

Court of Justice EU, 16 March 2010, Olympique Lyonnais v Olivier Bernard and Newcastle



FREE MOVEMENT

Rules requiring a 'joueur espoir' are a restriction on freedom of movement for workers

- Rules according to which a 'joueur espoir', at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which trained him are likely to discourage that player from exercising his right of free movement.

Even though, as Olympique Lyonnais states, such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less makes the exercise of that right less attractive. Consequently, those rules are a restriction on freedom of movement for workers guaranteed within the European Union by Article 45 TFEU.

No justification

- Damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of the objective of encouraging the recruitment and training of young players.

That Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it. A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

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Court of Justice EU, 16 March 2010

(V. Skouris, K. Lenaerts, P. Lindh, C.W.A. Timmermans, A. Rosas, P. Kūris, E. Juhász, A. Borg Barthet and M. Ilešič)

JUDGMENT OF THE COURT (Grand Chamber)

16 March 2010 (*)

(Article 39 EC – Freedom of movement for workers – Restriction – Professional football players – Obligation to sign the first professional contract with the club which provided the training – Player ordered to pay damages for infringement of that obligation – Justification – Objective of encouraging the recruitment and training of young professional players)

In Case C-325/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 9 July 2008, received at the Court on 17 July 2008, in the proceedings

Olympique Lyonnais SASP

v

Olivier Bernard,
Newcastle United FC,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts and P. Lindh, Presidents of Chamber, C.W.A. Timmermans, A. Rosas, P. Kūris, E. Juhász, A. Borg Barthet and M. Ilešič (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, Head of unit,

having regard to the written procedure and further to the hearing on 5 May 2009,

after considering the observations submitted on behalf of:

- Olympique Lyonnais SASP, by J.-J. Gatineau, avocat,
 - Newcastle United FC, by SCP Celice-Blancpain-Soltner, avocats,
 - the French Government, by G. de Bergues and A. Czubinski, acting as Agents,
 - the Italian Government, by I. Bruni, acting as Agent, and D. Del Gaizo, avvocato dello Stato,
 - the Netherlands Government, by C.M. Wissels and M. de Grave, acting as Agents,
 - the United Kingdom Government, by S. Osowski, acting as Agent, and D.J. Rhee, Barrister,
 - the Commission of the European Communities, by M. Van Hoof and G. Rozet, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 16 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns Article 39 EC.

2 The reference has been made in the course of proceedings brought by Olympique Lyonnais SASP ('Olympique Lyonnais') against Mr Bernard, a professional football player, and Newcastle United FC, a club incorporated under English law, concerning the payment of damages for unilateral breach of his obligations under Article 23 of the Charte du football professionnel (Professional Football Charter) for the 1997 – 1998

season of the Fédération française de football ('the Charter').

Legal context

National law

3 At the material time in the main proceedings, employment of football players was regulated in France by the Charter, which had the status of a collective agreement. Title III, Chapter IV, of the Charter concerned the category known as 'joueurs espoir', namely players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract.

4 At the end of his training with a club, the Charter obliged a 'joueur espoir' to sign his first professional contract with that club, if the club required him to do so. In that regard, Article 23 of the Charter, in the version applicable at the material time in the main proceedings, provided:

'...
On the normal expiry of the ["joueur espoir"] contract, the club is then entitled to require that the other party sign a contract as a professional player.
...'

5 The Charter contained no scheme for compensating the club which provided the training if the player, at the end of his training, refused to sign a professional contract with that club.

6 In such a case, however, the club which provided the training could bring an action for damages against the 'joueur espoir' under Article L. 122-3-8 of the Code du travail (Employment Code) for breach of the contractual obligations flowing from Article 23 of the Charter. Article L. 122-3-8 of the French Code du travail, in the version applicable to the facts in the main proceedings, provided:

'In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure.
...'

Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 During 1997, Olivier Bernard signed a 'joueur espoir' contract with Olympique Lyonnais for three seasons, with effect from 1 July of that year.

8 Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year from 1 July 2000.

9 Mr Bernard refused to sign that contract and, in August 2000, signed a professional contract with Newcastle United FC.

10 On learning of that contract, Olympique Lyonnais sued Mr Bernard before the Conseil de prud'hommes (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and Newcastle United FC. The amount claimed was EUR 53 357.16 – equivalent, according to the order for reference, to the remuneration which Mr Bernard would have received

over one year if he had signed the contract offered by Olympique Lyonnais.

11 The Conseil de prud'hommes in Lyon considered that Mr Bernard had terminated his contract unilaterally, and ordered him and Newcastle United FC jointly to pay Olympique Lyonnais damages of EUR 22 867.35.

12 The Cour d'appel, Lyon, quashed that judgment. It considered, in essence, that the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 39 EC.

13 Olympique Lyonnais appealed against that decision of the the Cour d'appel, Lyon.

14 The Cour de cassation considers that although Article 23 of the Charter did not formally prevent a young player from entering into a professional contract with a club in another Member State, its effect was to hinder or discourage young players from signing such a contract, inasmuch as breach of the provision in question could give rise to an award of damages against them.

15 The Cour de cassation points out that the dispute in the main proceedings raises a problem of interpretation of Article 39 EC since it raises the question whether such a restriction can be justified by the objective of encouraging the recruitment and training of young professional footballers in accordance with the judgment in [Case C-415/93 Bosman \[1995\] ECR I-4921](#).

16 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the principle of the freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which a "joueur espoir" who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?

(2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?'

Consideration of the questions referred for a preliminary ruling

17 By its questions, which should be examined together, the national court asks, in essence, whether the rules according to which a 'joueur espoir' may be ordered to pay damages if, at the end of his training period, he signs a professional contract, not with the club which provided his training, but with a club in another Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players.

Observations submitted to the Court

18 According to Olympic Lyonnais, Article 23 of the Charter is not an obstacle to effective freedom of

movement for ‘joueurs espoir’ since they are free to sign a professional contract with a club in another Member State subject to the sole condition that they pay compensation to their former club.

19 On the other hand, Newcastle United FC, the French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission of the European Communities argue that rules such as those at issue in the main proceedings constitute a restriction on freedom of movement for workers, which is, in principle, prohibited.

20 If it is held that Article 23 of the Charter constitutes an obstacle to freedom of movement for ‘joueurs espoir’, *Olympique Lyonnais* considers, on the basis of the judgment in *Bosman*, that that provision is justified by the need to encourage the recruitment and training of young players inasmuch as its only objective is to permit the club which provided the training to recover the training costs it incurred.

21 On the other hand, Newcastle United FC contends that the judgment in *Bosman* clearly placed any ‘compensation fee for training’ on the same footing as a restriction incompatible with freedom of movement for workers, since the recruitment of young players does not constitute an overriding reason in the public interest capable of justifying such a restriction. Moreover, Newcastle United FC contends that, under the rules at issue in the main proceedings, damages are calculated according to arbitrary criteria which are not known in advance.

22 The French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission argue that, according to the judgment in *Bosman*, the fact of encouraging the recruitment and training of young footballers constitutes a legitimate objective.

23 However, the French Government argues that, under the rules at issue in the main proceedings, the damages that the club which provided the training could claim were calculated in relation to the loss suffered by the club rather than in relation to the training costs incurred. According to the French Government and also the United Kingdom Government, such rules do not meet the requirements of proportionality.

24 The Italian Government considers that a compensation scheme may be regarded as a proportionate measure to achieve the objective of encouraging the recruitment and training of young players in so far as the compensation is determined on the basis of clearly defined parameters and calculated in the light of the burden borne by the club which provided the training. The Italian Government states that the possibility of claiming a ‘compensation fee for training’ is of particular importance for small clubs, which have limited structures and a limited budget.

25 The French Government, the Italian Government, the United Kingdom Government and the Commission refer to the Regulations on the Status and Transfer of Players of the Fédération internationale de football association (FIFA), which came into force during 2001,

after the material time in the main proceedings. Those regulations lay down rules for the calculation of ‘compensation fees for training’ which apply to situations in which a player, at the end of his training in a club in one Member State, signs a professional contract with a club in another Member State. According to the French Government, the United Kingdom Government and the Commission, those provisions comply with the principle of proportionality.

26 The Netherlands Government points out, in a more general manner, that there are reasons in the public interest, related to training objectives, which could justify rules by virtue of which an employer who provides training to a worker is justified in requiring the worker to remain in his employment or, if he does not do so, to claim damages from him. The Netherlands Government considers that, in order to be proportionate, compensation must fulfil two criteria, namely that the amount to be paid must be calculated in relation to the expenditure incurred by the employer in that training and account must be taken of the extent, and for how long, the employer has been able to enjoy the benefit of the training.

Findings of the Court

The existence of a restriction on freedom of movement for workers

27 First, it is to be remembered that, having regard to the objectives of the European Union, sport is subject to European Union law in so far as it constitutes an economic activity (see, in particular, *Bosman*, paragraph 73, and [Case C-519/04 P Meca-Medina and Majcen v Commission \[2006\] ECR I-6991](#), paragraph 22).

28 Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 45 TFEU et seq. or Article 56 TFEU et seq. (see, in particular, *Meca-Medina and Majcen v Commission*, paragraph 23 and the case-law cited).

29 In the present case, it is common ground that Mr Bernard’s gainful employment falls within the scope of Article 45 TFEU.

30 Next, it is settled case-law that Article 45 TFEU extends not only to the actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner (see *Bosman*, paragraph 82 and the case-law cited).

31 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application (see *Bosman*, paragraph 84).

32 In the present case, it follows from the order for reference that the Charter has the status of a national collective agreement, and it thus falls within the scope of Article 45 TFEU.

33 Finally, as regards the question whether national legislation such as the legislation at issue in the main proceedings constitutes a restriction within the meaning of Article 45 TFEU, it must be pointed out that all of the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place nationals of the Member States at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, in particular, *Bosman*, cited above, paragraph 94; Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 31).

34 National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute restrictions on that freedom even if they apply without regard to the nationality of the workers concerned (see, in particular, *Bosman*, paragraph 96; *Kranemann*, paragraph 26; and *ITC*, paragraph 33).

35 Rules such as those at issue in the main proceedings, according to which a 'joueur espoir', at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which trained him are likely to discourage that player from exercising his right of free movement.

36 Even though, as *Olympique Lyonnais* states, such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less makes the exercise of that right less attractive.

37 Consequently, those rules are a restriction on freedom of movement for workers guaranteed within the European Union by Article 45 TFEU.

Justification of the restriction on freedom of movement for workers

38 A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; *Bosman*, paragraph 104; *Kranemann*, paragraph 33; and *ITC*, paragraph 37).

39 In regard to professional sport, the Court has already had occasion to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate (see *Bosman*, paragraph 106).

40 In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must

be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.

41 In that regard, it must be accepted that, as the Court has already held, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see *Bosman*, paragraph 108).

42 The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, *Bosman*, paragraph 109).

43 Moreover, the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period.

44 Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.

45 It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, *Bosman*, paragraph 109).

46 It is apparent from paragraphs 4 and 6 of the present judgment that a scheme such as the one at issue in the main proceedings was characterised by the payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.

47 As the French Government stated, pursuant to Article L. 122-3-8 of the French Employment Code, the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. In addition, as *Newcastle United FC* pointed out,

the amount of that loss was established on the basis of criteria which were not determined in advance.

48 Under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.

49 In view of all the foregoing considerations, the answer to the questions referred is that Article 45 TFUE does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

50 A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 45 TFUE does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 16 July 2009 (1)

Case C-325/08

Olympique Lyonnais

v

Olivier Bernard and Newcastle United

(Reference for a preliminary ruling from the Cour de cassation (France))

(Freedom of movement for workers – National rule requiring a football player to compensate the club which trained him if, on completion of training, he contracts as a professional player with a club in another Member State – Obstacle to freedom of movement – Justification by the need to encourage recruitment and training of young professional players)

1. To those who follow 'the beautiful game', it is a passion – even, a religion. (2) Armies of dedicated fans travel the length of the Union to support their team at every match; and the likely performance of potential new recruits (possible transfer signings and home-grown talent) is a matter of burning importance. For gifted youngsters, being spotted by a talent scout and given an apprenticeship (that is, a training contract) with a good club is a magic key opening the door to a professional career. Sooner or later, however, the dream of footballing glory is necessarily allied to the hard-nosed reality of earning the highest income achievable over a limited time span as a professional player with the club that is prepared to offer the best wages packet. At the same time, clubs are understandably reluctant to see 'their' best young hopefuls, in whose training they have invested heavily, poached by other clubs. Where the apprenticeship club is small and relatively poor and the poaching club is large and vastly more wealthy, such manoeuvres represent a real threat to the survival (both economic and sporting) of the smaller club.

2. The facts giving rise to the present reference may be set out briefly. A young football player was offered a professional contract by the French club which had trained him for three years. He declined, but accepted another offer to play professionally for an English club. At the time, the rules governing professional football in France rendered him liable in damages to the French club. That club sued both him and the English club in the French courts for a sum based on the annual remuneration which he would have received if he had signed with the French club.

3. In that context, the Cour de cassation (Court of Cassation) asks whether the rules described conflict with the principle of freedom of movement for workers enshrined in Article 39 EC and, if so, whether they can be justified by the need to encourage the recruitment and training of young professional players.

Relevant provisions

Community law

4. Article 39 EC secures freedom of movement for workers within the Community. Such freedom entails in particular the right, subject to limitations justified on grounds of public policy, public security or public health, (a) to accept offers of employment actually made, (b) to move freely within the territory of Member States for that purpose and (c) to stay in a Member State for the purpose of employment.

National provisions

5. At the material time, (3) Article L. 120-2 of the French Code du Travail (Employment Code) provided: 'No one may limit personal rights or individual or collective liberties by any restriction which is not justified

by the nature of the task to be performed and proportionate to the aim sought.’

6. Article L. 122-3-8 of the same code provided that a fixed-term employment contract could be terminated prematurely only by agreement between the parties or in cases of serious misconduct or force majeure. If the employer terminated the contract prematurely in other circumstances, the employee was entitled to damages at least equal to the salary he would have received had the contract run its term. If the employee terminated the contract, the employer was entitled to damages corresponding to the loss incurred.

7. At that time, the Code du Sport (Sport Code) contained no provision relating to training of sports professionals, although Article L. 211-5 now provides that professional training contracts may require a trainee, on completion of training, to enter into a contract of employment with the training club for a period of no more than three years.

8. Employment of football players was further regulated in France by the Charte du Football Professionnel (Professional Football Charter), having the status of a collective agreement for the sector. Title III, Chapter IV, of the charter (1997-1998 version) concerned a category known as ‘joueurs espoir’ – promising players between the ages of 16 and 22 hoping to embrace a professional career, employed as trainees by a professional club, under a fixed-term contract. Article 23 of that chapter (4) provided, *inter alia*:

‘...
On the normal expiry of the contract, the club is then entitled to require that the other party sign a contract as a professional player.

...
1. If the club does not exercise that option, the player may resolve his status as follows:

(a) by signing a professional contract with a club of his choice, without any compensation being due to the previous club;

...
2. If the player refuses to sign a professional contract he may not, for a period of three years, sign with another club in the [French national football league] in any capacity whatever, without the written agreement of the club in which he was a “joueur espoir” ...

...’
9. At the material time, that charter – which applied and continues to apply only within France – did not regulate compensation between clubs in cases where a player had been trained by one club and then signed a contract with another club, although it now does. According to the agent for the French Government at the hearing, the rules now applicable in France correspond closely to the present FIFA rules set out below.

International rules

10. As regards transfers between football clubs in different countries, the FIFA Regulations on the Status and Transfer of Players now contain rules on training compensation when a player signs his first professional contract or is transferred before the end of the season of

his 23rd birthday. Those rules were elaborated in collaboration with the Commission, in the wake of the Court’s Bosman judgment. (5)

11. In accordance with Article 20 of the FIFA regulations and Annex 4 thereto, training compensation is paid to a player’s training club or clubs when he signs his first contract as a professional and, thereafter, each time he is transferred as a professional until the end of the season of his 23rd birthday.

12. On first registration as a professional, the club with which he is registered pays training compensation to every club that has contributed to his training, pro rata according to the period spent with each club. For subsequent transfers, training compensation is owed to his former club only for the time he was effectively trained by that club.

13. Clubs are divided into categories according to their financial investment in training players. The training costs set for each category correspond to the amount needed to train one player for one year multiplied by an average ‘player factor’ – the ratio of players who need to be trained to produce one professional player.

14. The calculation takes account of the costs that would have been incurred by the new club if it had trained the player itself. In general, the first time a player registers as a professional, compensation is calculated by taking the training costs of the new club multiplied by the number of years of training. For subsequent transfers, the calculation is based on the training costs of the new club multiplied by the number of years of training with the former club.

15. However, for players moving within the EU or the EEA, if the player moves from a lower to a higher category club, the calculation is based on the average training costs of the two clubs; if he moves from a higher to a lower category, the calculation is based on the training costs of the lower category club.

16. There is also a ‘solidarity mechanism’ governed by Article 21 and Annex 5. If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training between his 12th and 23rd birthdays receives a proportion of the compensation paid to his former club. It amounts in all to a maximum of 5% of the total compensation, spread over the seasons and among the clubs concerned.

17. As with the situation in France, no such international rules existed at the material time.

Facts, procedure and questions referred

18. In 1997, Olivier Bernard signed a ‘joueur espoir’ contract with the French football club Olympique Lyonnais, with effect from 1 July that year, for three seasons. Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year from 1 July 2000. Mr Bernard (apparently dissatisfied with the salary proposed) did not accept the offer but, in August 2000, signed a professional contract with the English club Newcastle United. (6)

19. On learning of that contract, Olympique Lyonnais sued Mr Bernard before the Conseil de prud’hommes (Employment Tribunal) in Lyon, seeking

an award of damages jointly against him and Newcastle United. The amount claimed was EUR 53 357.16 – equivalent, according to the order for reference, to the remuneration which Mr Bernard would have received over one year if he had signed the contract offered by Olympique Lyonnais.

20. The Conseil de prud'hommes considered that Mr Bernard had terminated his contract unilaterally, and ordered him and Newcastle United jointly to pay Olympique Lyonnais damages of EUR 22 867.35 on the basis of Article L. 122-3-8 of the Employment Code. The judgment did not give any reasons for the difference between the amount of damages claimed and the amount awarded.

21. The defendants appealed to the Cour d'appel (Court of Appeal), Lyon, which considered that Article 23 of the Football Charter was unlawful. The restriction it imposed was incompatible with the fundamental principle of freedom to exercise a professional activity and with Article L. 120-2 of the Employment Code. In particular, there was no provision specifying the compensation to be paid in respect of training in the event of premature termination. To require a player to continue to work for the club which trained him was a restriction on freedom to contract which was disproportionate to the protection of the club's legitimate interests, regardless of the cost of the training.

22. Neither of those courts considered it necessary to refer a question for a preliminary ruling, although asked to do so by Newcastle United. The Cour d'appel, however, while its ruling was based on French law, did consider that the requirement imposed by Article 23 of the Football Charter was also contrary to the principle in Article 39 EC.

23. Olympique Lyonnais has now appealed to the Cour de cassation. That court points out that Olympique Lyonnais's claim is based on Mr Bernard's failure to comply with the obligation to sign a contract with the club that trained him, not on the prohibition on signing with another club in the French league. The obligation in question does not prohibit a player from signing with a foreign club, but is likely to dissuade him from doing so in so far as he is likely to incur liability in damages. On the other hand, such liability might be justified by the club's legitimate interest in keeping a novice player whom it has just trained.

24. The Cour de cassation refers to the ruling in *Bosman*, that Article 39 EC 'precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee', and considers that the case raises a serious difficulty in interpreting that article.

25. It therefore seeks a preliminary ruling on the following questions:

'(1) Does the principle of freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which a "joueur

espoir" who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?

(2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?'

26. Written observations have been submitted by Olympique Lyonnais and Newcastle United, by the French, Italian, Netherlands and United Kingdom Governments, and by the Commission. At the hearing on 5 May 2009, Olympique Lyonnais, the French Government and the Commission presented oral argument.

Assessment

Preliminary remarks

Implications of the questions

27. It seems to me important to remember that the pursuit of sport falls within the scope of Community law only and precisely because and to the extent that it takes place within the sphere of the economic and individual activities and freedoms with which that law is concerned. That is indeed one of the basic premisses underlying the *Bosman* judgment. (7)

28. If, consequently, the principles and rules of Community law apply to a situation such as that in the present case, then, by the same token, the Court's ruling in this case has, potentially, wider implications for employees and employers in all sectors concerned by those principles and rules.

29. The Netherlands Government is therefore right to point out that the case impinges on the general issue of an employer willing to invest in training an employee but reluctant to see that employee immediately carry off the valuable skills acquired and place them at the service of a competing employer. That issue concerns Community law in so far as any restrictions placed on the employee's freedom to seek or accept other employment might restrict his freedom of movement within the Community.

30. The specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether there is a prohibited restriction on freedom of movement. They must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector.

31. Having said that, however, I do not consider that the Court has heard sufficient submissions to deal with the wider issue adequately. The Netherlands Government, which raised the more general issue in its written observations, was not present at the hearing, and none of the parties who were present enlarged upon the issue, even after prompting by the Court. In those circumstances, I do not propose to consider the broader implications of the case in any detail; and I suggest that the Court should confine its ruling to the specific context of the main proceedings.

Scope of the contested rule

32. As both Newcastle United and the United Kingdom Government point out, Article 23 of the Football Charter contains no explicit requirement for compensation to be paid by a player who contracts with a club in another Member State on completion of his training with a French club.

33. However, the questions referred concern the compatibility with Community law not of any specific provision, but of a rule 'pursuant to which a "joueur espoir" who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages'. That is the effect which the Conseil de prud'hommes gave to Article 23 of the Football Charter and Article L. 122-3-8 of the Employment Code, and neither the Cour d'appel nor the Cour de cassation has taken the view that it was mistaken in that interpretation – merely that the effect in question is, or may be, incompatible with a higher rule of law.

34. Consequently, this Court's concern must be with the effect described, whatever the provisions in which it is embodied.

Question 1: Compatibility with Article 39 EC

35. The first question may be answered briefly and simply: a rule which produces the effect described is, in principle, precluded by Article 39 EC. The reasoning which leads to that conclusion has been set out, in greater or lesser detail, in most of the observations submitted to the Court.

36. Sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC. The remunerated employment of professional or semi-professional footballers is such an economic activity. (8)

37. Article 39 EC extends not only to the actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner, including football association rules. (9) All the provisions referred to in the present case fall within one or other of those categories.

38. The situation of a French player, resident in France, who enters into a contract of employment with a football club in another Member State, is not a wholly internal situation which would fall outside the scope of Community law. It is the acceptance of an offer of employment actually made, to which Article 39 EC specifically applies.

39. Rules are liable to inhibit freedom of movement for workers if they preclude or deter a national of one Member State from exercising his right to freedom of movement in another Member State, even if they apply without regard to the nationality of the workers concerned, (10) unless the potential impediment to the exercise of free movement is too uncertain and indirect. (11)

40. Rules which require payment of a transfer, training or development fee between clubs on the transfer of a professional footballer are in principle an obstacle to freedom of movement for workers. Even where they apply equally to transfers between clubs in the same Member State, they are likely to restrict freedom of

movement for players who wish to pursue their activity in another Member State. (12) Rules under which a professional footballer may not pursue his activity with a new club in another Member State unless it has paid his former club a transfer fee constitute an obstacle to freedom of movement for workers. (13)

41. If a rule which requires the new employer to pay a sum of money to the former employer is thus in principle an obstacle to freedom of movement for workers, that must be equally or all the more true if the employee is himself liable to any extent. Either he must persuade the new employer to cover his liability or he must meet it out of his own resources, which are likely to be less than those of an employer. Nor is the potential impediment to the exercise of free movement in any way uncertain or indirect. A requirement to pay a sum of money is an immediate and important consideration for any worker contemplating refusing one offer of employment in order to accept another. (14)

42. That analysis is not, in my view, affected by the submissions of Olympique Lyonnais to the effect that a situation of the kind in issue is not concerned by Article 39 EC because that article was intended to cover discrimination on grounds of nationality, not restrictions of freedom to contract in the context of reciprocal onerous obligations, and/or because the dispute in fact falls within the sphere of competition law, as an instance of (allegedly) unfair competition.

43. As regards the first point, it is clear from the Court's case-law that Article 39 EC does indeed cover restrictions on freedom to contract if they are such as to preclude or deter a national of one Member State from exercising his right to freedom of movement in another Member State, at least as long as they derive from actions of public authorities or rules aimed at regulating gainful employment in a collective manner. As regards the second point, whilst the dispute between Olympique Lyonnais and Newcastle United may well touch on matters of competition law, those matters have not been raised by the referring court, so that the Member States and the Commission have not had an opportunity to comment on them. Moreover, if the dispute did raise issues of competition law, that would not of itself preclude the application of the Treaty provisions on freedom of movement. (15)

Question 2: Possible justification

44. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may none the less escape prohibition if they pursue a legitimate aim compatible with the Treaty. In order for that to be so, however, they must fulfil four further conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary for that purpose. (16)

45. It can hardly be questioned that the recruitment and training of young professional footballers is a legitimate aim which is compatible with the Treaty. Not only do all those who have submitted observations

agree on the point, but the Court itself has said so. (17) Nor is there any suggestion in the present case that the rules in issue are applied in a discriminatory manner.

46. As the Court pointed out in *Bosman*, (18) it is impossible to predict the sporting future of young players with any certainty. Only a limited number go on to play professionally, so that there can be no guarantee that a trainee will in fact prove a valuable asset either to the training club or to any other club. Rules such as the one in question here are therefore perhaps not decisive in encouraging clubs to recruit and train young players. None the less, such rules ensure that clubs are not discouraged from recruitment and training by the prospect of seeing their investment in training applied to the benefit of some other club, with no compensation for themselves. An argument that rules with that effect are justified in the public interest seems plausible.

47. On the one hand, professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged rather than discouraged. More specifically, the European Council at Nice in 2000 recognised that ‘the Community must ... take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured’. (19) In addition, the Commission’s White Paper on sport (20) and the Parliament’s resolution on it (21) both place considerable stress on the importance of training.

48. On the other hand, more generally, as the Netherlands Government has pointed out, the Lisbon Strategy adopted by the European Council in March 2000, and the various decisions and guidelines adopted since then with a view to its implementation in the fields of education, training and lifelong learning, accord primordial importance to professional training in all sectors. If employers can be sure that they will be able to benefit for a reasonable period from the services of employees whom they train, that is an incentive to provide training, which is also in the interests of the employees themselves.

49. It is, however, rather more difficult to accept that a rule such as that at issue in the present proceedings is suitable for securing the attainment of that objective and does not go beyond what is necessary for that purpose.

50. All those who have submitted observations – including *Olympique Lyonnais* – agree that only a measure which compensates clubs in a manner commensurate with their actual training costs is appropriate and proportionate in that way. Consequently, compensation based on the player’s prospective earnings or on the club’s prospective (loss of) profits would not be acceptable.

51. That appears to me to be a correct analysis. Of the last two criteria, the former might be susceptible to

manipulation by the club and the latter would be too uncertain. Neither would appear to have any particular relevance to the essential question of encouraging (or at least not discouraging) the recruitment and training of young players. Compensation related to actual training costs seems considerably more relevant. A number of further caveats have, however, been expressed.

52. First, since only a minority of trainee players will prove to have any subsequent market value in professional football, whereas a significantly greater number must be trained in order for that minority to be revealed, investment in training would be discouraged if only the cost of training the individual player were taken into account when determining the appropriate compensation. It is therefore appropriate for a club employing a player who has been trained by another club to pay compensation which represents a relevant proportion of that other club’s overall training costs.

53. Second, it may transpire that the training of a particular player has been provided by more than one club, so that any compensation due should, by some appropriate mechanism, be shared pro rata among the clubs in question.

54. Both of those concerns seem relevant when determining whether a particular scheme of compensation is appropriate and proportionate to the aim of encouraging the recruitment and training of young professional football players.

55. I am less convinced by a third concern which has been voiced, namely that the liability to pay the compensation should lie only on the new employer and not on the former trainee.

56. That, it seems to me, is not a proposition which can be upheld unconditionally. In general, the skills and knowledge which render an individual valuable on the employment market may be acquired at his own expense, at the public expense or at the expense of an employer who trains him in return for his services. If, on the expiry of the training period in the latter case, the ‘balance of the account’ between training costs and services rendered indicates that the cost of the training has not yet been compensated in full, then it does not seem unreasonable that the trainee should be required to ‘balance the account’, either by providing further services as an employee or (if he does not wish to do so) by paying equivalent compensation. Whilst the need to pay training compensation may discourage an employee from accepting a contract with a new employer, in either the same or another Member State, there seems no particular reason why he should be placed, at the training employer’s expense, in a better position to accept such a contract than another candidate who has trained at his own expense.

57. Such considerations will, however, vary according to the way in which training is generally organised in a particular sector. If, as appears to be the case, training of professional footballers is normally at the clubs’ expense, then a system of compensation between clubs, not involving the players themselves, seems appropriate. And I would stress that, if the player himself were to bear any liability to pay training compensation, the

amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs. If it is necessary to train *n* players in order to produce one who will be successful professionally, then the cost to the training club (and the saving to the new club) is the cost of training those *n* players. It seems appropriate and proportionate for compensation between clubs to be based on that cost. For the individual player, however, only the individual cost seems relevant.

58. To sum up, the need to encourage the recruitment and training of young professional football players is capable of justifying a requirement to pay training compensation where an obligation to remain with the training club for a specified (and not over-lengthy) period (22) after completion of training is not respected. However, that will be so only if the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club and, to the extent that the compensation is to be paid by the player himself, limited to the outstanding cost of the individual training.

The current French and FIFA rules

59. Many of the parties submitting observations have drawn the Court's attention to the rules currently contained in Articles 20 and 21 of, and Annexes 4 and 5 to, the FIFA Regulations on the Status and Transfer of Players. Those rules now govern situations such as that of Mr Bernard but were not in force at the material time in the present case. They were adopted in 2001, with the Commission's approval, and seek to ensure compliance with the Court's case-law, in particular the judgment in *Bosman*. The French Government points out in addition that the French Professional Football Charter has followed suit and now contains comparable rules for domestic situations.

60. The United Kingdom Government in particular points out that, under the current FIFA rules, the club, not the player, pays compensation; the compensation is calculated on the cost of training a player, adjusted by the ratio of trainees needed to produce one professional player; various safeguards and limits render the compensation proportionate to the aim sought; and a solidarity mechanism apportions compensation between clubs when several have contributed to training.

61. Explicitly or implicitly, those parties also request that the Court should give its blessing to the rules currently in force.

62. It seems to me, however, that specific approval would not be appropriate in the context of the present case, which concerns a situation to which those rules did not apply. That said, some of the reasoning which I have set out above, and some of the reasoning which will be used by the Court in its judgment, may well be relevant if and when it may become necessary to examine the compatibility of those rules with Community law.

Conclusion

63. In the light of all of the foregoing, I am of the opinion that the Court should give the following answers to the questions raised by the Cour de cassation:

(1) A rule of national law pursuant to which a trainee football player who at the end of his training period signs a professional player's contract with a club of another Member State may be ordered to pay damages is, in principle, precluded by the principle of freedom of movement for workers embodied in Article 39 EC.

(2) Such a rule may none the less be justified by the need to encourage the recruitment and training of young professional football players, provided that the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club and, to the extent that the compensation is to be paid by the player himself, limited to any outstanding cost of the individual training.

1 – Original language: English.

2 – As Bill Shankly put it (perhaps apocryphally) when reflecting on the relationship between the Liverpool and Everton fans, 'Some people believe football is a matter of life and death. I am very disappointed with that attitude. I can assure you it is much, much more important than that.' For other versions of what may (or may not) have been said, see <http://www.shankly.com/Webs/billshankly/default.aspx?aid=2517>.

3 – A new code took effect on 1 May 2008. The substance of the provisions in issue remains unchanged, but the numbering and presentation are no longer the same.

4 – Although, from the copy of the charter produced by the French Government, it seems that the provision concerned is Article 23 of Title III, Chapter IV, of the charter, the parties and the national courts have uniformly referred to it as Article 23 of the charter. To avoid inconsistency, I shall follow suit and refer to it as 'Article 23 of the Football Charter'. The same provision is currently Article 456 of the 2008-2009 version of the charter.

5 – Case C-415/93 [1995] ECR I-4921.

6 – The facts of the present reference therefore concern two very well-known and well-funded clubs. However, the principles at stake apply to all professional football clubs, however wealthy the destination club or impoverished the training club.

7 – See in particular paragraphs 73 to 87 of that judgment and the case-law cited there; see also Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paragraph 22 et seq.

8 – See *Meca-Medina and Majcen*, paragraphs 22 and 23 and the case-law cited there.

9 – See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; *Bosman*, paragraph 82; and Case C-176/96 *Lehtonen* [2000] ECR I-2681, paragraph 35.

10 – See *Bosman*, paragraph 96; Case C-190/98 *Graf* [2000] ECR I-493, paragraphs 18 and 23; and *Lehtonen*, paragraphs 47 to 50.

11 – See *Graf*, paragraphs 23 to 25.

12 – See *Bosman*, paragraphs 98 and 99.

13 – See *Bosman*, paragraph 100.

14 – In contrast to the situation in Graf (see in particular paragraphs 13 and 24 of that judgment).

15 --- See, for example, Meca-Medina and Majcen, paragraph 28.

16 – See Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32; Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37; Bosman, paragraph 104. The phrase ‘raisons impérieuses d’intérêt général’, used systematically by the Court in French, has been translated into English in a variety of ways; ‘overriding reasons in the public interest’ seems to be the most recent, and the one which best reflects the meaning.

17 – See Bosman, paragraph 106.

18 – At paragraph 109.

19 – Annex IV to the Presidency Conclusions of the Nice European Council Meeting (7, 8 and 9 December 2000).

20 – COM(2007) 391 final.

21 – Non-legislative resolution of 8 May 2008 (document P6_TA(2008)0198).

22 – Thus, within the context of a total professional playing career that is necessarily limited in length, an obligation to spend (say) the first 10 years from the date of signing the first professional contract with the training club would plainly be unacceptable.
