The Sporting Exemption in European Case Law

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Abstract

In the early nineties, when the “Bosman” case arose, sports authorities were faced with a great challenge. The widely accepted autonomy and self-regulation of the sports sector was at stake. If sports were to be treated as just another economic activity without exceptions and if its specific characteristics were not recognised, the whole athletic establishment would be endangered. Since then there were many efforts both from member states and from sports entities in order to establish the so called “sporting exemption” on a political level as well as before the European Court of Justice (henceforth ECJ). The “Olympique Lyonnais” case presents an opportunity for the ECJ to rule in favour of the existence of the exemption. Advocate General E. Sharpston delivered her Opinion on the 16th of July 2009 supporting the exemption. The present contains a summary of this Opinion as well as remarks on the effect that this case is going to have on the athletic establishment if the ECJ adopts the Advocate General’s views on the matter.

Key Words: Sports law, sporting exemption, proportionality, European law, free movement of workers.
I. Facts of the Case

In 1997, a football player, signed a so called “joueur espoir” contract with the French football club Olympique Lyonnais, for three seasons. Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year. The football player, apparently dissatisfied with the salary proposed, did not accept the offer but, signed a professional contract with another club, the English club Newcastle United. After that, Olympique Lyonnais sued the player in the French courts, seeking an award of damages jointly against him and Newcastle United. The amount claimed was equivalent to the remuneration which the player would have received over one year if he had signed the contract offered by Olympique Lyonnais.

It was the French Court’s view that the football player had terminated his contract unilaterally, therefore it ordered him and Newcastle United jointly to pay Olympique Lyonnais damages on the basis of the provisions of the French Employment Code. However the amount awarder was less than the amount claimed and the Court did not give any reasons for the difference between these amounts. The defendants appealed to the French Court of Appeal, but neither of those courts considered it necessary to refer a question for a preliminary ruling, although asked to do so by Newcastle United. The Court of Appeal, 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. Olympique Lyonnais then appealed to the French highest Court the “Cour de Cassation”. The Cour de Cassation referred to the ruling in “Bosman”(Papaloukas, 2008, p.16), by stating 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” (Bosman, 1995, para. 114; Sharpston, 2009, paras 18-24).

The Cour de Cassation seeked 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?» (Sharpston, 2009, para. 25).
II. The FIFA rules

In 1997 when the case arose, no international rules existed. Nowadays however, as regards transfers between football clubs in different countries, the FIFA Regulations on the Status and Transfer of Players contain rules on training compensation. Those rules were elaborated in collaboration with the Commission, in the wake of the Court’s “Bosman” judgment. According to Article 20 of the FIFA regulations and Annex 4 (FIFA Regulations on the Status and Transfer of Players) thereto, training compensation is paid to a player’s training club or clubs when he signs his first contract as a professional and, after that, each time he is transferred as a professional until the end of the season of his 23rd birthday. 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 (Sharpston, 2009, paras 10-12).

All 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. This 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 multiplying the training costs of the new club by the number of years of training. In all 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 (Sharpston, 2009, paras 13-17).

III. Incompatibility with Article 39 EC

Article 39 EC reads as follows:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail 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 this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.”

As regards the first question referred to the Court the answer that can be simply given is that a rule which produces the effect described is, in principle, precluded by Article 39 EC. The Court has ruled that “It is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC” (Meca-Medina, 2006, para. 22 et seq. and Papaloukas, 2005, p. 39). The remunerated employment of professional or semi-professional footballers is such an economic activity. 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. All the provisions referred to in the present case fall within one or other of those categories.

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. 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, (Meca-Medina, 2006, para. 22 et seq.) unless the potential impediment to the exercise of free movement is too uncertain and indirect (Graf, 2000, paras 18 and 23 to 25). 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 (Bosman, 1995, paras. 98-99).

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 (Bosman, 1995, para. 100). In that sense a rule which requires the new employer to pay a sum of money to the former employer is 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 per-
suade 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.

It is therefore 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. (Sharpston, 2009, paras 35-43)

IV. The Justification of the Incompatibility

According to the rulings in the “Kraus” (Kraus, 1993, para. 32) and “Gebhard” cases (Gebhard, 1995) Treaty provisions “preclude any national measure ... liable to hamper or to render less attractive the exercise by Community nationals... of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest” (Thieffry, 1977, paras 12 and 15). Nations measures infringing fundamental freedoms in order to be justified they must fulfil the four conditions of the Principle of Proportionality:

- they must be justified by an overriding reason relating to the public interest,
- they must be appropriate for ensuring the attainment of the aim which they pursue,
- they must be is necessary for attaining it and the aim could not be attained by less restrictive measures,
- they must not be applied in a discriminatory manner.

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 to the Court agree on the point, but the Court itself has said so in paragraph 106 of its “Bosman” ruling where it stated “In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between 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.” On the other hand there is
no suggestion in the present case that the rules in issue are applied in a discriminatory manner.

It is impossible to predict the sporting future of young players with any certainty as the Court pointed out in “Bosman” (Bosman, 1995, para. 109). There is only a limited number of players that 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 the present case 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. Therefore an argument that rules having that effect are justified in the public interest seems plausible (Sharpston, 2009, paras 45-46).

On the one hand, professional football is not merely an economic activity but also a matter of considerable social importance in Europe. The training and recruitment of young players should be encouraged rather than discouraged. 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” (European Council Meeting, Nice, 2000). In addition, the Commission’s White Paper on sport and the Parliament’s resolution on it (European Parliament Resolution, 2008), both place considerable stress on the importance of training.

On the other hand, the Lisbon Strategy (Lisbon European Council 23 and 24 March 2000 Presidency Conclusions) 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 (Sharpston, 2009, para.47-48).

However finding a compensation scheme that would fit the proportionality requirements is not an easy task. 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 a club is to bear liability to pay compensation, then a system of compensation between clubs, not involving the players themselves, seems appropriate. 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 appropriate (Sharpston, 2009, para.57). Any measure that is basing compensation on the player’s prospective earnings or on the club’s prospective loss of profits could not be consider proportionate as it would not appear to have any particular relevance to the essential question of encouraging or at least not discouraging the recruitment and training of young players (Sharpston, 2009, para.51).

V. The Confirmation of the Sporting Exemption

The present case should be examined in conjunction to the “Bosman” ruling. In that ruling the ECJ did not reject the previous “Walrave” and “Dona” decisions (Papaloukas, 2007, p.40), but limited their scope significantly by further defining their context. Rather than examining whether a practice was an issue of genuine sporting interest – which automatically should mean according to the Court’s previous rulings that there is no economic activity – the ECJ advanced to the next question, namely whether the contested practice involved any economic activity and considered that the practice in question was in fact an economic activity.

A reasonable interpretation of the decision might be therefore, that the rule set by the “Bosman” decision is that if a practice is an economic activity, it cannot be excluded. In such a case the ECJ did not need to refer to the “Dona” decision since, according to that decision, only if a practice is not an economic activity it may be then considered as of sporting interest and therefore be excluded. Why then did it choose to refer to the Dona decision and not simply to ignore it?

The ECJ’s non-reference in the “Bosman” ruling of the rule set in the “Walrave” Case and on the other hand the reference in paragraph 76, to the rule set in the “Dona” Case, in conjunction with its obvious attempt to find a way through the “Dona” rule cannot mean anything other than the fact that the “Bosman” ruling was intended to amend the “Dona” rule in the sense that practices of sporting interest are not excluded for the reason that they lack economic characteristics by definition as was mentioned in the “Dona” case, but they are excluded merely because they are of sporting interest and may be excluded even if they contain an economic interest but do not exceed the (sporting) purpose (Papaloukas, 2007, p.40) for which they were intended.

This interpretation may not be the most obvious. Indeed for many years it was considered more reasonable to interpret the “Bosman” ruling (Papaloukas, 2008, p.16), as meaning that sporting activities of an economic nature are never excluded. But if we are to examine the whole of the ECJ’s case law on the sporting exemption, this is surely the only interpretation which goes hand
in hand and even prepares the ground for the ECJ’s case law which it was about to follow namely the “Deliege” (Papaloukas, 2008, p.51), “Lehtonen”, “DLG”, “Wouters”, “Piau” (Papaloukas, 2008, p.220 and Papaloukas, 2007, p.45), “Meca Medina” (Papaloukas, 2008, p.299), cases and the present “Olympique Lyonnais” case. The result of the ECJ’s case law is that the principle of proportionality, was perhaps implied in the “Bosman” case but it was explicitly established in the after - “Bosman” case law as the rule applied to cases concerning the exemption of sports rules from Treaty provisions.

If the Advocate General’s opinion concerning the “Olympique Lyonnais” case is adopted by the Court this would be yet another triumph of the sports authorities in their efforts to convince the European Institutions of the specificity of sport and its need for autonomy (Papaloukas, 2005, p.39). It would be better if this decision had come in the nineties since this case arose in the nineties. If this was so, this decision would become at least as important as the “Bosman” case as it would recognise the sporting exemption. Instead the sports community had to wait for the interpretation of numerous rulings until the “Meca Medina” ruling was issued in order to clear the fact that the sporting exemption does apply. The issuing of such a decision in the “Olympique Lyonnais” case in the present time would however reaffirm the existence of a sporting exemption (Papaloukas, 2009, p.7) applied under the conditions of the proportionality rule (Papaloukas, 2010, p.86).

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