transparency, fairness and integrity in football transfers.

⁸² Ibid. See para. 152. Taking into account the *Matuzalem*’s remuneration under a new contract simply provides an indication of another club’s valuation and not how the former club valued a player’s services for the existing contract period, see CZARNOTA, P. *FIFA Transfer Rules and Unilateral Termination Without “Just Cause.”* *Berkeley Journal of Entertainment and Sports Law*. 2013, Vol. 2, No. 1, p. 43. In his article Czarnota also offers solution for insufficient compensation if a player terminates the contract shortly prior to its expiration. On the other hand Weger argues club can claim all sorts of extra damages, see WEGER, F. *Webster, Matuzalem, De Sanctis... and the future*. p. 55.

⁸³ PEARSON, G. *Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football Transfer System.* *European Law Journal*. 2015, Vol. 21, No. 2, p. 228.

⁸⁴ WEATHERILL, S. *The Olivier Bernard Case: How, if at All, to Fix Compensation for Training Young Players?* *International Sports Law Journal*. 2010 No. 1-2, p. 5.

⁸⁵ RIGOZZI, A., HASLER, E., NOTH, M. *The CAS procedural rules.* In: Manuel Arroyo (ed.). *Arbitration in Switzerland. Practitioner’s Guide. Vol. II.* Wolters Kluwer, 2018, p. 1426.

⁸⁶ PEARSON, G. *Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football Transfer System.* p. 229.

⁸⁷ IOANNIDIS, G. *How a system of judicial precedent may help the rights of athletes before the Court of Arbitration for Sport.* In: D. Chatziefstathiou – B. García – B. Séguin (eds.). *Routledge Handbook of the Olympic and Paralympic Games* Routledge. p. 30, see alternative wording of Art. 17 RSTP drafted by CZARNOTA, P. *FIFA Transfer Rules and Unilateral Termination Without “Just Cause.”* pp. 45–46.

⁸⁸ RSTP further specified the method of calculation of the compensation for breach of contract *without just cause*, but only by a club to be paid *to a player* (Interestingly, in this case collective bargaining agreements may prevail).

⁸⁹ An overview of the main achievements in relation to the reform of the transfer system from October 2017 – May 2021. In: FIFA [online]. [2021-09-30]. Available at: <<https://img.fifa.com/image/upload/vbykzozs9uhtlgzvf5aa.pdf>>. The Council of Europe published in June 2021 the material by KOS, Drago. *Technical Paper, FIFA Transfer system reform*, which includes some general recommendations.

FIFA president Infantino had expressed frustration at the way the transfer market had developed into a business in its own right, attracting speculators looking to profit from player trades in the same way investors in other markets traded commodities or financial products.⁹⁰ For this reason FIFA in RSTP prevents third parties from acquiring ownership of the players' economic rights (known as "TPO"), when the third party, other than two clubs transferring the player from another, is investing into the interest in the future transfer payment. The third party owner can thus earn a return on its earlier investments if the player's transfer fee is higher than the valuation at the time the third party made the investment; the selling club, in its turn, can use the money from the third party owner to sign and develop players it could not afford otherwise.⁹¹ This regulation by FIFA was held so far legal by the European Commission.⁹² Duval argues that TPO restrictions are legitimate since TPO as a practice is *per se* promoting contractual instability because it is logical, that TPO contracts would include various clauses strongly incentivizing clubs to sell their players.⁹³ SFT also confirmed TPO is legitimate and proportional.⁹⁴ Nevertheless according to Duval, if clubs are forced to turn to TPO investors, it is mainly because FIFA and UEFA (and the big clubs) have refused to put in place the necessary redistributive mechanisms to ensure a minimum of competitive balance as was advocated by the CJEU in the *Bosman* ruling years ago (and by the EU Commission).⁹⁵

Unfortunately, the transfer system indeed became a big business. The transfer rules constitute an internationally recognized and accepted commercial contract, which sets out the rules governing the international transfer of footballers between clubs.⁹⁶ As any other business, transfers would function best when law is clear and predictable.⁹⁷ The

⁹⁰ PANJA, T. FIFA Report Details Plan to Remake Soccer's Transfer Market. In: *The New York Times* [online]. 13. 9. 2018 [2021-06-21]. Available at: <<https://www.nytimes.com/2018/09/13/sports/soccer/fifa-report-transfer-market.html>>.

⁹¹ HOCK, B., GOMTSIAN, S. Private order building: the state in the role of the civil society and the case of FIFA. *The International Sports Law Journal*. 2018, Vol. 17, No. 3-4, p. 196.

⁹² Further discussion about legality of TPO see Van MAREN, O., DUVAL, A. et al. Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium. *The International Sports Law Journal*. 2016, Vol. 15, No. 3-4, pp. 233–252.

⁹³ DUVAL, A. Unpacking Doyen's TPO Deals: In defence of the compatibility of FIFA's TPO ban with EU law. In: *Asser International Sports Law Blog* [online]. 18. 9. 2015 [2021-03-05]. Available at: <<https://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-in-defence-of-the-compatibility-of-fifa-s-tpo-ban-with-eu-law>>.

⁹⁴ 4A_260/2017, Judgment of February 20, 2018. SFT emphasized that TPO practice creates many risks. Namely risks associated with the opacity of investors; risks of endangering the professional freedom and the rights of players; risk of conflicts of interest, even match-fixing/match-manipulation, as the same investor can have TPOs in several clubs in the same competition etc., see Swiss International Arbitration Decisions. In: *swissarbitrationdecisions.com* [online]. 20. 2. 2018 [2021-09-30]. Available at: <www.swissarbitrationdecisions.com/sites/default/files/20%20février%202018%204A%20260%202017.pdf>.

⁹⁵ DUVAL, A. *Unpacking Doyen's TPO Deals: In defence of the compatibility of FIFA's TPO ban with EU law*. About failure of RSTP to compensate for education and training of players in small clubs see De MARCO, N. Transfers, agents and minors. In: J. Anderson – R. Parrish – B. García (eds.). *European Law and the governance of sport*. p. 394, citing KEA-CDES Study on the Economics and Legal Aspects of Transfers of Players, EAC/17/2011, January 2013.

⁹⁶ CZARNOTA, P. *FIFA Transfer Rules and Unilateral Termination Without "Just Cause."* p. 36.

⁹⁷ SCHAFFER, R., AGUSTI F., DHOOGHE L. *International Business Law*. Stamford: Cengage Learning Legal Studies In Business, 2014, p. 37.

transfer rules should avoid uncertainty of excessive transfer fees and return to those objectives defended in the *Bosman* case. The message of *Bosman* was strong and persuasive, but the free movement of players is not accomplished. RSTP might act as an important role model for regulating international labour migration in other international sports.⁹⁸ The future will show if it is possible at all by the planned reform.

IX. TRANSFER RESTRICTIONS WITHIN ONE MEMBER STATE OF EU – EXAMPLE OF CZECH ICE-HOCKEY

It cannot be forgotten, that the *Bosman* case abolished transfer fees paid for transfers between clubs of different Member States of EU and “an imbalance between interstate and intra-state trade is created.”⁹⁹ Despite some literature was optimistic, that “such was the impact of the *Bosman* judgment that the right to move freely at the end of a contract was ultimately extended to domestic transfers,”¹⁰⁰ it is not always true as the danger of fragmentation at national level is described in this part of the article. One might ponder whether national judges might in practice be prompted by awareness that the cross-border transfer system has collapsed to adopt a more rigorous inquiry into the permissibility of domestic restrictions.¹⁰¹

It is therefore interesting to contrast the case of *Bosman* and *Matuzalem* with the view of the Czech Highest Administrative Court in the *intra-state* situation concerning transfer fees and the status of professional players in ice-hockey.¹⁰² It is useful excursion into comparison with football because there is no homogenous law of sport but law of sports instead, resp. sport is not just football.¹⁰³

According to the Czech court it is hard to imagine, that professional athlete would unilaterally terminate contract and left “for free” from a club, which provided him sports education and training. Moreover, the Court provided very original approach to the status of professional players. The Court explained that it is not possible to imagine the professional athlete’s activity being subject to provisions of the Labor Code on fixed term contracts, working time and overtime periods. The Court concluded that the activity of professional sport is not clearly regulated by the Czech law and that is why it would be unfair to apply the employment law at contractual relationship between professional players and clubs. The Court paid attention to the fact that the employment law was not “*favoured by the parties to the contract*” at stake. In other words, the Court allowed professional players in team sports to avoid employment status and become independent contractors, *de facto* undertakings, as providers of services. The Court reasoned, that imposing employment relationship under the Labor Code to professional athletes would threaten specific professional

⁹⁸ ANDREFF W. International labour migration. In: Wladimir Andreff, Stefan Szymanski. *Handbook on the Economics of Sport*. p. 329.

⁹⁹ SPINK, P. Blowing the Whistle on Football’s Domestic Transfer fee. *The Juridical Review*. 1999, p. 78.

¹⁰⁰ BOYES, S. *Human rights at the intersection of EU law and sport*. p.134.

¹⁰¹ WEATHERILL, S. *Collected Papers. European Sports Law*. Berlin: Springer, 2007, p. 106.

¹⁰² *J.M. v. Finanční ředitelství v Českých Budějovicích*, 2 Afs 16/2011 – 78, November 29th, 2011.

¹⁰³ See WEATHERILL, S. *Principles and Practice in EU Sports Law*. Oxford: Oxford University Press, 2017, pp. 185–190 (his choice was to compare football, cricket and rugby).

sports sector and could be disadvantageous for individuals.¹⁰⁴ Unfortunately the Court did not elaborate in detail interests of players and aims of transfer system because the issue of the case was merely about the level of taxation professional ice-hockey player has to pay either as an independent contractor or an employee.

The national ice-hockey associations have discretion to model their transfer systems. IIHF has not achieved yet the global system similar to RSTP. IIHF lacks enforcement power of FIFA in terms of minimum requirements of contracts, their termination, level of transfer compensations or central adjudication organ competent for these issues. The Czech ice-hockey players association (CAIHP) asserts, that “from the side of IIHF there is no pressure against national associations to compel clubs to conclude fair contracts with players. That is why we want to initiate negotiations at the IIHF together with other European associations in order to change the attitude and ask IIHF to assist to achieve harmonization of the status of players in Europe.”¹⁰⁵ So far IIHF attempted to create international regulation concerning the education and training fee, but the draft was not adopted.¹⁰⁶ IIHF is considered as rather democratic, than “a dictatorship”.¹⁰⁷ It is worth of consideration if international federation should be more active in the case of below described issue of transfer fees at national level or not.¹⁰⁸

Transfer fees are established in the Czech ice-hockey’s association regulations for transfers *within* the Czech republic (the Czech ice-hockey respects the free movement of persons in inter-state transfers according to the *Bosman* case).¹⁰⁹ Clubs are free either to agree to pay the transfer fee (of whatever amount, resp. buyout clause is possible) or simply to avoid it. If clubs fail to agree, which is often the case, then the national association’s transfer fee system applies. It provides pre-determined level of transfer fees scale. Education and training compensation increases according to the player’s age.¹¹⁰ In case of profes-

¹⁰⁴ It is debatable if all players agree with this relationship outside the employment law, because they lost many guarantees normally available to employees. Professional sport is not only success, fame or money, it is also damaged health (FRYČER, M., BRABEC, L. *Můj divoký hokejový život*. Luboš Brabec, 2017, p. 259). Players pay health and social insurances themselves. In other words the player receives the gross amount of his agreed compensation (WISE, A., MEYER, B. *International Sports Law and Business*. Berlin: Springer, 1997, p. 1120).

¹⁰⁵ Interview with CAIHP president Libor Zbořil. In: Pavel Ryšavý (ed.). *Hráčské asociaci hrozil zánik*. *Deník Sport*. June 25th 2021, pp. 18–19.

¹⁰⁶ Prepared in 2010 based on document by EHLERT, Ashley. *Education Fee System Feasibility Study*.

¹⁰⁷ EHLERT, A. *Education Fee System Feasibility Study*. pp. 16–17.

¹⁰⁸ For comparison: according to RSTP, which applies to international transfers, the transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with article 1 paragraph 3 of RSTP, which must be approved by FIFA. Such regulations should also provide for a system to reward clubs affiliated to the relevant association investing in the training and education of young players. Each association shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements. In particular, the principles, which were already described above, must be considered (for example contractual stability; termination of contracts due to just cause and sporting just cause; that contracts cannot be terminated during the course of the season etc). RSTP also defines in its article 1 paragraph 3, which RSTP’s provisions are mandatory in relation to transfers at national level.

¹⁰⁹ Except when player moves internationally and wants to return to the Czech republic. The player must come back via his home club and then transfer to a different Czech club, unless agreed otherwise with player’s home club (EHLERT, A. *Education Fee System Feasibility Study*. p. 45).

¹¹⁰ Transfer regulations for the non-professional ice-hockey (*Přestupní řád mimo klubů Extraligy a I. ligy*).

sional ice-hockey players, the level of fees depends on number of seasons and games played in the professional league, national team etc.¹¹¹ In other words unless agreed otherwise, clubs must pay fees for transfers of players, including professionals whose education and training already ended and even if their contract expired!¹¹² Transfer fees terminated many careers of players in Czech ice-hockey, because alternative clubs refused to pay the requested fee by the player's club.

Since Czech professional players are independent contractors, what branch of law could help professional players with this status? Arbitrators in *Matuzalem* also advocated that it is often wrong to treat players as being the weak party per se, not deserving any special indemnity of traditional employee.¹¹³ Advocate General Lenz in his opinion to *Bosman* case noted: "Admittedly, it cannot be ruled out that individual persons too may be regarded as undertakings if their activity represents a provision of services for consideration".¹¹⁴

EU competition law would be an alternative to approach the Czech transfer fees scenario, because EU law of free movement of persons and services does not apply in intra-state situation. EU competition law applies if European transfer market could be affected by restricting, preventing or distorting competition by clubs or national ice-hockey association. Clubs are undertakings and national association is an association of undertakings.¹¹⁵ If trade between Member States is not affected, national competition law applies. According to Weatherill domestic transfer system appears to be vulnerable to challenge based on EU competition law and this is task for some brave player to "test this point of law in the domestic arena if national associations remain obdurate in defence of their transfer systems."¹¹⁶

The competition law does not necessarily prohibit every agreement between undertakings or every decision of an association of undertakings. The overall context has to be evaluated in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives, resp. whether consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate.¹¹⁷

If we consider aim of the transfer system to encourage education and training of young players, there is an inspiration within ice-hockey family. Several national associations adopted alternative methods to achieve this aim. CJEU would appreciate their variety because it advertised to look for other means than those restricting players' movement. Based on interviews with national ice-hockey associations' officials, those methods in-

¹¹¹ Transfer regulations for the professional ice-hockey (*Přestupní řád pro kluby Extraligy a I. ligy*).

¹¹² The transfer fee is only symbolic when player attained 600 games played in the elite competition of Extraleague (levels of transfer fees, point no. 6, attached to *Přestupní řád pro kluby Extraligy a I. ligy*).

¹¹³ CAS 2008/A/1519-1520, Para. 156.

¹¹⁴ See also creative observation of AG Lenz in relation to players' status in competition law, whether they are a competitor, customer or consumer, para 286 of his opinion to the *Bosman* case.

¹¹⁵ VAN ROMPUY, B. *The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations*, pp. 183–185.

¹¹⁶ WEATHERILL, S. *Collected Papers. European Sports Law*, p. 109–110.

¹¹⁷ C-519/04 *Meca-Medina and Majcen*. ECLI:EU:C:2006:492, para 42.

cluded education and training funds, pooling system and others.¹¹⁸ These mechanisms do not exist in the Czech ice-hockey. The current problem in Czech scenario is that transfer regulations provide unclear distinction between compensations for education and training and those paid when training age already ended, including professionals whose contract expired.¹¹⁹ As far as transfers of professionals are concerned, from an economic perspective there is no reason to believe that a player's value on the market owes more to training by a club than to a player's own efforts, discipline and natural talent.¹²⁰ Perhaps fans could influence transfer fees reforms because the main goal of competition law policy is the protection of consumer.¹²¹ The best alternative however would be the social dialog with professional players as employees.¹²²

Czech ice-hockey association plans to review the transfer fee system.¹²³ It should focus at complex evaluation, taking into account role and aims of transfer system, rather than short-sighted solutions. According to former player Jakub Čutťa money from transfers are not directed effectively to small clubs, resp. these clubs do not have enough funds to educate players and the training is based on enthusiasm of player's coach, not earnings. According to Čutťa "football is somewhere else" and it is interesting he advocated the solution close to TPO to improve Czech ice-hockey: the coach, who educates and trains the player from his first years, should share percentage of money from his transfer when the player fulfilled his training and education years and became professional.¹²⁴

Something is wrong when some parents complained they had to pay the excessive fee by themselves on behalf of a new club in order their children could move to the club according to their choice.¹²⁵ Czech ice-hockey officials argue if transfer fees were abolished completely,

¹¹⁸ EHLERT, A. *Education Fee System Feasibility Study*. pp. 44–57.

¹¹⁹ See also the text below of this part of the article about transfers of minors and young players.

¹²⁰ The *Webster* case, CAS 2007/1298, 1299 and 1300, para 142, in which arbitrators further elaborated that a club cannot simply assume it is the only source of success of a player without bringing any proof (which would be very difficult).

¹²¹ CAMATSOS S. *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance*, 12 *Sports LAW. J.* 155, 2005, pp. 168–169. Camatsos argues that EU institutions fail to consider the main goal of competition law policy to protect consumer welfare when it comes to sports by focusing solely on the player-club relationship. For example Czech professional clubs prefer to buy foreign out-of contract players because they are not subject to transfer fees according to the *Bosman* case. In other words, Czech clubs do not contract with equally good Czech player. The development of Czech talents for the national team is endangered and Czech fans' expectations are lost.

¹²² It is not possible now – players are independent contractors. Some authors criticize the approach of the Czech Highest Administrative Court because professionals of team athletes should be employees according to existing employment law, PICHRT, J. (ed.). *Sport a (nejen) pracovní právo*. Praha: Wolters Kluwer, 2014. The Highest Administrative Court confirmed its position in professional footballer case (viz. Afs 22/2012 – 31, August 1st, 2012). Czech professional football players perform as independent contractors as well. The Czech FA has been also under the pressure from the European confederation UEFA to compel players and clubs to enter employment relationship and abandon the model of players being entrepreneurs.

¹²³ RYŠAVÝ, P. *Tabulky v českém hokeji: Nefér hra s vadnými pravidly. Přijde úprava?* *Deník Sport*. April 24th 2021, p. 19.

¹²⁴ Interview with Jakub Čutťa by HORÁK, M. *Sport Magazin*. No. 8/2021, p. 37.

¹²⁵ Ombudsmanku znepokojila výše odstupného za přestupy dětí. Hokejový svaz se brání. In: *Sport.cz* [online]. 5. 6. 2017 [2021-05-07]. Available at: <www.sport.cz/hokej/ostatni/clanek/890371-ombudsmanku-znepokojila-vyse-odstupneho-za-prestupy-deti-hokejovy-svaz-se-brani.html>.

parents would have to pay higher membership fee for their children's club per year.¹²⁶ The problem for movement of players of this age is again that clubs own the registration rights. The author of this article described this scenario in the debate at the *Bosman* anniversary conference held at the Asser Instituut in Den Haag but the discussion resulted in the clear answer: "We cannot help you with this according to *Bosman*".¹²⁷ As it was argued in the introduction to this article, the *Bosman* case is not able to reach all possible situations to improve the free movement of persons at national level.¹²⁸ We could at least argue by the freedom of association and by the David's view according to the Convention on the Rights of the Child. David refers to the case-law of Belgium and Luxembourg, with judges recognizing the right of the child to freely choose his/her team, resp. that children are not "negotiable commodities" and that "slavery has been prohibited in our countries since centuries".¹²⁹ According to David rights of children have to be fully taken into account by all partners involved in sports: parents, trainers, federations and especially public authorities.¹³⁰

X. ALTERNATIVE ARGUMENTS CONCERNING COMPULSORY NATURE OF WORK

It may be understood as exaggerated to use the term slavery in modern sports.¹³¹ Many authors do use term of slave trade in relation to sports regulation, perhaps to demonstrate some absurd restrictions between club and player.¹³² Some athletes also attempted to invoke the prohibition of compulsory labor according to article 4 of the European Convention of Human Rights despite they entered the sports sector voluntarily. A consent of the potential victim of compulsory labor does not seem to be a decisive factor and other considerations matter as well.¹³³ Even if a person has voluntarily en-

¹²⁶ In the Czech Republic the ice-hockey players are educated and trained in their childhood thanks to financing by clubs, municipalities and partly by parents, EHLERT, A. *Education Fee System Feasibility Study*. p. 45.

¹²⁷ International and European Sports Law symposium on "20 years later: the legacy of Bosman", which took place on 18 June 2015 at the T.M.C. Asser Instituut, The Hague, Netherlands.

¹²⁸ CJEU in *Bosman* case, para 112, was too much self-confident stating that application of different rules to transfers between clubs belonging to national associations within the EU and to transfers between such clubs is unlikely to pose any particular difficulties.

¹²⁹ DAVID, P. Children's Rights and Sports. *International Journal of Children's Rights*. 1999, Vol. 7. No. 1, p. 71. David seems to be optimistic about the *Bosman* case effect in general and he argued that this decision is an extremely important one because it is a clear illustration that sports careers have a human rights dimension that may not be neglected by sports federations and by States.

¹³⁰ RSTP in football has ambition to improve the situation concerning minors but it only forbids international transfers of minors, subject to some exceptions, see De MARCO, N. Transfers, agents and minors. In: J. Anderson – R. Parrish – B. García (eds.). *European Law and the governance of sport*. pp. 402–409.

¹³¹ More about slavery see NIEBOER, H. J. *Slavery as an Industrial System: Ethnological Researches*. Hague: M. Nijhoff. HeinOnline.

¹³² For example SPINK, P. Blowing the Whistle on Football's Domestic Transfer fee. *The Juridical Review*. 1999, p. 84. VALLONI, L., PACHMANN, T. Switzerland: The Landmark Matuzalem Case And Its Consequences On The FIFA Regulations. In: *Mondaq*. [online]. 25. 7. 2012 [2021-05-07]. Available at: <<https://www.mondaq.com/sport/184712/>>.

¹³³ See *Van Der Musselle v Belgium*, para. 36 where the European Court of Human Rights stated that the consent in advance "...correctly reflects one aspect of the situation; nevertheless, the Court cannot attach decisive weight thereto... Account must necessarily also be taken of other factors".

tered into labour contract or has agreed to perform certain services, the circumstances may change in such a way or the objections to the work in question, especially in engagements of long duration, may become so far-reaching that holding the person unqualifiedly to his consent may indeed bring in issue Article 4.¹³⁴ For the resolution of a particular case therefore all circumstances are important, including the nature of a sanction against the complainant.¹³⁵

The famous sports related case concerning the compulsory labor was decided by the European Commission of Human Rights.¹³⁶ In the case *X v. Netherlands* professional footballer complained that he was not free to leave his current club and transfer to play for another one. In fact it would seem that the player was not really complaining of being forced to work for the first club, but about his inability to work for another employer in the same field.¹³⁷ The European Commission of Human Rights concluded that the nature of the work was not oppressive and did not cause the victim unavoidable hardship. Again it matters whether the circumstances of the case are normal in particular profession or if there is some kind of discriminatory treatment.¹³⁸ Another alternative available for the complainant is also relevant.¹³⁹ This suggests the European Commission of Human Rights has not recognized the reality of a professional footballer's situation.¹⁴⁰

XI. CONCLUSION

At international level, can we think of some better regulation of transfers to avoid excessive compensations, for example some new harmonized code where public and private authorities would cooperate in partnership, similar to the World Anti-doping Code? Intergovernmental organizations such as the United Nations and the World Trade Organization have played an important role by producing uniform codes on many busi-

¹³⁴ VAN DIJK, P., VAN HOOFF, F. et al. *Theory and Practice of the European Convention on Human Rights*. 4th ed. Intersentia 2006, p. 446, where authors also argue that among alternatives offered to the person in question should be termination of the contract coupled with the obligation to pay *reasonable* compensation.

¹³⁵ *Van Der Mussele v Belgium*, para. 35-39. The European Court of Human Rights also applied ILO Conventions where compulsory labor is defined, including the nature of sanctions, see ILO Convention No. 29 of 1930 and No. 105 of 1957, see CLEMENTS, L., MOLE, N., SIMMONS, A. *European Human Rights: Taking a Case under the Convention*. 2nd ed. London: Sweet&Maxwell. 1999, p. 136.

¹³⁶ Since the entry into force of Protocol No. 11 on November 1st 1998 a new permanent Court took the place of the European Commission of Human Rights and the European Court of Human Rights, see VAN DIJK, P., VAN HOOFF, F. et al. *Theory and Practice of the European Convention*. p. 36.

¹³⁷ GARDINER, S. at al. *Sports Law*. 3rd ed. Cavendish Publishing Ltd., p. 219.

¹³⁸ *Van Der Mussele v Belgium*, para. 38 and 43.

¹³⁹ In *Van Der Mussele v Belgium* case the pupil lawyer had a possibility to perform profitable services within his agenda next to the activity he complained about. Similarly US practice according to the 13th Amendment of the US Constitution where a player claimed breach of this Amendment by being tied to the club Philadelphia Phillies, see *Flood v Kuhn*, 316 F. Supp. 271 (S.D.N.Y.) 1970, 280–281. The judge refused to apply the 13th Amendment and the case continued in the light of competition law (WONG, Glen. *Essentials of Sports Law*. 4th ed. Santa Barbara: Praeger. 2010, p. 487). Recently another professional football player A. Mutu also invoked Article 4 in front of European Court of Human rights, but without any success as well (Para. 190 of *Mutu/Pechstein* case).

¹⁴⁰ GARDINER, S. at al. *Sports Law*. p. 219.

ness subjects, from food safety to contract law.¹⁴¹ This probably sounds too far from an ideal solution, impossible to be drafted with detailed provisions, because each sport is different as it was seen in this article in case of football and ice-hockey. Supervision of European Commission in the process of drafting RSTP was an attempt with some hope to balance interests of free movement of players and aims of transfer system. It is admirable RSTP tried to harmonize rules across various legal systems, different levels of economies and sporting performance. IIHF has not achieved this to improve national standards of transfers as Czech example showed. Nevertheless RSTP must improve but it provided very valuable experience to learn from. New developments in this area shall take place probably at courts or CAS again. Judges should look at internal logic of provisions of transfer rules, their relationship with other provisions of the transfer regulation as well as its purpose revealed by the history of its adoption to balance various aims.¹⁴² It is true that codes cannot cover all situations. For example when FIFA created four categories of real costs of training of young players worldwide, it was criticized that “these numbers were determined by a bunch of bureaucrats playing with dices in their offices in Zurich”.¹⁴³ Moreover transfer restrictions are not only about fees. For example the termination of contract by the player for *just sporting cause* is according to RSTP possible only in the 15 days following the last official match of the season of the club with which the player is registered (unless the parties have agreed at mid-season to mutually terminate their working relationship). Negotiations with players under the contract can take place also within strictly determined period of time at the end of their contract. So called Transfer Windows allow players to move among clubs only within short period of time during the year.¹⁴⁴ These are unusual conditions compared to other industries.¹⁴⁵

If there would be no international re-regulation of transfers possible, some hope for improving transfer rules remains at the lower level of the legal hierarchy at national level. According to Geeraert public authorities must defend the common good by ensuring that freedom of association of sports organizations cannot be abused to act against common interest.¹⁴⁶

¹⁴¹ SCHAFFER, R., AGUSTI F. DHOOGHE L. *International Business Law*. p. 37. Andreff proposed so called Coubertobin Tax concerning transfer of young players to be monitored and supervised by an international organization either an existing one (the UN Development Programme or the World Bank) or an ad hoc one to be created, for instance under auspices of the UN or IOC. ANDREFF, W. *International Labour Migration*. p. 330. Similar efforts were made in the past to turn World Anti-doping Agency (WADA) into an International Public Law Agency based on international convention, see MESTRE, M. *The Law of The Olympic Games*. The Hague: Netherlands. T.M.C. Asser Press, 2009, p. 53, referring to similar examples of public-private partnership in World Tourism Organization or Afro-Asian Rural Reconstruction Organization.

¹⁴² See *Webster* case, CAS 2007/1298, 1299 and 1300, para. 115.

¹⁴³ DROLET, J. Ch. *Extra Time: Are the New FIFA Transfer Rules Doomed?* p. 181.

¹⁴⁴ According to Camatsos, windows restrict free movement of players, viz. CAMATSOS, S. *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance*. p. 170.

¹⁴⁵ Czech ice-hockey recently amended transfer regulations that no transfer fee can be paid for transfers of children aged until 9 years of age. However only three players can be acquired by one club without the consent of the original club of players. Why just three? The transfer must be accomplished until May 31st of each season. Why? (See Transfer regulations for the non-professional ice-hockey – *Přestupní řád mimo klubů Extraligy a I. ligy*).

¹⁴⁶ GEERAERT, A. *The autonomy of the Olympic and sport movement*. p. 252.

The national associations should also make “proactive moves” to check human rights as described by Daniela Heerdt.¹⁴⁷ Sports leagues ought to be public trusts to be operated by owners and league administrators for the benefit of the Public.¹⁴⁸

Intensive participation of athletes in the preparation of transfer rules together with governing bodies must be also encouraged, because the transfer rules are binding for athletes. Athletes contract with the rules but to what extent they participate on their production, resp. how freely they consent to them?¹⁴⁹ Some authors propose intervention by reflexive law in form of the collective bargaining.¹⁵⁰

Another, perhaps naïve but the best solution is to find some right people with good character to govern sports fairly, including the right principles in transfers.¹⁵¹ The transfer system remains unfortunately an unresolved chapter.

¹⁴⁷ HEERDT, D. A Reflection on Recent Human Rights Efforts of National Football Associations. In: *Asser International Sports Law Blog* [online]. 1. 3. 2021 [2021-03-15]. Available at: <<https://www.asser.nl/SportsLaw/Blog/post/a-reflection-on-recent-human-rights-efforts-of-national-football-associations-by-daniela-heerdt-tilburg-university>>.

¹⁴⁸ ROSS S., SZYMANSKI S. *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers*. Stanford: Stanford University Press. 2008, p. 3.

¹⁴⁹ Very frequently mentioned point in discussions with speakers at Anti-Doping Law Conference 2021, organized by LawInSport on 15th–16th June 2021.

¹⁵⁰ GARDINER, S., WELCH R. *Player trades, free agents and transfer policies in professional sport*.

¹⁵¹ One of the outcomes of discussion among participants at Digital International Symposium on NADO Governance under the title of ‘Governance in Anti-Doping: How to meet the Challenges,’ organized by Play the Game on 18–19 May 2021.