



Solidarity compensation framework in football revisited

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Abstract

The present article discusses key problems related to suitability of the existing solidarity compensation system for the current transfer market in football. It briefly explains the origin, current wording and applicability of the FIFA solidarity framework, adopted in 2001 and consisting of ‘solidarity contribution’ and ‘training compensation’ systems, as well as its consistency with the EU law. Article demonstrates key deficiencies of the FIFA solidarity framework, resulting in the competitive imbalance between football clubs participating in organized football and lack of the efficient, systemic encouragement for training and development of youth players by football clubs. Furthermore, this article includes a review of *de lege ferenda* proposals aimed to eliminate major flaws of the current framework, enhance solidarity and competitive balance between football clubs as well as to reduce disproportionalities in respect to financial gratification for training clubs of professional football players.

Keywords FIFA · RSTP · Solidarity mechanism · Training compensation · CJEU · EU

1 Introduction

The concept of solidarity covers a wide range of aspects connected with the operations of the football market. It varies from the principal theme of this article, i.e., the solidarity compensation framework within the football transfer system, consisting of ‘solidarity contribution’ system (Article 21 and Annex 5 of the FIFA Regulations on Status and Transfer of Players, ‘RSTP’) and ‘training compensation’ system (Article 20 and Annex 4 of the RSTP), through other arrangements of football governing bodies (‘FGBs’), such as UEFA home-grown players’ rule and/or UEFA Financial Fair Play scheme, to rules on the collective selling of media and broadcasting rights to football competitions, tournaments and events. Although such mechanisms differ significantly in terms of their scope, subject matter and/or impact on the functioning of the football market, the point of intersection, i.e., the aim pursued by all such arrangements to the regulatory framework, remains the same—to enforce the competitive balance and solidarity between football clubs and leagues.

This article aims mainly to explain the current solidarity compensation framework in the football transfer market adopted by FIFA in 2001. In particular, it presents the perception of the solidarity compensation framework from the European Union (‘EU’) law perspective, includes a brief analysis of the FIFA rules on solidarity contribution and training compensation mechanisms, and addresses key deficiencies of such a framework, preventing FGB from achieving the pursued aims: to serve as an efficient mechanism to distribute the income generated by the biggest football clubs, as well as a systemic encouragement for training and development of youth players by football clubs. Moreover, the analysis contains several suggestions on possible amendments of the solidarity compensation mechanisms in order to adjust them to the realities of current-day football and eliminate their major flaws. At the same time, it includes a review of alternative approaches, which might replace the existing regulations on solidarity compensation within the transfer market. It should also be emphasized that this article is intended neither to serve as a comprehensive guide to the compensation framework (including the review jurisprudence of FIFA Dispute Resolution Chamber (‘FIFA DRC’) or the Court of Arbitration for Sport in Lausanne (‘CAS’) in this respect) nor a justification of the solidarity scheme on the basis of the EU law.

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2 The solidarity in the football & the European Union law

As pointed out in the introduction to this article, solidarity in football has many different aspects and relates not only to solidarity compensation schemes, but also to all other measures aimed at pursuing the distribution of wealth between clubs and associations, as well as creating competitive balance in football. Solidarity between clubs in relation to the football transfer market, including its feature as a way to protect the training of young sportsmen and training clubs, including grassroots football, seems to be one of the three most important aspects of solidarity in football besides collective selling of media and broadcasting rights and UEFA actions to enforce competitive balance and solidarity in European football, *inter alia* through the UEFA home-grown players' rule ('HGPR') and the UEFA Financial Fair Play ('FFP') scheme. The European Commission indicates that 'organized solidarity mechanisms between the different levels and operators' is one of the special characteristics of sport structure, allowing the recognition of the 'specificity of sport' and the so-called European approach to sport.¹ Such statement has particular importance in view of the fact that Article 165 of the Treaty of Lisbon enables the development of the EU sports policy with special regard for to the specific nature of a sport and promotion of fairness and openness in sporting competitions.²

EU institutions, on numerous occasions, have addressed the solidarity schemes in football. There is no doubt that in the European Parliament's and the European Commission's assessment, the vertical solidarity in sport, i.e., mechanisms supporting the distribution of monies between the wealthiest and smaller clubs, including amateur/grassroots clubs, underpins the current organization of sport in the EU.³ UEFA seems to share this view as it aims to use its revenues to 'support re-investment and redistribution in the game in accordance with the principle of solidarity between all levels and areas of sport'⁴ and stresses that the future of European sports depends heavily on 'an ambitious and inclusive training policy common to all Member States'.⁵

¹ Commission of the European Union, White Paper on Sport, COM (2007) final 391, July 2007, paras. 4.1–4.2.

² Parrish et al. (2010), p. 5.

³ Garcia (2009), p. 276.

⁴ UEFA, Vision Europe. The direction and development of European football over the next decade, Nyon, April 2005, p. 7, http://fasfe.org/images/docs/UEFA_Vision_Europe.pdf. Accessed 21 July 2018.

⁵ UEFA (2010) UEFA's position on Article 165 of the Lisbon Treaty, p. 7, https://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf. Accessed 19 July 2018.

It is undisputable that in view of the jurisprudence of the Court of Justice of the European Union ('CJEU'), sport is a subject to the EU law insofar as it constitutes an economic activity.⁶ Additionally, in accordance with the *Meca-Medina* ruling,⁷ the authority of FGBs to set out sporting rules is limited by the EU law, in particular by free movement and competition law principles laid down in the Treaty on the Functioning of the EU ('TFUE'). As emphasized in the KEA & CDES Report prepared for the European Commission:

*rules aimed at implementing sports specificity derogating from normal labor or competition laws that apply to traditional industries, can only be justified if sport bodies guarantee, through adequate mechanisms, that sporting values are upheld against strict commercial objectives. Such values relate essentially to the organization of fair and balanced competition, the enforcement of collective solidarity mechanisms and youth development.*⁸

In the *Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*, listed as Annex IV to the Conclusions of the French Presidency from the European Council meeting in Nice on 7–10 December 2000, it has been highlighted that the 'training policies for young sportsmen and women are the life blood of sport, national teams and top-level involvement in sport and must be encouraged'.⁹ Furthermore, sport associations and public authorities were invited to take the steps necessary 'to preserve the training capacity of clubs affiliated to them and to ensure the quality of such training, with due regard for national and Community legislation and practices'.¹⁰ Such conclusions were also supported by the European Parliament in its 2012 Resolution, where the

⁶ CJEU, case C-36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union cycliste internationale and others*, ECLI:EU:C:1974:140; CJEU, case C-415/93 *Union Royale Belge des Societes de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463, para. 73; CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 27; CJEU, case C-519/04 *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, para. 22.

⁷ CJEU, case C-519/04 *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492.

⁸ Report by the KEA European Affairs and the CDES (Centre for the Law and Economics of Sport) of January 2013, the Economic and Legal Aspects of Transfers of Players p. 252, <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf>. Accessed 11 August 2018.

⁹ European Council, Conclusions of the Presidency, Annex IV - Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, 7–10 December 2000, Nice, France, para. 11.

¹⁰ *Ibid.*

importance of training allowances was underlined as a mean providing an effective protection mechanism for training centers and a fair return on investment as the ‘training for players at local level and investments in sports education are needed for the sustainable development of the sports movement in Europe’.¹¹ Analogously, the European Commission in its White Paper on Sport recognized that ‘investment in and promotion of training of young talented sportsmen and sportswomen in proper conditions is crucial for a sustainable development of sport at all levels’.¹² Such statements are of paramount importance as they also clearly show the support for the CJEU conclusions in the *Bernard* ruling from the European Parliament’s perspective. Additionally, the European Parliament has emphasized on numerous occasions the need to subscribe to ‘a European charter for solidarity in football, that commits subscribers to respect good practices concerning the discovery, recruitment and reception of young foreign football players’,¹³ the creation of a solidarity fund that would finance prevention programs in countries most affected by human trafficking’,¹⁴ as well as the significance of training allowances, as ‘these provide an effective protection mechanism for training centers and a fair return on investment’ as the ‘training for players at local level and investments in sports education are needed for the sustainable development of the sports movement in Europe’.¹⁵

Therefore, the legality of solidarity and transfer market measures adopted by FGBs needs to be analyzed from the EU law perspective prior to outlining the inefficiencies of the current approach of the FGBs to solidarity on the football transfer market. Naturally, the analysis of the perception of the solidarity and training encouragement mechanisms established on the basis of the RSTP by the CJEU and the European Union institutions has great significance in this regard. Nevertheless, as indicated by Egger and Stix-Hackl, FIFA transfer regulations form a wide, complex whole and it is not correct to analyze its individual components regardless of its entirety.¹⁶ Additionally, a brief description of the other aspect of solidarity in football, related to UEFA FFP and UEFA HGPR in particular, is useful in painting a broader picture of the current EU approach toward solidarity between football clubs, undoubtedly influencing also the policy of the FGBs

on football rules aimed to encourage training and development of youth players.

2.1 The European Union approach toward solidarity as a justification of the existence of the football transfer market

The compatibility of the transfer system in football with the EU law, in particular freedom of movement for workers guaranteed within the EU by Article 45 TFEU¹⁷ and the EU competition law, is a subject of considerable debate in sports law literature, in particular as a result of a competition law complaint lodged to the European Commission by the International Federation of Football Players (‘FIF-Pro’) in September 2015.¹⁸ The main matter under discussion is not the legality of the current transfer system established in 2001 in the light of the EU freedoms and competition law, as it is rather unambiguous that FIFA rules on transfers, contractual stability or even solidarity contribution and training compensation mechanisms *prima facie* infringe the fundamental freedoms and the competition law of the EU,¹⁹ but whether the transfer system can be accepted in the case the restrictions to a freedom of movement for workers and competition with the EU market can be deemed as justified and legitimate, i.e., they pursue a legitimate aim compatible with the TFUE, justified by overriding reasons in the public interest, and their application ensures the objectives in question and do not go beyond what is necessary to accomplish it.²⁰

In the CJEU jurisprudence, notably in the *Bosman* ruling in 1995, three legitimate aims pursued by the current transfer system are identified: protection of the integrity of competitions, competitive balance between football clubs, and protection of the training clubs and development of young players.²¹ The last objective, crucial in relation to the solidarity compensation framework included in the RSTP, i.e., encouragement to recruit and train young players, has been directly accepted as legitimate in the *Bosman* ruling in view of the specific characteristics of the sport (football) and its considerable social importance in

¹¹ Resolution of the European Parliament of 2 February 2012 on the European dimension in sport (2011/2087(INI)), OJ C 239E, 20 August 2013, pp. 46–60, paras. 71–74.

¹² *Supra*, note 1, para. 37.

¹³ Resolution of the European Parliament of 29 March 2007 on the future of professional football in Europe (2006/2130(INI)), Official Journal 027 E, 31/01/2008 P. 0232–0240, para. 38 tiret 1 & 2.

¹⁴ *Ibid.*, para. 38 tiret 1 & 2.

¹⁵ *Supra*, note 12, paras. 71–74.

¹⁶ Egger and Stix-Hackl (2002), p. 83.

¹⁷ CJEU, case C-415/93 *Union Royale Belge des Societes de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463, para. 82, CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 30.

¹⁸ Recently i.a. Pearson et al. (2014), Szymanski (2015).

¹⁹ Pearson (2015), pp. 220–221.

²⁰ CJEU, C-55/94 *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, para. 37; CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 38, CJEU, case C-19/92 *Dieter Kraus v Land Baden-Württemberg*, ECLI:EU:C:1993:125, para. 32.

²¹ Pearson (2015), p. 232.

the EU.²² This has been supported by Advocate General Sharpston in her opinion case *Bernard*:

*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.*²³

Consequently, bearing in mind that ‘the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players,’²⁴ ‘the returns on the investments in training made by the clubs providing it are uncertain by their very nature’²⁵ and ‘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,’²⁶ the CJEU ruled in the *Bernard* case in 2008 that a scheme guaranteeing payment of a financial compensation to the training club for a player in case he signs a professional football contract with another club shall be in principle justified by the objective of encouraging recruitment and training of young players.²⁷ Otherwise, training clubs, in particular small football clubs operating at a local level, whose investment in recruiting and training young footballers has a considerable importance for the social and educational function of sport, could be discouraged from investing in training and development of youth players.²⁸ However, it should be stipulated that in view of the CJEU, in order to be legitimate, 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’.²⁹

²² The CJEU highlighted also that ‘it must be accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players’ CJEU, case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463, paras 106–108.

²³ Opinion of Advocate General Sharpston in CJEU case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:14, para. 47.

²⁴ CJEU, case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463, para. 108; CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 41.

²⁵ *Ibid.*, para. 109; *Ibid.*, para. 42.

²⁶ CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 43.

²⁷ *Ibid.*, para. 45.

²⁸ *Ibid.*, para. 44.

²⁹ *Ibid.*, para. 45.

To sum up the conclusions of the CJEU in the *Bosman* and *Bernard* rulings, it should be assumed that the system that compensates the player’s training costs adopted by FIFA and national football federations should, in principle, meet the following conditions: (i) compensation must be related to the actual cost of training, provided that not only individual costs but also a relevant proportion of the whole training cost of the club is taken into account; (ii) compensation should be shared *pro rata* among the training clubs of the player; (iii) the amount of compensation due to a given club should decrease in the course of time and subsequent transfer of a player’s registration rights (the longer the club receives return on its investment in training a player, the smaller limitations on the free movement of the player shall be applied)³⁰; (iv) the new club shall pay solidarity contribution to the training club; and (v) the system shall not impose any restrictions on the free movement of workers to a greater extent than necessary for its purpose.

Therefore, if the adopted framework does not provide the training compensation payment related to the real training costs incurred by the football club, such as the French FA rules on *joueur espoir* in the *Bernard* ruling, it shall be considered an illegal restriction on the freedom of movement for workers and subsequently a breach of the EU law. Accordingly, if the solidarity contribution mechanism also fails to provide a principle of solidarity among football clubs, it shall be noted that the whole transfer framework in football market might be vulnerable to challenge on the basis of the EU law (mainly competition and/or free movement arguments). In this context, it is very important to emphasize that in sports law literature some authors underline that solidarity between clubs has not only been an important principle of the football transfers system adopted in 2001 by FIFA, but in fact the *raison d’être* of the whole current framework.³¹ Otherwise, without efficient mechanisms promoting solidarity among football clubs and training of young players, FIFA would not have been able to justify and operate the transfer system of players in light of the EU law, in particular the comments made by CJEU in the *Bosman* and *Bernard* rulings.³² Such a view should be supported in the light of Commissioner Viviane Reding’s statement to the European Parliament concerning the reform of FIFA rules governing international transfers, presented in March 2001. Commissioner, involved in the negotiations with FIFA as a Member of the European Commission responsible for Education and Culture, pointed out three areas of the new FIFA regulations which were of crucial importance: (i) protection of

³⁰ *Ibid.*, p. 31.

³¹ Blackshaw and Kolev (2009), pp. 11–18.

³² *Supra*, note 26.

young players moving within the EU, in particular in order to guarantee appropriate general and sporting education to such players; (ii) encouragement and compensation system for clubs which train young players and provide a ‘social dimension to their sporting activity,’ and (iii) stability of sporting competitions, ensured by limited possibility of unilateral termination of a football contract and disciplinary measures against players who terminate their football contracts during its first two years without just cause and/or sporting just cause.³³ Finally, the significance of the solidarity compensation system as a justification of the existence of the transfer system (which clearly curtails the free movement of a player as an employee within the EU territory) in the light of the European Union law was also highlighted in the European Commission statement on the outcomes of discussions between the European Commission and FIFA/UEFA on regulating international football transfers.³⁴

Nevertheless, in sports law literature legal justification of the football transfer system based on arguments that it protects the training clubs and encourages the development of youth players is often undermined.³⁵ Weatherhill emphasizes that transfer rules operate mainly by virtue of tradition and FGBs use arguments mentioned above ‘as a camouflage for the maintenance of inefficient or unfair practices.’³⁶ In-depth analysis of the legality of the transfer system under the EU was carried out by Pearson, who summarized the main objections against the framework established on the basis of the RSTP.³⁷ In particular, it is highlighted that even potential adverse impact of the abolition of the transfer system for football clubs and lack of an efficient alternative for the current framework shall not override the fact (if the case) that restrictions for players’ fundamental freedoms and EU competition law are not proportional to the gains achieved.³⁸

In view of the fact that the transfer system has not been duly analyzed by the CJEU or the European Commission as regards competition law (in *Bosman*, after stating that it is contrary to the free movements rights, the Court refrained from ruling out on its compliance with the EU

competition law),³⁹ the potential challenge on the basis of the Articles 101 and 102 TFUE remains feasible, as demonstrated by FIFPro legal complaint against the FIFA transfer system submitted to the European Commission in 2015.⁴⁰ Although due to the FIFA and FIFPro agreement signed on 6 November 2017—which mainly addresses amendments to the RSTP concerning abusive conduct of the parties and new rules on unilateral termination of the contract—the complaint has been withdrawn by the FIFPro,⁴¹ it appears that a potential challenge of the system based on the arguments with regard to its failure to pursue legitimate aims such as competitive balance and incentivization to train and develop young player is still an option for an individual litigant, as demonstrated in the further part of this article.⁴²

2.2 The European Union and other aspects of solidarity in football

Besides the aspect of solidarity connected directly with the operations of the football transfer market, the collective selling of media and broadcasting rights and UEFA actions to enforce competitive balance and solidarity in European football, through the UEFA HGPR and the UEFA FFP scheme, are two other important features of the financial solidarity model of European football. Although they do not specifically relate to the operations of the solidarity compensation framework on the transfer market, they should be hereby briefly explained to show the current state of play and potential synergies with the latter.

The European Commission, in its White Paper on Sport, recommended sport organizations to ‘pay due attention to the creation and maintenance of solidarity mechanisms’ in collective selling of media and broadcasting rights.⁴³ Furthermore, the recommendation to the member states to introduce and/or reinforce such a policy in the interests of ‘solidarity, an equitable redistribution of income between sports clubs, including the smallest ones, within and between the leagues, and between professional and amateur sport, so as to prevent a situation in which only big clubs benefit from media rights’ was also included in the Resolution of the European Parliament on the White Paper on

³³ Statement by Commissioner Viviane Reding to the European Parliament of 13 March 2001, Speech/01/117 The Reform of FIFA Rules Governing International Transfers, <http://europa.eu/rapid/press-releases-action.do?reference=SPEECH/01/117&format=HTML&aged=0&language=EN&guiLanguage=en>. Accessed 9 August 2018.

³⁴ Commission Press Release of 5 May 2001, IP/01/314 Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers, http://europa.eu/rapid/press-release_IP-01-314_en.htm. Accessed 21 July 2018.

³⁵ Pearson (2015), pp. 223–224; Weatherhill (2004), pp. 113–116.

³⁶ Weatherhill (2004), p. 151.

³⁷ Pearson (2015), pp. 230–236.

³⁸ *Ibid.*, p. 231.

³⁹ Parrish (2015), p. 257.

⁴⁰ FIFPro media release ‘FIFPro legal action against FIFA transfer system,’ 18 September 2015, <https://fifpro.org/news/fifpro-takes-legal-action-against-fifa-transfer-system/en/>. Accessed 27 July 2018.

⁴¹ FIFPro media release ‘FIFA and FIFPro sign landmark agreement’, 6 November 2017, <https://fifpro.org/news/fifa-and-fifpro-sign-landmark-agreement/en/>. Accessed 27 July 2018.

⁴² See different view on this issue: Weatherill (2008), p. 5.

⁴³ Commission’s White Paper on Sport of 11 July 2007, COM (2007) final 391—White Paper on Sport, para. 48.

Sport.⁴⁴ As indicated by the European Parliament in the 2007 resolution:

*it is vital for professional football that the revenues from television rights be distributed in a fair way that ensures solidarity between the professional and amateur games, and between competing clubs in all competitions; notes that the current distribution of television revenues in the UEFA Champions League to a significant degree reflects the size of the clubs' national television markets; notes that this favors big countries, thereby diminishing the power of clubs from smaller countries.*⁴⁵

As pointed out in the UEFA Financial Report for season 2016/2017, UEFA's main objective is to 'reinvest as much as possible in European football, not only by way of payments to participating clubs and member associations, but also to those which do not qualify to take part in our competition' as well as 'strengthening solidarity, to protecting the future of the game and to maximizing UEFA's finances in a way that reflects and highlights the concept of solidarity.'⁴⁶ UEFA makes solidarity payments to both member associations in order to develop their infrastructure (UEFA HatTrick program, which provides for a one-off EUR 3.5 million solidarity payment for each UEFA member association between seasons 2016/2017 and 2019/2020), contribute to their running costs and as incentive payment, as well as to clubs eliminated in the preliminary stages of the UEFA Champions League and the UEFA Europa League and other top-tier clubs that do not qualified for UEFA's main competitions.

Particular attention must be given to UEFA rules on locally trained players and squad limits. This topic has been a subject of attention of the European Commission due to regulations of the football governing bodies, which were clearly in breach of the EU law, including 'UEFA 3 + 2' rule (ruled contrary to the EU law in the CJEU ruling in the *Bosman* case) and 'FIFA 6 + 5' rule (to which European Commission 'showed a red card' in the statement of Commissioner Vladimir Spidla on 28 May 2008).⁴⁷ Beginning with the 2006/2007 seasons, UEFA introduced a rule limiting the number of players entitled to

be registered by a club in UEFA competitions to 25, including at least 2 goalkeepers and, at present, 4 association-trained players⁴⁸ and 4 club-trained players.⁴⁹ Additionally, each club is entitled to register an unlimited number of players aged 21 and younger, provided that each such player has been eligible to play for the club concerned for any uninterrupted period of 2 years from his 15th birthday.⁵⁰ Such measure aims to increase the chances of players in their training club and enforce participation of locally developed players in the squads of European clubs.⁵¹ An additional objective of the rule was to encourage clubs to invest in training infrastructure. Although the rule constitutes a clear restriction and indirect discriminatory measure on a football player's free movement, its merits have been supported by the European Parliament in its 2007 *Resolution on the future of professional football in Europe*.⁵² Nonetheless, the UEFA HGPR resulted only in very modest improvements to competitive balance, giving little evidence to suggest its impact on the quality of youth development in European clubs, but also on the restrictive effects on the movement of professional footballers.⁵³ Lack of positive results of the rule appears to depend mainly on the limited scope of its application (binding only in UEFA competitions, not in national leagues, and concerning merely 32% of players registered on the A list to competitions, including only 16% of club-trained players), which was constructed to meet the

⁴⁴ Resolution of the European Parliament of 8 May 2008 on the White Paper on Sport (2007/2261(INI)), OJ C 271E, para. 73.

⁴⁵ *Supra*, note 13, para. 62.

⁴⁶ UEFA Financial Report 2016/2017, 42nd Ordinary UEFA Congress Bratislava, 26 February 2018, p. 11, https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Finance/02/54/02/87/2540287_DOWNLOAD.pdf. Accessed 4 August 2018.

⁴⁷ Statement of Commissioner Vladimir Spidla The Commission shows a red card to the 6 + 5 rule proposed by FIFA, 28 May 2008, <http://ec.europa.eu/social/main.jsp?langId=en&catId=25&newsId=204&furtherNews=yes>. Accessed: 27 July 2018.

⁴⁸ In accordance with para. 43.05 of the UEFA Champions League Regulations for season 2018/2019: 'a player who, between the age of 15 (or the start of the season during which the player turns 15) and 21 (or the end of the season during which the player turns 21), and irrespective of his nationality and age, has been registered with a club or with other clubs affiliated to the same association as that of his current club for a period, continuous or not, of three entire seasons or of 36 months.' See UEFA Champions League Regulations for season 2018/2019, p. 41, https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/55/82/79/2558279_DOWNLOAD.pdf. Accessed 14 August 2018.

⁴⁹ In accordance with para. 43.04 of the UEFA Champions League Regulations for season 2018/2019: 'a player who, between the age of 15 (or the start of the season during which he turns 15) and 21 (or the end of the season during which he turns 21), and irrespective of his nationality and age, has been registered with his current club for a period, continuous or not, of three entire seasons (i.e., a period starting with the first official match of the relevant national championship and ending with the last official match of that relevant national championship) or of 36 months.' See *Ibid*.

⁵⁰ Players aged 16 may be registered on List B if they have been registered with the participating club for the previous two years without interruption. See: *Ibid*, para. 43.10–43.11, p. 42.

⁵¹ Zylberstein (2010), p. 62.

⁵² European Parliament supports 'the UEFA measures to encourage the education of young players by requiring a minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads.' See *Supra*, note 13, para. 34.

⁵³ Dalziel et al. (2013), p. 8.

proportionality criteria concerning its restrictive effects on the free movement to the benefits of the rule in terms of competitive balance and encouragement for training young players. The 2013 study on the assessment of the UEFA home-grown players' rule presents several alternative measures to the UEFA HGPR, such as club licensing schemes requiring clubs to provide high quality youth development programs, salary caps, financial inducement to develop home-grown players, squad limits or lengthening the maximum term of the contract for players, which might carry out less discriminatory effects than the UEFA rule. Several alternative ideas are also presented in sports law literature, such as a combination of a cap on transfer fees and some kind of redistribution of income to assist clubs in maintaining successful local youth academies, optionally connected with the quota mechanism based on the UEFA HGPR agreed between social partners such as FIFPro, the European Club Associations and the European Leagues.⁵⁴ Nonetheless, it is persuasive that only a comprehensive approach, i.e., maintaining the UEFA HGPR rule with a modest increase in the quotas and implementation of some of the above-mentioned measures may enhance solidarity balance and incentivize clubs to develop young players.⁵⁵ The home-grown rule should also be looked into by FIFA in order to implement a joint approach toward club-trained and association-trained players worldwide.

Moreover, through UEFA FFP, UEFA pursues the objective to 'further promote and continuously improve the standard of all aspects of football in Europe and to give continued priority to the training and care of young players in every club,'⁵⁶ trying to reestablish a 'level playing field' in European football. In the joint statement of the vice-president and the European Commissioner for Competition Joaquín Almunia and President of UEFA Michel Platini dated 21 March 2012, the parties stated that objective of the Financial Fair Play Regulations are consistent with the aims and objectives of the EU policy in the field of state aid.⁵⁷

Irrespective of the above-mentioned activity of the European Parliament and European Commission to create a more competitive balance by increased redistribution,⁵⁸ unfortunately EU institutions failed to

achieve indicated aims, giving de facto the football governing bodies free rein to adopt relevant regulations. In total, in the 2016/2017 season, UEFA made solidarity payments amounting to EUR 268.3 million to member associations and to clubs eliminated in the preliminary stages of the UEFA Champions League and the UEFA Europa League and other top-tier clubs that do not qualified for UEFA's main competitions. Such an amount might be considered significant if the gross commercial revenue of UEFA from its main competitions would not amount to EUR 2.35 billion for season 2017/2018 and the share for the clubs participating in those competitions would not be EUR 1.27 billion, including EUR 762 m for the participants of the UEFA Champions League (UCL) group stage onwards (32 teams), not even mentioning the further hindrances for clubs from small and medium European national associations to qualify to the UCL group stage starting from season 2018/2019.⁵⁹

3 Current FIFA solidarity compensation framework in football—critical analysis

The current football transfer system was shaped in 2001, further to a long-lasting negotiations between football governing bodies and the European Commission initiated as a result of a non-compliance of the past regulations of FIFA and UEFA with the EU law as identified in the *Bosman* ruling of the CJEU.⁶⁰ The European Commission opened the infringement procedure against FIFA in 1998 as a result of FGBs non-complying with the CJEU ruling and lack of enforcement of the free movement and competition principles to the football market.⁶¹ An informal agreement between football governing bodies and the European Commission aimed at closing the investigation of the European Commission on potential incompatibility of the RSTP, edition 1997, with the EU competition law, as well as at providing FIFA with protection against any further challenges of the transfer system based on the EU law arguments.⁶²

The football transfer framework agreed upon in 2001 is based on several pillars which were intended to form new transfer regulations in line with the EU law, with due

⁵⁴ Gardiner and Welch (2016), p. 78.

⁵⁵ Downward et al. (2014), p. 508.

⁵⁶ UEFA, UEFA Club Licensing and Financial Fair Play Regulations, Edition 2018, p. 2. https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/56/20/15/2562015_DOWNLOAD.pdf. Accessed 11 August 2018.

⁵⁷ Joint statement of the Vice-president and the European Commissioner for Competition Joaquín Almunia and President of UEFA Michel Platini dated 21 March 2012, http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf. Accessed 8 August 2018).

⁵⁸ *Ibid*, para. 63.

⁵⁹ *Supra*, note 46, p. 11.

⁶⁰ CJEU, case C-415/93 *Union Royale Belge des Societes de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463.

⁶¹ Pearson (2015), p. 224.

⁶² Duval and van Rompuy (2016), p. 95.

regard for specific characteristics of a sport and the autonomy of sporting organizations.⁶³ Among the principles of the new transfer framework, such as fairness and openness of the competition system in football, stability of the contractual relationship between the player and the club, registration periods and in-depth monitoring of transfer transactions, FGB and the European Commission placed creation of a revenues distribution system in order to award an effort made by training clubs to train young footballers.⁶⁴ Such a redistribution system has been designed to encourage more and better training of young football players, as well as to create a solidarity scheme among football clubs by awarding financial compensation to clubs which have been involved in training and football education of youth players.⁶⁵ As agreed between the European Commission and FIFA/UEFA, the encouragement and compensation system for the training club shall comprise of a solidarity fund to be sustained by a 5% levy on each compensation payment for a transfer by unilateral termination of contract in order to guarantee that training clubs receive a part of the player's added value, as well as of a compensation mechanism for training costs incurred by the player's clubs up to the age of 23 on the basis of real costs incurred.⁶⁶ Nevertheless, application of this two principles into internal football regulations remained at the discretion of FIFA, while the European Commission has undertaken to stand as a permanent guard ensuring that incorporation of these principles into FIFA's rules are effectively achieved.⁶⁷

FIFA's Executive Committee adopted a new, amended version of the RSTP—a set of rules applicable to international transfers—on 5 July 2001. The above-mentioned arrangements with the European Commission resulted in the establishment of two mechanisms which form the solidarity compensation system related to international transfers to date: the solidarity contribution system and the training compensation system. Undoubtedly, while amending the RSTP in 2001 in order to adjust the football market regulations to the EU law, FIFA intended to create one, comprehensive solidarity framework composed of solidarity contribution and training compensation systems, aimed to foster training and education of young players, as well as to strengthen the competitive balance. This conclusion is not only supported by the position of both systems in Chapter VII of the RSTP entitled 'Training compensation and solidarity mechanism,' but also explicitly mentioned in the FIFA Circular no. 769⁶⁸ and the

official 'FIFA Commentary on the Regulations for the Status and Transfer of Players' (the RSTP Commentary).⁶⁹ The said framework aims to pursue both horizontal solidarity in football, i.e., redistribution of income in order to promote a degree of competitive equality, and vertical one, i.e., transmission of funding from elite level sport to amateur clubs and 'grassroots.'⁷⁰

In view of arrangements with the European Commission and the jurisprudence of the CJEU, proper and actual implementation of agreed principles with the EU institutions, including a proper implementation of a principle agreed upon between football governing bodies and the European Commission that 5% of each compensation payment for any transfer of a professional player throughout his career shall be distributed among training clubs of the player, as well as an efficient system promoting training of young players (based on reimbursement of real training costs incurred), seems to be a natural priority and one of the main principles for FIFA. As already stipulated in this article, solidarity compensation schemes are indispensable elements of the whole current transfer market, as without efficient mechanisms promoting solidarity among football clubs and training of young players, FIFA might face material problems to justify the transfer system of players in light of the EU law and therefore to provide an evident actual legal basis for challenging the entire football transfer system. Nevertheless, in the opinion of the author of this article, such presumption is not covered in factual operations of football governing bodies. Several shortcomings of the solidarity framework, both of systemic nature and due to FIFA's reluctance to interpret the rules and to reflect the current practice of the transfer market in football, as indicated below, exist.

However, it does not come as a surprise for both EU institutions and football governing bodies. UEFA duly noted the erosion of the solidarity principle in football in its paper already in 2005, pointing out that the traditional solidarity mechanisms, in particular on the national level, have been lost under the pressure from some of the other trends, including increase in the financial aspects in sport and changes in the commercialization of TV rights.⁷¹ Such concerns about the effectiveness of the system were also noticed by the European Parliament in its *Resolution on the future of professional football in Europe* of 29 March 2007 in the context of the *Bosman* ruling, which, despite being the free movement and having positive effects on players' contracts and their mobility,

⁶³ *Supra*, note 33.

⁶⁴ *Ibid.*

⁶⁵ FIFA Circular no. 769, dated 24 August 2001, p. 2.

⁶⁶ *Supra*, note 33.

⁶⁷ *Ibid.*

⁶⁸ FIFA Circular no. 769 dated 24 August 2001, p. 15.

⁶⁹ FIFA Commentary on the Regulations for the Status and Transfer of Players, 2008, p. 62.

⁷⁰ Weatherill (2017), p. 323.

⁷¹ *Supra*, note 4, p. 20.

also had several negative consequences for the sport, including an increased ability on the part of the richest clubs to sign up the best players, a stronger link between financial power and sporting success, an inflationary spiral in players' salaries, reduced opportunities for locally-trained players to express their talent at the highest level and reduced solidarity between professional and amateur sport.⁷²

Moreover, in 2013, the European Commission has 'blown the whistle over inflated football transfer fees and lack of level playing field,' emphasizing that although football clubs spend around EUR 3 billion a year on player transfers, only very limited money (less than 2% of transfer fees) trickles down to smaller clubs, further increasing the imbalance existing between clubs on the transfer market.⁷³ Therefore, it was concluded that 'the level of redistribution of money in the game, which should compensate for the costs of training and educating young players, is insufficient to allow smaller clubs to develop and to break the strangle-hold that the biggest clubs continue to have on the sport's competitions.'⁷⁴ As mentioned in the European Commission press release in 2013:

the European Commission fully recognizes the right of sports authorities to set rules for transfers, but our study shows that the rules as they are do not ensure a fair balance in football or anything approaching a level playing field in League or Cup competitions. We need a transfer system which contributes to the development of all clubs and young players.⁷⁵

Interestingly, following the judgments of the CJEU in the *Bosman* and *Bernard* cases, it seems that under certain conditions the competent juridical body of the EU accepts the compatibility of this system with the Community's legal order⁷⁶ and is aware of existing difficulties, for instance in establishing an individual training cost per player for the FIFA training compensation system, as will be demonstrated later in the article.⁷⁷ The European Commission's lack of 'appetite' to relaunch the infringe-

ment procedure against the legality of the transfer system and to enter into negotiations with football governing bodies on the new football framework again is also visible. It has not used the FIFPro complaint against the transfer market as an initiative to review the efficiency of the FIFA mechanisms aimed to promote competitive balance and training and development of young players.⁷⁸

Therefore, an in-depth analysis of the current solidarity compensation framework needs to be made in order to deliver a well-grounded opinion on the operations of the solidarity contribution and training compensation systems, as well as to determine recommendations in respect of the other approaches to the solidarity principle within the football transfer market.

3.1 The FIFA solidarity contribution system (Art. 21 & Annex 5 of the RSTP)

The solidarity contribution is defined in the RSTP, June 2018 edition, as a monetary compensation due each time a professional footballer is transferred during the course of his contract to any affiliated club⁷⁹ which contributed to his education and training between seasons of his 12th and 23rd birthdays.⁸⁰ Following Annex 5 of the RSTP, which sets out detailed rules on the payment of such compensation, it shall amount to '5% of any compensation, not including training compensation, paid to his [player's] former club'⁸¹ and it shall be 'deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years.'⁸² The responsibility regarding

⁷² *Supra*, note 13, para. 38.

⁷³ Commission Press Release of 7 February 2013, IP/13/95 Commission blows the whistle over inflated football transfer fees and lack of level playing field, http://europa.eu/rapid/press-release_IP-13-95_en.htm. Accessed 19 July 2018.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Even if that is the case, there is a potential violation of the player's freedom to change of employer, which would not be acceptable in any other area of the economy. See: Weatherill (2008), p. 4.

⁷⁷ Hendrickx (2010), p. 25.

⁷⁸ FIFPro, Press release of 17 July 2018 "European Commission, FIFPro agree to close cooperation", <https://www.fifpro.org/news/european-commission-fifpro-agree-to-close-cooperation/en>. Accessed 18 July 2018.

⁷⁹ As the CAS explicitly indicated in its judgements, only clubs affiliated to national football associations being members of FIFA are entitled to claim an amount for solidarity contribution. See CAS 2011/A/2635 Real Madrid Club de Futbol v. Confederaçao Brasileira de Futbol (BF) and Sao Paulo FC, award of 25 July 2012; de Weger, p. 449.

⁸⁰ FIFA, RSTP Edition June 2018, Article 21 and Annex 5, paragraph 1, p. 26 and 70.

⁸¹ FIFA, RSTP Edition June 2018, Annex 5, paragraph 1.

⁸² *Ibid.*

both calculation and distribution of the actual amount of solidarity contribution, including ascertaining all clubs involved in the training process of the player,⁸³ in particular on the basis of the player passport, lies with the acquiring club.⁸⁴

FIFA has followed the 2001 arrangements with the European Commission and assumed that the key football formation process of a player takes place between the age of 12 and 23 and only clubs involved in the training and education of a player within such period shall be rewarded.⁸⁵ Furthermore, two sub-periods shall be indicated—an initial period of the player’s development, occurring between the seasons of the player’s 12 and 15 birthdays (0.25% of total compensation paid for the transfer of the player per each football season), and a principal period, which follows the player’s initial period and lasts until the end of the season of the 23rd birthday of a player (contribution amounting to 0.5% of total compensation per football season). In the case the player was transferred during any of his formation seasons, solidarity contribution shall be calculated on a *pro-rata* basis and paid to both teams of the player’s registration.

Interestingly, literal wording of Article 21 of the RSTP limits entitlement to solidarity contribution only to the clubs involved in the training and education of the player between the age of 12 and 23. Additionally, the RSTP Commentary highlights that solidarity contribution ‘will be distributed to all clubs that have trained the player throughout his entire sporting activity,’⁸⁶ without any restrictions. What is more, as pointed out in the official

⁸³ In case there are any doubts concerning the accuracy or completeness of data provided in the passport, the player and the national associations of the training clubs of the player shall assist the new club in settling the obligations resulting from the solidarity contribution mechanism. Consequently, if history of the player’s registration cannot be traced back to a season of the age of 12 and/or any of the clubs involved in the player’s training or education ceased to participate in organized football and/or no longer exist, a national association of affiliation of such club is entitled to receive the relevant proportion of the solidarity contribution and assign it to youth football development programs developed by such association.

⁸⁴ As the CAS jurisprudence indicates, any stipulation between the parties to a transfer agreement consisting in an obligation of the former club of the transferred player to pay a possible solidarity contribution would not affect the training club(s) of the transferred player since it would not be viable to expect the club(s) involved in the training and education of the player to have full knowledge of contractual stipulations between the parties to a transfer agreement concerning such a player. Therefore, as CAS pointed out in its judgement: ‘the training club always has to claim its share of the solidarity contribution from the new club which will be allowed to reclaim it from the former club of the player if and when this amount should not have been deducted from the total transfer sum.’ See CAS 2014/A/3723 Al Itihad FC v. Fluminense FC, award of 22 January 2015.

⁸⁵ FIFA Circular no. 769 dated 24 August 2001, p. 15.

⁸⁶ *Ibid.*

statement of the European Commission,⁸⁷ one of the key objectives for modifying FIFA regulations on transfers was to ‘ensure the stability of competitions and to strengthen solidarity between large and small clubs, including amateur clubs,’ as well as to pursue competitive balance of football competitions. Interestingly, no reference to a feature of solidarity contribution as an encouragement for training and development of young players was made. As such, it is debatable whether restrictions of the scope of entities entitled to solidarity payments in accordance with solidarity contribution scheme is deliberate and necessary. Nevertheless, it appears unlikely that FIFA considers the amendments of the current age threshold in this regard.

Rules on the payment procedure of solidarity contribution have been defined in Article 2 of Annex 5 of the RSTP. The club acquiring registration rights to the player must pay monies to the training club(s) in accordance with the calculation rules—no later than 30 days after the player’s registration in the new club. If the clubs transferring the player’s registration rights agree that the transfer fee shall be paid in installments or on any contingent payments, the relevant part of the solidarity contribution payments shall be made not later than 30 days after the maturity date of a given installment/contingent payment. Any failure to comply with the obligations stipulated in Article 21 and/or Annex 5 of the RSTP, in particular lack of payment of solidarity contribution within the set deadline, may result in imposition of disciplinary measures by the FIFA Disciplinary Committee.⁸⁸

3.2 Analysis of the efficiency of the solidarity contribution system based on transfer fees

In accordance with Article 21, solidarity contribution shall be payable whenever a transfer involves a compensation of any kind, not only a ‘classic’ transfer fee.⁸⁹ In this context, as confirmed by the DRC and CAS jurisprudence, the provisions regarding the solidarity mechanism cannot be circumvented, for example, by means of an exchange of players, agreements between clubs with regard to friendly matches, take-over of wage payments in the case of loan

⁸⁷ Commission Press Release of 6 December 2000, IP/00/1417 Football transfers: Commission underlines the prospect of further progress, http://europa.eu/rapid/press-release_IP-00-1417_en.htm. Accessed 22 July 2018.

⁸⁸ Following numerous DRC decisions, one of the disciplinary measures is that a party is condemned by the DRC to pay a default (Swiss) interest payment of 5% per year if the payment has not been done within 30 days until the day of the payment is applied. See for instance FIFA DRC decision no. 47774 dated 27 April 2007.

⁸⁹ Flores (2013), p. 227.

instructions or payments in the case of future transfer compensation (i.e., sell-on clauses).⁹⁰ For the purposes of the solidarity contribution scheme, the term ‘transfer’ should be understood broadly, i.e., as any transfer of a player’s registration rights between two clubs affiliated to different national associations, which includes a transfer compensation fee paid to the former club and results in a successful transfer of the Player’s ITC to the acquiring club’s national association.⁹¹ This approach was also confirmed by the CAS jurisprudence.⁹² Therefore, it needs to be emphasized that solidarity contribution payment shall be due not only in relation to definitive transfers but also to loans,⁹³ transactions of exchange of players⁹⁴ and/or transfers on the basis of a buy-out clause included in a player’s contract,⁹⁵ while it does not apply to transactions concerning futsal clubs⁹⁶ and so-called free transfers, i.e., transfer of a player’s registration rights to a new club as a result of expiration and/or termination of a contract in the former club. Nevertheless, it is disputable whether such an approach efficiently pursues its legitimate aims, i.e., to enhance the competitive balance within the football market

and reward training clubs of players who succeeded in professional football.

The idea to base the whole solidarity framework in football on transfer fees probably seemed to be a natural and logical consequence of the reality of the football market operation in the late 1990s. Until the judgement of the CJEU in *Bosman*, players were not entitled, on the expiry of their contracts, to be employed by another football club (both national or from a country other than the previous club) unless the latter club has paid to the former a transfer, training or development fee. As a consequence, at the moment of negotiations of the new transfer system, albeit the standards of free movement of employees after the expiry of their contracts had been slowly introduced to the football market, the vast majority of movement of players were executed on the basis of agreements between the previous and new clubs of the player.

However, it shall be highlighted that the realities of the football market in late 1990s differ significantly from the current ones and the efficiency of the solidarity framework shall be assessed in light of the distinguishing features of the recent shape of the transfer market. The size of the football market is growing sharply, reaching—only in Europe—a total value of EUR 24.6 billion for the 2015/2016 football season.⁹⁷ This growth is also reflected in the transfer market. While in the 1994/1995 season there were 5,735 international transfers within the EU territory with transfer fees amounting to EUR 402,869,000 overall, in the 2010/2011 season the number of such transfers increased to 18,307 and overall transfer fees for such transfers rapidly increased to EUR 3,002,198,000.⁹⁸ A significant increase in the number of transfers and transfer fees year-to-year is also evident from FIFA reports. In 2011, the total number of international transfers amounted to 11,882 and overall transfer fees to EUR 2,9 billion. In 2014, they increased to 13,158 and EUR 4,08 billion respectively, while in 2017 they reached 15,624 transfers and EUR 6,37 billion of transfer fees.⁹⁹ At the first glance, it seems that development of the transfer market shall result in increasing amount of solidarity funds paid to training clubs of players and therefore in maintaining competitive balance in the football market. Unfortunately, this presumption is misleading and at least three material observations shall be made.

First and foremost, transfers with a transfer fee or any other kind of financial compensation due to the releasing

⁹⁰ de Weger (2016), pp. 452–456.

⁹¹ See Flores (2013), p. 227; Blackshaw and Kolev (2009), p. 13, as well as FIFA DRC decision no. 117178 dated 2 November 2007.

⁹² In the award in CAS 2011/A/2356 case, the panel pointed out that: ‘the elements identifying a transfer of a player between clubs for the purposes of solidarity contribution mechanism are: (i) the consent of the club of origin to the early termination of its contract with the player, (ii) the willingness and consent of the club of destiny to acquire the player’s rights, (iii) the consent of the player to move from one club to the other, and (iv) the price or value of the transaction.’ See CAS 2011/A/2356 SS Lazio S.p.A. v. CA Vélez Sarsfield & Fédération Internationale de Football Association (FIFA), award of 28 September 2011, p. 1.

⁹³ In accordance with Article 10 of the RSTP, loans are subject to the same rules that apply to the transfer of players, including the provisions on the solidarity mechanism. Consequently, if the player is on loan, the loaning club is entitled to receive a solidarity contribution for the period that the player was on loan. It is also worth noting that the club receiving the player on the basis of a loan is obliged to retain 5% of the loan fee and to distribute the amount due to all the clubs that have actually contributed to the training of the player between the ages of 12 and 23.

⁹⁴ As the DRC pointed out in one of its judgements, an exchange of players indirectly implies a financial agreement due to the fact that the relevant qualities of the players have a financial value in the football transfer market. See FIFA DRC decision no. 17630 dated 12 January 2007.

⁹⁵ In the case of inclusion of a buy-out clause in the contract, i.e., a provision allowing the player to unilaterally terminate the contract upon the payment of a set compensation (buy-out fee), such a buy-out fee shall be considered for the purposes of a solidarity contribution scheme as an equivalent of a transfer fee and—therefore—be decreased by 5% of the solidarity fee. See CAS 2011/A/2356 SS Lazio S.p.A. v. CA Vélez Sarsfield & Fédération Internationale de Football Association (FIFA), award of 28 September 2011, para. 74.

⁹⁶ FIFA, RSTP Edition June 2018, Article 10 of Annex 7, p. 82.

⁹⁷ Deloitte, Annual Review of Football Finance: Ahead of the Curve. Sports Business Group, July 2017, <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf>. Accessed 23 July 2018.

⁹⁸ *Supra*, note 8, p. 8.

⁹⁹ FIFA Global Transfer Market Report 2018, pp. 5–7.

club (excluding solidarity payments) currently constitute only 15.8% of the overall amount of international transfers.¹⁰⁰ This is a result of changing realities of the football transfer market since the adoption of the current transfer framework in 2001, in particular the application of the principle of freedom of movement for workers to footballers whose contract with a former club have expired. In 2017, change of the club of registration by players who were out of contract accounted for 65.5% of all international transfers, while only 13% of transfers accounted for a permanent transfer of the player's registration rights between two clubs.¹⁰¹ Therefore, an up-to-date system of redistribution of income between football clubs does not apply to 84.2% of international transfers and 100% of transfers within a given football association—a truly overwhelming data which makes a defense of rationality of current solidarity schemes based on transfer fees utterly reckless.

Moreover, one should be reminded that spending in the transfer market demonstrates a significant element of concentration. As presented in the KEA & CDES Report *'The Economic and Legal Aspects of Transfers of Players,'* in the 2010/2011 football season more than 55% of the overall amount paid as transfer fees was between the clubs of the so-called Big 5 leagues (England, Spain, Germany, Italy, France). Szymanski proves that most of the money generated by transfers circulates among the larger clubs and the trickle-down effect, i.e., distribution of money between professional and grassroots football, is very limited.¹⁰² For example, of the total number of 15,624 international transfers in 2017, only in 773 the transfer fee amounted to more than USD 1 million, average transfer fee of the 'top 50' transfers amounted to USD 48.4 million, while 67.4% of the overall transfer spending accounted for only 50 clubs of 13 member associations.¹⁰³ At the same time, out of 15 top transfer streams by value in 2017, only 1 stream (English club as a releasing club and Chinese club as an acquiring club) not included both clubs from the 'Big 5 leagues.'¹⁰⁴ Thus, due to the domination of the 'Big 5 leagues' in terms of money flow within the transfer market, a general conclusion seems to be legitimate: the trickle-down effect connected with the solidarity framework concerns mainly players transferred between the clubs competing in the five biggest European leagues.

In view of the above-mentioned data, it should be stated that neither transfer fees are efficient means to promote solidarity in football nor the current solidarity framework

adopted by FIFA is able to reach the objective pursued. As a result, the basis of the current framework turns out to be outdated and inaccurate as transfer fees ceased to be an indispensable element of transfers and therefore an adequate means to distribute the money from the richest clubs to clubs which contributed to the training and formation of the best footballers. Additionally, the majority of important money flows in the transfer market is limited solely to the biggest clubs from the 'Big 5 leagues' and, as proven below, the current limited revenue sharing stream between clubs in the market has been pointlessly narrowed down to international transfers only, which results in further constraints to one of the pillars of the current football market. As a consequence, the current solidarity framework has extremely limited efficiency as an encouragement for the clubs to train and develop youth players and brings legitimate questions on the legality of the current transfer system in light of the EU law. In particular, having due notice of the role of the European Commission as a supervisor and an entity responsible for the scheme created independently by the football governing body, it should be expected that this EU institution will have a particular interest in the anticipated amendments of the FIFA solidarity mechanism and, in case of insufficient intervention, may undertake actions in order to force the aims agreed upon in 2001 are actually achieved.¹⁰⁵

3.2.1 Analysis of the applicability of the FIFA solidarity contribution scheme to national transfers only

In accordance with the RSTP Official Commentary, the solidarity contribution scheme applies exclusively to international transfers, i.e., transfers of players' registration rights between two clubs from different national federations.¹⁰⁶ Such approach brings serious concerns related to the appropriateness in relation to the aims pursued by Article 21 of the RSTP and the arrangement between the European Commission and football governing bodies made in 2001.

Lack of applicability of the solidarity contribution scheme to national transfers has been declared in sports law literature as 'irregularity of solidarity mechanism' and a serious injustice of the existing transfer system.¹⁰⁷ It shall be considered that solidarity contribution pursues crucial aims of the RSTP, i.e., to reward training clubs of young players and to restore competitive balance between big and

¹⁰⁰ *Ibid.*, p. 3.

¹⁰¹ *Ibid.*, p. 6.

¹⁰² Szymanski (2015).

¹⁰³ *Supra*, note 99, p. 17.

¹⁰⁴ *Ibid.*, p. 21.

¹⁰⁵ Commission Press Release of 14 February 2001, IP/01/209 Joint statement by Commissioners Monti, Reding and Diamantopoulou and Presidents of FIFA Blatter and of UEFA Johansson, http://europa.eu/rapid/press-release_IP-01-209_en.htm. Accessed 7 August 2018.

¹⁰⁶ *Supra*, note 69.

¹⁰⁷ Blackshaw and Kolev (2009), p. 11.

smaller clubs, accepted by the CJEU in the *Bosman* and *Bernard* rulings as part of legitimization of the existence of the current transfer system in European football. As such, bearing in mind the fact that the literal wording of Article 21 of the RSTP does not limit the applicability of the solidarity scheme solely to international transfers, it seems as a logical consequence that the scheme should also apply to national transfers. Furthermore, such approach was shared by FIFA DRC until 2004, when a shift occurred in its standpoint based on the assumption that as the RSTP deals only with international transfers, the solidarity contribution mechanism shall also not apply to transfers between clubs from the same association.¹⁰⁸ It needs to be admitted that the FIFA Circular no. 769, which explains the new 2001 FIFA transfer system, provides that financial compensation on the basis of the solidarity scheme applies when ‘a non-amateur engages in an international transfer during the term of his contract.’¹⁰⁹

Regardless of a dogmatic discussion concerning the intended scope of applicability of the solidarity mechanism, it shall be highlighted that in accordance with Article 1 para 2 of the RSTP—internal regulations of a national association shall ‘provide for a system to reward clubs investing in the training and education of young players.’¹¹⁰ The wording of this provision is vague, thus bringing questions whether such a system only includes the training compensation mechanism, or both training compensation and solidarity schemes. The purpose of the solidarity scheme advocates of its applicability to the greatest extent possible, i.e., also to national transfers. Nonetheless, due to FIFA’s unaccountable reluctance to clear the scope of this RSTP’s article, numerous national associations—including the FA, FIGC or Polish FA—have not stretched the solidarity mechanism to national transfer within their remit. On the other hand, some federations adopted the solidarity framework to its national regulations (e.g., Brazilian FA, which established a national solidarity mechanism on the basis of Article 29-A of the so-called Pelé Law).¹¹¹

Bearing in mind the above-mentioned analysis, the current interpretation of the scope of applicability of the solidarity scheme as well as unclear wording of the FIFA regulations concerning the solidarity contribution mechanism should be evaluated negatively. As a pillar of the existing transfer regulations, and even its *raison de’etre*, the solidarity scheme shall apply to the broadest possible

range of transfers, both national and international. This framework should be a platform of redistribution of money between the bigger and smaller football clubs, promoting legitimate aims, such as rewarding the clubs investing in training of young footballers and enhancing competitive balance in football, which have a beneficial impact on the whole football market. In this context, international or national character of a transfer has secondary importance. After all, the crucial aspect is the existence of a transfer fee and a financial investment of the acquiring club, whose part shall be distributed between the training clubs of the player to pursue the solidarity objective, as agreed between football governing bodies and the European Commission. Any limitations thereof have counterproductive and anti-competitive effects. By narrowing the application of the solidarity scheme to international transfers, FIFA excluded the vast majority of football transfers from the scope of the solidarity framework and unlawfully (or at least without proper consultations with the European Commission) limited the ‘trickle-down effect’ of the transfer system. Moreover, it needs to be noted that the scale of such limitation is enormous, provided that transfer fees in the ‘Big 5 leagues’ (both international and national) amount to EUR 5.9 billion—only EUR 0.4 billion less than the total amount of all fees paid worldwide for international transfers. Therefore, in particular bearing in mind the fact that the decision on the shape of the current FIFA regulations regarding solidarity levy was delegated by the European Commission to football governing bodies, FIFA intentionally reduced important sources of founding of grassroots football and clubs concentrated on development and training of young football players, which—in view of the FIFA objectives and 2001 arrangements with the European Commission—is surprising and unexplainable.

Irrespective of the above-mentioned, it should also be highlighted that lack of applicability of the solidarity contribution system to national transfers has an anti-competitive effect on international transfers of players (5% of the transfer fee less for the releasing club) and as such could be questioned as a solution incompatible with the EU law. Therefore, bearing in mind that the current approach of the FIFA administration, FIFA DRC and CAS seems to be contradictory to the aims pursued by the scheme which are legitimate and compatible with EU law, the scope of possible adjustments of the RSTP provisions in order to broaden the scope of application of the solidarity scheme to the greatest possible extent shall be analyzed.

First of all, taking into account the content of Article 1 para 2 of the RSTP, i.e., that FIFA regulations do not apply to transfers of players between clubs belonging to the same association and that such transfers shall be governed by internal regulations issued by the national association relevant for releasing and acquiring clubs, the direct

¹⁰⁸ *Ibid*, pp. 14–16.

¹⁰⁹ *Ibid*, p. 16; FIFA Circular no. 769 dated 24 August 2001, p. 15; FIFA DRC decision no. 71026 dated 22 July 2010.

¹¹⁰ FIFA, RSTP Edition June 2018, Article 1. para 2, p. 7.

¹¹¹ See CAS 2015/A/4061 São Paulo Futebol Club v. Centro Esportivo Social Arturzinho, award of 26 November 2015.

applicability of the RSTP rules on solidarity contribution to both international transfers and transfers with the so-called international dimension shall be recommended. The notion of an ‘international dimension’ is widely used in the FIFA regulations with respect to employment-related disputes between a club and a player or a coach to justify establishment of FIFA jurisdiction to contractual relations which could also be a subject to national dispute resolution chamber competence. An ‘international dimension’ applies when a player or a coach is a foreigner in the country of the registered seat of the club.¹¹² By using this concept to solidarity contribution as well, we also broaden the scope of the scheme to transfers of players between clubs affiliated to the same national association in the case a player holds a foreign citizenship or—preferably—in the case a player was trained between the seasons of his 12th and 21st birthdays by any club from a national association different than the one of the parties to the transfer agreement.¹¹³ It is counterproductive and contrary to legitimate aims pursued by the solidarity scheme to rule out the application of solidarity contribution in such case, in particular bearing in mind that football governing bodies and the European Commission agreed on a 5% levy on each compensation payment for transfer by unilateral termination of contract in order to guarantee that training clubs receive part of a player’s added value.¹¹⁴ It is to believe that FIFA does not have any legally sound and rational argument opting for the exclusion of application of the solidarity scheme and the conformity of the applied solidarity framework with the 2001 arrangements with the EU institutions. Therefore, by accepting that ‘transfers with an international dimension’ in the meaning presented above shall entitle, next to international transfers, a training club to obtain the solidarity contribution, FIFA brings back some rationality and fairness to the current framework.

Secondly, FIFA shall reconsider whether solidarity contribution mechanism does not constitute a provision of the RSTP which needs to be binding at national level and included without modification in the association’s regulations in line with Article 1 para 3 of the FIFA regulations. As in accordance with 2001 informal agreement between FIFA and the European Commission, a 5% levy shall apply to each compensation payment for transfer, the differentiation between international transfers, subject to solidarity

contribution, and national transfers, which currently in the vast majority of national associations are not subject to any solidarity payments, lacks rationality and legal reasoning. The training clubs of the player have no influence on his further career path and shall not suffer from the fact that the player, unless very successful and transferred for high transfer fees, was never transferred for a significant amount internationally. On the contrary, the aim of the 2001 compromise was that training clubs shall receive part of the player’s added value, irrespective of the country of origin of the clubs transferring the player. Therefore, there are strong arguments supporting the view that Article 21 and Annex 5 of the RSTP shall be binding on the national level on the basis of Article 1 para 3 of the FIFA regulations or a national association shall at least include appropriate means to protect the training clubs of the players in its internal regulations and promote solidarity between big and smaller clubs in line with the RSTP provisions.

3.2.2 Analysis of the current solidarity percentage level

As already indicated, solidarity contribution in accordance with Annex 5 of the RSTP shall amount to 5% of any compensation paid in the case of a transfer of a professional between clubs affiliated to different national associations. The scheme intends to pursue the aim agreed upon between football governing bodies and the European Commission in 2001, i.e., the principle of a 5% levy on each compensation payment for transfers in the football market in order to guarantee that training clubs receive part of the player’s added value.

Unfortunately, as demonstrated in the FIFA Global Transfer Market Report, the current framework fails to achieve anticipated results. In 2017, only 1% (USD 63.8 million) of money flows in the transfer market accounted for solidarity contribution payments, while training compensation payments amounted to 0,3% (USD 20.3 million).¹¹⁵ Therefore, the amounts actually received by training clubs on the basis of the solidarity compensation mechanisms clearly remain below the threshold agreed in 2001. At the same time, irrespective of the significant growth of the overall transfer market in recent years (from EUR 2.9 billion in 2014 to EUR 6.37 billion in 2017), the redistributive component of transfers is stagnating at best, remaining below EUR 85 million per year. Such a systemic failure results from many features, varying from insufficient transparency in the football market, lack of effective monitoring and enforcement tools, insignificant fines for non-compliance with requirements stipulated in Annexes 4–5 of the RSTP, to the lack of awareness in many amateur or semi-professional clubs about their entitlement to

¹¹² See FIFA, RSTP Edition June 2018, Article 22(b), p. 26.

¹¹³ For example, a player XX, a citizen of Poland, was registered to a Polish club between season of his 12 and 16 birthdays, then was transferred to German club and represented such a club for further 3 seasons (seasons of his 17–19 birthdays) and subsequently moved on a free transfer basis of an English club Y. Finally, player XX changes the club of registration within the FA (from club Y to club Z) for a transfer fee amounting to GBP 100,000,000.

¹¹⁴ *Supra*, note 33.

¹¹⁵ *Supra*, note 99.

solidarity payment in relation to transfers of their former players. Nonetheless, a comparison between EUR 84.1 million paid by the clubs on the basis of both RSTP's mechanism encouraging training of young players and USD 446 million—an official and reported payments by the football clubs to intermediaries—indicates the present realities of the transfer market and its disregard to the key aims allegedly pursued by the system agreed upon in 2001 between football governing bodies and the European Commission.¹¹⁶

A KEA & CDES study prepared in 2013 for the European Commission, among proposed measures to improve competitive balance through redistribution mechanisms and financial accountability, included a recommendation to increase—as a rule—the solidarity mechanism percentage to 8%, while the percentage could be higher in relation to top transfer fees above a certain threshold.¹¹⁷ The proposal to increase the percentage of the solidarity mechanism has also been repeated in a report of the European Commission published in 2018,¹¹⁸ while ECA in its 2013 study on transfer market analyzed the effects a potential increase in the solidarity mechanism threshold would have.

Nevertheless, the increase in a threshold by 3% in order to enhance the redistribution of revenues linked to transfers, as suggested by the European Commission, does not appear to be a cure for dysfunctions of the current solidarity framework. Particularly, as discussed in point 3.1.1 above, solidarity system based on transfer fees is outdated and ineffective and such minor amendments would not result in a fair and just income redistribution model within the transfer market. Additionally, ensuring effective monitoring and enforcement of the money flows related to transfers must be considered an issue of the utmost importance. Otherwise, an increase in the solidarity threshold without resolving the problems related to its collectability would paradoxically penalize compliant clubs. Furthermore, it would not significantly support solidarity between clubs.¹¹⁹ As presented in point 6.5 below, only a strategic shift in the operational model of the transfer system, including, for instance, establishment of clearing houses on both an international and a national level, as well as football associations' implementation of national transfer matching systems integrated with the TMS and programs such as UEFA FFP, may prove to be a

real 'game changer' in relation to the enforcement of the solidarity payments to the training clubs.

Nonetheless, in the case football governing bodies choose—for whatever reason—to leave the current solidarity mechanism based on transfer fees unchanged, besides eliminating some of its main shortcomings, a decision to considerably raise the percentage of transfer fees to be distributed among the previous clubs of the player shall be supported, either to a set fee (for example 8–10% of any compensation paid in relation to a transfer) or in line with a more sophisticated mechanism. For instance, a solidarity contribution of 12% of the total transfer equivalent resulting from a transfer can be proposed. This would mean an increase in its current level by 7%, where the training clubs of a player between the seasons of his 12th to 15th birthdays would be entitled to 0.5% of the transfer amount for each year of training; training club of a player between the seasons of his 16th to 19th birthdays—up to 1.5% for each year of training, while training clubs which registered the player in the seasons of his 20th and 21st birthdays—up to 2% for each year of training. At the same time, the rationality of proposals of some of football stakeholders to allocate part of the training compensation payments to a football association to which the training club of the player is affiliated in order to strengthen the grassroots programs is debatable. In particular, it needs to be stressed that in some national federations mechanisms supporting grassroots football and local football associations already exist, for instance consisting in 'tax' on incoming and outgoing football transfers.¹²⁰

Alternatively, the creation of the so-called luxury tax or solidarity progressive tax, aimed to build a 'level playing field' and restore competitive balance in football as well as to promote training and development of youth footballers, shall be analyzed. Such an idea gained public attention after a declaration of UEFA President Aleksander Ceferin, who confirmed his openness to the idea of enforcement of luxury tax on transfer fees beyond a certain transfer fee amount in 2017.¹²¹ It foresees that solidarity payments connected with any transfer of a player involving a transfer fee shall be dependent on the amount of a transfer fee and progress in the case the transfer fee exceeds some thresholds. On the one hand, such taxes aim to increase solidarity among football clubs in the case of top deals in the football market and on the other—to discourage clubs from using financial resources in order to force transfer of registration to footballers.

¹¹⁶ *Ibid.*, p. 22; European Commission (2018), An update on change drivers and economic and legal implications of transfers of players. Final Report to the DG Education, Youth, Culture and Sport of the European Commission, March 2018, p. 46.

¹¹⁷ *Supra*, note 8, p. 260.

¹¹⁸ European Commission (2018), p. 59.

¹¹⁹ European Club Association (2013) Study on the transfer system in Europe, 2013, pp. 23–24; <http://www.ecaeurope.com/research>. Accessed 22 July 2018.

¹²⁰ A Polish club releasing the player—in the case of an international transfer—is required to make a payment amounting to 2% of the transfer fee to the local football association, as well as a payment amounting to 1.5% of the transfer fee to the Polish FA. See para. 37 of the Resolution no. VIII/124 of the Management Board of the Polish FA on status and transfer of players dated 14 July 2015.

¹²¹ European Commission (2018), p. 61.

Although the possible thresholds of the levy and the scope of such a tax is to be determined by football governing bodies, based on a detailed economic and market practice analysis, an integration of ‘luxury tax’ and solidarity contribution scheme in one, ‘progressive solidarity tax’ may be discussed and developed. For instance, solidarity tax may differ depending on the amount of the transfer fee, increasing from 5% of the transfer fee between 0 and 5 million EUR, 10% of the transfer fee between 5 and 10 million EUR, 12.5% of the transfer fee between 10 and 20 million EUR, 15% of the transfer fee between 20 and 40 million EUR, up to 20% of the transfer fee above 40 million EUR. Additionally, out of a solidarity payment, for instance 20% of the fees due in relation to the transfer fees above 20 million EUR could be paid as ‘grassroots tax’ to the national association(s) of the player’s registration between the seasons of his 12th and 21st birthday and shall be reserved for youth football development programs in the association(s) in question.

3.3 The FIFA training compensation system (Art. 20 and Annex of the RSTP)

Although the training compensation system does not per se refer to solidarity, it has the utmost importance in regard of the enforcement of competitive balance on a football market and the protection of training clubs of young players from the muscle drain by the strongest clubs. As such, it enhances the so-called trickle-down effect. As a result, the training compensation system undeniably complements the solidarity contribution scheme in pursuing solidarity on the football market, and the necessity to present it in order to explain the whole solidarity compensation framework is undeniable.

The purpose of this system is to foster training of young players and provide them with educational assistance by awarding training clubs compensation/contribution for doing so.¹²² As CAS pointed out in its judgements, the club which trained the player should be compensated for its training efforts and the club that has benefited from the training efforts invested by the training club should be obliged to pay a training compensation to the training club¹²³ with the aim of maintaining competitive balance between clubs.¹²⁴

Article 20 and Annex 4 to the RSTP provide for a regulatory framework for the training compensation system. In accordance with Article 20 of the RSTP, training compensation shall be payable in the case of the following events:

(i) signing of his first professional contract by the player¹²⁵; and (ii) each time a professional player is transferred internationally until the end of the season of his 23rd birthday (during or at the end of the player’s contract). The scheme shall not apply to women’s football. More explicit details concerning the calculation and applicability of the training compensation are set out in Annex 4 to the RSTP.

Contrary to the solidarity contribution scheme, FIFA has assumed that the key football formation of a player takes place between the age of 12 and 21. Therefore, training compensation shall be payable to former training clubs of the player up to the age of 21, in case of materialization of any event giving title to training compensation until the player turns 24. In the case of the clubs from the EU or the EEA territory, if it is evident that a player has already terminated his training period before the age of 21, the seasons to be taken into consideration will only be those between the player’s 12th birthday and the season in which he completed his training period.

The responsibility of the new club to pay training compensation varies depending on whether the player signs a professional contract in a club from different national association than his previous training clubs or if he is transferred to the new club as a professional player already. Upon first registration as a professional, the new club is responsible for the payment of training compensation to every previous training club of the player since his 12th birthday.¹²⁶ Meanwhile, in the case of a subsequent transfer of the professional, only his previous club shall be entitled to training compensation for the due period of training.¹²⁷ Consequently, every

¹²² European Club Association (2014) ECA Legal Bulletin no. 4, September 2014, p. 4.

¹²³ CAS 2009/A/1757 MTK Budapest v. FC Internazionale Milano S.p.A., award of 30 July 2009.

¹²⁴ CAS 2014/A/3553 FC Karpaty v. FC Zestafoni, award of 6 October 2014.

¹²⁵ It also needs to be emphasized that the notion of a ‘first professional contract’ bears no relation whatsoever to what would be understood under or what would amount to a professional contract at a domestic level. Thus, the above-mentioned notion should be understood solely within the meaning contained in article 2 of the RSTP, which states as follow: ‘a professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs.’

¹²⁶ The payment shall be made to all clubs with which the player has previously been registered in accordance with the player’s career history, as provided for in the player passport. As Art. 3.1 of Annex 4 of the RSTP indicates: ‘(...) the amount payable is calculated on a pro-rata basis according to the period of training that the player spent with each club. (...)’ See also FIFA DRC decision no. 971059 dated 14 September 2007.

¹²⁷ FIFA, RSTP Edition June 2018, Article 3.1 of Annex 4 of the RSTP.

definitive transfer,¹²⁸ even at a national level,¹²⁹ has the legal effect to ‘break the chain.’¹³⁰ Such an approach was created to ensure that any club that trained a player between the seasons of his 12th and 21st birthday is only entitled to receive training compensation once.¹³¹

Training compensation is not due if the former club terminates the player’s contract without just cause as well as in the event in which the player is transferred to a category 4 club or if a professional reacquires amateur status.¹³² However, if a player re-registers as a professional within 30 months of being reinstated as an amateur, his new club shall pay training compensation in accordance with article 20.¹³³

3.3.1 Analysis of the method of calculation of training costs of clubs

Annual average training and education costs for the purposes of the training compensation scheme are established on a confederation basis, updated and published every year

¹²⁸ Another aspect of the training compensation system is an ongoing football dispute concerning applicability of training compensation in player loans, which—in accordance with a long-standing jurisprudence of the FIFA DRC and CAS—does not ‘break the chain.’ As stated in Article 10 para. 1 of the RSTP, ‘(...) loan is subject to the same rules as apply to the transfer of players, including the provisions on training compensation and the solidarity mechanism.’ The decisive element for the entitlement is where the player actually played, as confirmed in several decisions by the DRC and the CAS. As the FIFA DRC stated in its judgement, ‘all clubs which have in actual fact contributed to the training of a player as from the age of 12 are, in principle, entitled to training compensation for the timeframe that the player was effectively registered for them.’ However, the CAS emphasized that this rule does not apply if the club that loaned the player to another club can demonstrate that it bore the costs of the player’s training during the loan period. That is to say, those clubs receiving a player and bearing the costs of the player’s training also benefit from training compensation or the solidarity mechanism for the time the player was effectively trained by that club on loan. Consequently, clubs that received a player on loan are entitled to training compensation if all other criteria are met, when after the expiry of the loan the player returns to his club of origin, and thereafter is transferred from his club of origin to a club belonging to another association before the end of the season of his 23rd birthday. See FIFA DRC decision no. 891179 dated 6 August 2009; CAS 2008/A/1705 Grasshopper v. Alianza Lima, award of 18 June 2009. This was also confirmed in CAS 2013/A/3119 Dundee United FC v. Club Atlético Vélez Sarsfield, award of 20 November 2013; See European Club Association (2014) ECA Legal Bulletin, no. 4 September 2014, pp. 5–6, Art. 4 para 2 of Annex 4 of the RSTP, edition June 2018, p. 68.

¹²⁹ See CAS 2007/A/1320-1321 Feyenoord Rotterdam v. Clube de Regatas do Flamengo, award of 26 November 2007.

¹³⁰ See also FIFA DRC decision no. 12132748 dated 12 December 2013.

¹³¹ See Ongaro (2010), p. 78.

¹³² FIFA, RSTP Edition June 2018, Article 2.2 of Annex 4.

¹³³ See FIFA, RSTP Edition June 2018, Article 3.2.

in FIFA circulars on categorization of clubs, registration periods and eligibility. Clubs for each national association are divided in up to 4 categories reflecting the training costs incurred by a given club on training and educating youth players. Unless the decision regarding division of clubs into categories within each national association is a sole decision of such an association, it is FIFA’s choice how many categories shall be allocated for a given confederation/association.¹³⁴ Associations are required to divide their clubs each year into the corresponding categories made available to them.¹³⁵ Consequently, average training costs are updated at the end of every calendar year.

The RSTP provides that the manner of calculation of training compensation depends on whether the player moves between clubs from two different national associations inside the territory of the EU/EEA or whether one of such clubs is affiliated to a national association of the EU/EEA. As a general rule, calculation of training compensation is based on a formula set out in the FIFA Regulations, namely the annual cost of training one player (starting from the season of the player’s 12th birthday until the season of his 21st birthday) multiplied by the so-called player factor, i.e., the ratio of players who need to be trained to produce one professional player per year. Accordingly, an amount for training compensation will be payable until the end of the season in which the player reaches the age of 23, although the calculation of the amount payable will be based on the years between the 12th birthday and the age when it is established that the player completed his training, up to the age of 21. In the case of the transfers not within the EEU, compensation for training shall be calculated ‘based on the training costs of the new club multiplied by the number of years of training with the former club.’¹³⁶ However, if a player moves inside the territory of the EU/EEA from a lower to a higher category club, average training costs of the two clubs shall be established, and in the opposite case—only training costs of the lower-category club are relevant. In individual cases, the DRC may review disputes concerning the amount of

¹³⁴ Training costs and categorization of clubs for the year 2018 differ depending on the confederation and amounts to between USD 2,000 (Category IV) and USD 40,000 (Category II) for AFC and CONCACAF and between USD 2,000 (Category IV) and USD 30,000 (Category II) for CAF and OFC. Category III costs for the above-mentioned confederations amount to USD 10,000. Only national associations affiliated to CONMEBOL and UEFA may be qualified to Category I for the purposes of training compensation—UEFA costs equals to EUR 10,000 (Category IV), EUR 30,000 (Category III), EUR 60,000 (Category II) and EUR 90,000 (Category I), while CONMEBOL costs equals to USD 2,000 (Category IV), USD 10,000 (Category III), USD 30,000 (Category II) and USD 50,000 (Category I) See FIFA Circular no. 1627 dated 9 May 2018.

¹³⁵ FIFA Circular no. 1627 dated 9 May 2018.

¹³⁶ See FIFA, RSTP 2018, Article 5.2 of Annex 4.

training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review.¹³⁷

Furthermore, some deviations from the above-mentioned rules apply for players moving from one association to another inside the territory of the EU/EEA¹³⁸ and in calculation of training costs for players for the seasons between their 12th and 15th birthdays (i.e., four seasons) when training compensation shall be based on training and education costs of category 4 clubs in order ensure that training compensation for very young players is not set at unreasonably high levels.¹³⁹

It needs to be re-emphasized that during the negotiations between FIFA and the European Commission finalized in 2001, the training compensation system was accepted as a matter of principle, as all football stakeholders acknowledged that clubs investing in the training and education of footballers need to be rewarded.¹⁴⁰ The legality of such principle in view of the EU law was then confirmed in 2008 in the *Bernard* ruling. Still, the CJEU noticed that any calculation system of training allowances based on the general and predetermined criteria, not directly related to real training costs incurred by the club, brings concerns as a potentially illegitimate limitation of the free movement of workers within the EU.¹⁴¹ At the same time, one may argue

that in this judgement the Court initially approved the general assumptions of the method of calculation of the FIFA training compensation by multiplying the annual cost of training one player by the so-called player factor by stating that the scheme must take due account of ‘the costs borne by the clubs in training both future professional players and those who will never play professionally’ and not criticizing the mechanism adopted by FIFA.¹⁴² Therefore, it can be assumed that FIFA is entitled to establish training compensation amounts for a given club on the basis of its average costs borne on educating and training youth players without the necessity to calculate the training cost for every player individually. From the perspective of the concept of ‘specificity of sport’ and its interpretation by the EU institutions, such assumption seems acceptable. As Weatherhill rightly points out, football is a team sport—to train one high-skilled player on which the club can potentially earn money, it is necessary to run the entire academy.¹⁴³ However, neither the European Commission nor the CJEU has directly approved the method of calculation or the exact amounts of training compensation established by FIFA. Nonetheless, football governing bodies in view of the *Bernard* ruling appear to be cautiously optimistic that the training compensation system is safe from being deemed incompatible with the EU law, as the system to reward clubs investing in the training and education of young players was ‘fully supported.’¹⁴⁴ Such approach might be misleading, though.

The RSTP does not anticipate that the provisions on training compensation system shall be binding at a national level, but only indicates its applicability to international transfers and require national associations to provide for a system to reward clubs investing in the training and education of young players in its internal regulations.¹⁴⁵ Therefore, the fees in the case of international and domestic transfers often vary significantly—compensation fees specified in internal regulations of national associations are usually much lower than those established on the FIFA level. Additionally, rules governing FIFA’s training compensation system often differ from those adopted at a national level. As a result, the scope of entitlement of clubs for such a payment on the basis of international and national regulations varies (i.e., in some associations clubs are not required to provide a professional player with a new contract offer or even to demonstrate a genuine interest in maintaining a player in a club to be entitled to training compensation). Thus, this could be seen as a violation and restriction of movement of workers in the EU, not

¹³⁷ See FIFA, RSTP 2018, Article 5.4 of Annex 4.

¹³⁸ See FIFA, RSTP 2018, Article 6.3 of Annex 4: the former club of the player loses its right to claim training compensation if it fails to offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract, provided that an offer shall furthermore be at least of an equivalent value to the current contract. Notwithstanding the prerequisite of offering a contract, even a club that has failed to meet the basic and/or additional requirements could still claim training compensation. Thus, if the training club provides evidence or concrete indications justifying not offering a contract, it is nevertheless entitled to training compensation. As the CAS stated in its judgement CAS 2006/A/1152, ‘a training club not immediately offering a professional contract to one of its trainees can still justify its entitlement to training compensation if it proves a bona fide and genuine interest in keeping the player on the club’s roster or in its youth academy’ and, furthermore, in award CAS 2009/A/1757: ‘the aims of sporting justice shall not be defeated by an overly formalistic interpretation of the FIFA Regulations which would deviate from their original intended purpose.’ In the case CAS 2012/A/2890 it was held that in order to encourage the training of players, compensation should be granted whenever it appears contrary to common sense to conclude that the training club was not interested in keeping the services of the player. See CAS 2006/A/1152 *ADO Den Haag v. Newcastle United FC*, award of 7 February 2007; CAS 2009/A/1757 *MTK Budapest v. FC Internazionale Milano S.p.A.*, award of 30 July 2009; CAS 2012/A/2890 *FC Nitra v. FC Banik Ostrava*, award of 26 April 2013.

¹³⁹ See FIFA, RSTP Edition June 2018, Article 5.3 of the Annex 4; Ongaro (2010), pp. 89–90.

¹⁴⁰ Ongaro (2010), pp. 71–72.

¹⁴¹ CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, para. 46.

¹⁴² *Ibid*, para. 45.

¹⁴³ Weatherill (2008), p. 4.

¹⁴⁴ Zylberstein (2010), p. 62; Ongaro (2010), p. 70.

¹⁴⁵ FIFA, RSTP Edition June 2018, Article. 1 para. 2–3, p. 7.

mentioning that in this respect the present training compensation system is highly inconsistent, not being coherent as regards all football transfers with international dimension.

Moreover, the due amount of training compensation for a player does not depend on his value on the transfer market, his status (professional football player or amateur, first team member or reserve team member, member of a national team or not) or interest in acquiring his services by other football clubs. Hence, while compensation amounts for top talented players are relatively low, players with average skills and potential, trained by the club together with more talented players and to which a professional contract offer was presented, have a limited opportunity to choose a club due to disproportionately high compensation. In light of the above, even if the player ends his education at one club and does not want to continue the cooperation, in the case of a foreign transfer only the unilateral decision of the club not to offer a professional contract or to waive its rights to training compensation releases the new club of the player from the obligation to pay training compensation to a former club. If a former club decides to claim its share in training compensation in accordance with the FIFA regulations, the player is in fact limited to changing a club within the same national federation. Therefore, the so-called hindrance effect applies rather to average players than to the biggest talents whose market value exceeds the amount of compensation based on Article 20 of the RSTP multiple times.

Additionally, training and education costs for the purposes of the training compensation scheme are established on a confederation basis, updated and published every year in FIFA circulars on categorization of clubs, registration periods and eligibility. Clubs worldwide are divided in up to 4 categories reflecting the training costs incurred by a given club on training and educating youth players, provided that FIFA determines the number of categories available for each national association. While constructing the training compensation system in early 2000, FIFA was hoping that associations ‘would indicate the types of costs that they believed should be taken into account in calculating training compensation fees.’¹⁴⁶ Since the majority of national associations did not reply to the enquiry, FIFA decided to create a categorization system on the basis of the few replies received and studies carried out by its general secretariat.¹⁴⁷ Costs being a basis of calculation of value for the actual costs of training young players at clubs were disclosed in FIFA Circular no. 799.¹⁴⁸ The

indications and clarifications gained through the consultations process played a major role in the establishment of indicative annual training compensation amounts per confederation and ‘FIFA strived to find a high grade of consensus among all stakeholders with regard to the training compensation amounts prior to fixing them.’¹⁴⁹ However, the newly created categorization system did not reflect average annual training compensation fees per player for each category of clubs for each single member association, making some generalizations and simplifications inevitable for setting the training compensation system by FIFA without the necessary feedback from national associations. Therefore, FIFA only established indicative amounts of training compensation for each confederation (or—in the most positive scenario—for regions such as Central-East Europe or Balkans) in 2002, which in principle have remained unchanged until today.¹⁵⁰ Only few national associations were asked to assign their clubs into 4 different categories, while the remaining associations were considered to have between one and three different standards of training offered by their clubs. Provided that the system of categorization has a simplified and clear structure and disputes concerning application of the indicative amounts are lately rather uncommon, FIFA continues to base the system on the same principles and avoids any unnecessary interference concerning its scope.

Nevertheless, the above-mentioned rationalization of the adopted approach is questionable, both with regard to its legal justification and fairness. First of all, FIFA assumes that each club assigned to a certain category allocates similar financial investments in training players. Regardless of the expenditure on the functioning of the academy, first team staff policy and team’s achievements, the current system guarantees the same amount for a year of training for clubs participating at a given level of national competitions, rendering it impossible for top training academies from small federations to obtain a fair return from their investments and expertise in development of young players.¹⁵¹ FIFA was aware of such inequalities of the current

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health insurance), any social charges and/or taxes paid on salaries, accommodation expenses, tuition fees and costs incurred in providing internal or external academic education programs, travel costs incurred in connection with the players’ education, costs of training camps, travel costs for training, matches, competitions, expenses incurred for use of facilities for training, costs of football kit and equipment, salaries of coaches, medical staff and other professionals, as well as other miscellaneous administrative costs. See: FIFA Circular no. 799 dated 19 March 2002, p. 1–2.

¹⁴⁹ *Ibid*, p. 81.

¹⁵⁰ FIFA Circular no. 826 dated 31 October 2002, p. 2.

¹⁵¹ As a rule, clubs from the top-tier league in a given national association are assigned to the highest training compensation category available for such association and each lower category includes clubs

¹⁴⁶ See Ongaro (2010), p. 78.

¹⁴⁷ *Ibid*, p. 78.

¹⁴⁸ Such costs shall be established on the basis of salaries and/or allowances and/or benefits paid to players (such as pensions and

training compensation system since its establishment. As the Head of the Players' Status and Governance Department of FIFA Mr. Omar Ongaro admitted in his 2010 article, FIFA had no knowledge whether the adopted categorization thresholds for training costs reflected the true costs sustained by the training clubs as they were established 'in general' for a given confederation/region and were not designed to guarantee that football clubs receive a fair return on their particular average investment in the development of young players.¹⁵² Although in theory FIFA DRC may review a dispute concerning the amount of training compensation due to a training club and adjust it, in practice clubs do not have any effective means to recover additional funds. Actually, FIFA DRC limits its interference to truly exceptional cases and when some very particular circumstances apply, because 'to this day, neither the DRC nor the CAS has ever proceeded to adjust the respective amounts for having considered them to be clearly disproportionate to the case under review.'¹⁵³

The scope of clubs assigned to category 4 by FIFA is also controversial, especially due to the fact that any transfer of a player to these clubs precludes the right to training compensation for the training club. While the reason for such a preclusion is that category 4 is the lowest level of the categorization ladder of clubs for the purposes of training compensation and therefore it mainly groups purely amateur clubs, it needs to be stressed that in the case of numerous national associations where only two categories (3 and 4) exist, in particular in Central and Eastern Europe (Poland, Croatia, Czech Republic, Serbia etc.), clubs from the second tier of competitions, being—as a rule—fully professional, are entitled to acquire the services

of a talented player free of charge, without any compensation due to the training club, which often has allocated significant costs to develop the player. However, such a legal arrangement, completely understandable in relation to amateur players and amateur clubs, does not serve its purpose in relation to professional players and professional clubs allocated to category 4. Therefore, owing to the RSTP framework, some clubs receive unfair competitive advantage over clubs having a similar position at the football market but required to make high training compensation payments due to its categorization to category 2 or 3.

While part of FIFA's arguments concerning the need of certain grade of abstraction and simplification to guarantee simplicity, clarity and transparency of the categorization system are sound, it is hard to agree with the opinion of the global football governing body that the training compensation's categorization system maintains a proper balance and constitutes a realistic approach 'to achieve the higher-ranking objective of motivating clubs to invest in training and education of young players.'¹⁵⁴ In particular, an unsuccessful attempt to receive feedback from national associations in early 2000s in order to establish the actual training costs borne by football clubs in each FIFA's affiliated association cannot be considered a legitimate explanation of generalizations and inefficiencies of the training compensation's categorization system 20 years later. Bearing in mind the professionalization, commercialization and informatization of the associations since the adoption of the training compensation mechanism, including creation of the FIFA TMS and FIFA *Domestic Transfer Matching System* ('DTMS') and the growth of the FIFA administration and compliance departments enabling FIFA in-depth monitoring of the activity on the international football market, it is reasonable to assume that currently FIFA is enabled to adopt and enforce a more detailed and just categorization system efficiently reflecting the true training costs borne by individual club in order to train a player, i.e., a system as suggested below.

In view of the above-mentioned, it needs to be emphasized that the current categorization system established by FIFA in early 2000s does not reflect the true costs borne by the majority of clubs in relation to training and development of football players, demonstrating an unreasonably high level of abstraction and simplification. In particular, a principle to determine a training cost for all clubs in a given association on the basis of the competition level in which the club plays and the position of the national team in the FIFA ranking nearly 15 years ago (as changes in the categorization system since its adoption have been infinitesimal) seems to be unjust and not corresponding to

Footnote 151 continued

from the lower competition league. For instance, a Polish football club from Ekstraklasa, top-tier football competition in Poland, may create a leading football academy in Europe (with full scholarship, boarding schools, international tournaments etc.), spend tens of millions of euros on infrastructure and hire the best coaches in this part of Europe, producing top talents poached by the biggest football clubs in Europe, but still the training costs due to such a club in line with current FIFA regulations in the case the player decides to move to a foreign football club are established in precisely the same manner as for another club competing in the same competition tier, irrespective of their investment in youth training. Such an example is even more persuasive in relation to Dinamo Zagreb—one of the best football academies in the world, which FIFA assigned to Category III (30,000 EUR per season). It shares the same category with other clubs competing in Prva Liga and affiliated to Croatian football association, which spends a dozen times less for youth development than Dinamo. At the same time, clubs affiliated to the biggest football associations in the world and participating in their top-tier competitions (for instance Bournemouth in England or VVV-Venlo in the Netherlands) have the highest Category I (90,000 EUR per season) even though their training standards and costs are much lower than in Dinamo.

¹⁵² Ongaro (2010), p. 78–80.

¹⁵³ *Ibid.*, pp. 82–83.

¹⁵⁴ *Ibid.*, p. 83.

the increasing level of professionalization of the football market, mainly in Europe. Furthermore, the level of protection and compensation amounts for clubs investing significant sums in youth development, their training facilities and ‘producing’ talented players, but affiliated to smaller associations, are deliberately and unfairly low, while clubs affiliated to the biggest associations are entitled to high training compensation irrespective of their true investment in training and education of young players.

Therefore, it shall be highlighted that material change in the existing model of categorization of the clubs for the training compensation scheme needs to be introduced. For instance, adoption of the international/continental ‘categorization—licensing regime’ by the football governing bodies for clubs reflecting the real costs sustained by training clubs to train one player (both future professional players and those who will never play professionally) may be proposed. As a starting point, all clubs worldwide/continentwide would be assigned to category 1—the lowest one. All clubs in this category would be entitled to a training compensation fee established on a very low level, e.g., EUR 1,000 for each season. At the same time, the number of categories available to any club in the world would amount to 10, while the training compensation amount would increase proportionally for each subsequent category (the highest category could reach, e.g., EUR 100,000 per season). FIFA would establish a pre-determined and transparent criteria binding worldwide, which need to be fulfilled by every club to be assigned to any higher category—i.e., training costs being a basis of categorization of clubs could be analogous to those stipulated in FIFA Circular no. 799,¹⁵⁵ while some additional infrastructural and reputation criteria would also influence the assignment of a club to a given category. Clubs interested in receiving higher category than 1 would be required to submit an application through FIFA TMS, demonstrating the fulfillment of the pre-determined criteria for a given category. In the case of any doubts or uncertainty, FIFA shall be entitled to ask an expert group functioning at the association level of the applicant club to verify the data provided by such club as well as provide FIFA with a report on problematic issues. Therefore, the category for the training compensation purposes would be established individually, on the basis of a given club’s football infrastructure (number of pitches, their quality, technical/goalkeeper training areas, functional training areas, gym etc.), existence of accommodation for players and social infrastructure (boarding school, study rooms, profiled schools, social space), development and medical infrastructure (research and development center, medical staff, rehabilitation center, wellness center), qualifications

of the coaching and management staff of the academy (including the number of coaches with UEFA A and/or UEFA Youth licences), reputation of the academy and the number of home-grown trained players playing professional football within the last 10 years. Additionally, each association should be required to create an analogous system at a national level and to manage it through the DTMS system. In such a case, FIFA would also have an ability to monitor the proper functioning of the academies registered and categorized for the purposes of the FIFA training compensation mechanism.

3.3.2 Analysis of the so-called European exception

In Article 6 of Annex 4, RSTP includes three special provisions concerning training compensation applicable in the case of a player moving from one association to another inside the territory of the EU/EEA. First, rules on the calculation of training compensation in the case a player moves from a lower to a higher category club are slightly different than the general rules described in Article 5 of Annex 4 of the RSTP. In such case, the calculation shall be based on the average training costs of the two clubs. Such rule seems to be more fair than the general rule that the calculation shall be made based solely on the training costs of the acquiring club as—at least in theory—it also reflects the training costs actually incurred by the releasing club. In 2001, FIFA explained that the general aim of the rule was to stimulate solidarity between clubs and encourage clubs to invest in training, as for a player even from a very small amateur academy top clubs would be required to pay as though they would train the player themselves.¹⁵⁶ However, it seems that such an idea—bearing in mind decisions of FIFA in other issues connected with solidarity compensation schemes, which have significant negative consequences for training clubs, including amendment of the wording of Article 5 para 3 of Annex 4 of the RSTP in 2014—does not have legitimate grounds. It appears that in the case the training club of the player invests in the player’s development and training, in particular provides him with full-time accommodation, food, nutrition, both football and school education, and bears the costs of the player’s travel to national and international tournaments and competitions, it shall be rewarded accordingly. Therefore, the model that categorization of the acquiring club (especially as a huge number of fully professional clubs holds third and fourth category status for the purpose of calculation of training compensation) prevails over true training costs of the training club lacks logic and fairness. In view of the above-mentioned, true training costs of the club which developed a player shall be taken into

¹⁵⁵ *Supra*, note 121.

¹⁵⁶ FIFA Circular no. 769, p. 7.

consideration in accordance with the model indicated in Article 6 para 1 a) of Annex 4 of the RSTP not only if the player moves from a lower to a higher category club inside the territory of the EU and/or EEA, but to all players' movement subject to a training compensation payment.

Furthermore, the former club—in order to be entitled to training compensation—must offer the player a new contract at least of an equivalent value to the current contract, in writing, via registered post at least 60 days before the expiry of the latter. Such a rule ensures that only a club really interested in further services of a player shall be entitled to claim training compensation. Consequently, the former club of a player loses its right to claim training compensation if it fails to offer a player a contract on the terms described above or cannot demonstrate a *bona fide* and genuine interest in further services of a player. As explained in detail in point 3 above, the jurisprudence of CAS indicates that training compensation should be granted whenever it appears contrary to common sense to conclude that the training club was not interested in keeping the services of a player.¹⁵⁷ Alongside the calculation method discussed above, such a rule appears to be just and beneficial to all football stakeholders, as the club actually interested in prolonging the cooperation with a player shall be properly rewarded for the training costs in the case the player moves to another club from a different association, while in the case the club is not genuinely interested in keeping the services of a player, he is free to change the club without any payments to be borne by the acquiring club. Thus, the extension of such a rule globally should also be supported.

Besides the two above-mentioned rules pertaining to clubs from the territory of the EU or EEA, which establishment as a binding rule for all international transfers should be supported, Article 6 of Annex 4 of the RSTP includes the third rule, which appropriateness brings some objections. Article 6.2 of the said annex provides that the final season of training of a player in the club inside the territory of the EU or EEA may occur before the season of the player's 21st birthday 'if it is established that the player completed his training before that time.' Such a legal arrangement leads to ambiguity regarding the entitlement of the training club to the training compensation payment if the player signs a professional contract and/or becomes a member of the senior team of the club. RSTP does not include any more detailed information in this respect, and the market practice has been established on the basis of the jurisprudence of FIFA DRC and CAS. Nonetheless, one more time the question of the aims pursued by such a provision needs to be addressed. Does, in the case of a very

talented or early maturing player who progresses to the senior squads earlier than other players of his age, the training club of such a player shall be deprived of its right to compensation for training in case of international movement of the player before his 21st birthday? Is it truly a fact that a player who becomes a regular starter in his training club's senior team at the age of 18 ends his development phase then? Is such a rule necessary to justify that training compensation pursues the objective of encouraging recruitment and training of young players in a manner consistent with the EU law? Answers to all of the above-mentioned questions are debatable and therefore the football market regulator shall consider its deletion from the training compensation framework.

3.3.3 Analysis of Article 5 Paragraph 3 of Annex 4 of the RSTP

The current wording of Article 5 para 3. of Annex 4 of the FIFA Regulations includes an exception from the general rules on calculation of training compensation and states that 'to ensure that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays (i.e., four seasons) shall be based on the training and education costs of category 4 clubs' and reflects the original content of this provision from 2001.¹⁵⁸ However, it shall be noticed that between 1 October 2009 and 31 July 2014, the wording of this provision was significantly amended, indicating that where the event giving rise to the right to training compensation occurs before the end of the season of the player's 18th birthday, the training costs for players for the seasons between their 12th and 15th birthdays (i.e., four seasons) shall no longer be based on training and education costs of category 4 clubs, but on the category of the new club or—in the case of European clubs as pointed out in Article 6.1 a) of Annex 4 to the FIFA Regulations—on the average training costs of the two clubs.¹⁵⁹ Although bringing back the scope of this provision to its original wording in 2014 was made without any explanation to football stakeholders and with a 7-days transitional period,¹⁶⁰ it has entailed huge financial consequences and a significant deterioration of the position of the training club in the transfer market. Therefore, the aims which in 2014 stimulated FIFA to amend the wording of Article 5 para 3 of Annex 4 of the RSTP to its previous scope are unclear and incomprehensible.

Furthermore, it shall be highlighted that this amendment concerns in particular international transfers between clubs

¹⁵⁷ CAS 2012/A/2890 *FC Nitra v. FC Banik Ostrava*, award of 26 April 2013.

¹⁵⁸ Monbaliu (2015), p. 7.

¹⁵⁹ FIFA Circular no. 1190, dated 20 May 2009.

¹⁶⁰ FIFA Circular no. 1437, dated 23 July 2014.

affiliated to associations within the territory of the EU and the European Economic Area, as in accordance with Article 19.2 b) of the FIFA Regulations such transfers of players aged between 16 and 18 are excluded from a general ban on international transfers of minors. In consequence, the decision of FIFA resulted in significant decrease in training compensation payments to be made by the wealthiest European clubs for top talented players from other clubs registered within the territory of the EU and EEA, as the payment for each year of training of such a player amounts to EUR 10,000. It is difficult to understand that although FIFA highlights that protection of minor players and training clubs as well as encouragement of youth training and development constitute one of the most important aims pursued by football governing bodies, it acknowledged that application of higher training compensation costs in the case of international movement of underage player is not justified. In fact, it introduced an amendment to the RSTP which clearly encourages clubs to drain the biggest talents from training clubs affiliated to associations from smaller European countries. Such a possibility has not remained unnoticed and currently it is extremely difficult for training clubs to sign a first professional contract with a very talented youngster (as a rule, public law in the majority of the EU and EEA countries allows clubs to sign a contract with a player and his legal guardians when he is 15 or 16), as scouts of the most renowned clubs are tempting such players since they are 13–14 with a prospect of signing a contract in such clubs just a couple of months later (including regular invitations for trials etc.). What is crucial, the decreased costs of training compensation in relation to the most talented players result in making the whole training process by smaller clubs, which invest in training facilities, international tournaments and accommodation for the youth players, unprofitable and pointless as the prospect of receiving EUR 10,000 per each year of training of such a player will never refund the costs of players who will never play professionally. Therefore, by adopting the current version of Article 5 para 3 of Annex 4 of the RSTP, FIFA—probably unintentionally—decreased the protection of training clubs below the standard indicated by the CJEU in the *Bernard* ruling as suitable to ensure the attainment of the objective of encouraging recruitment and training of young players.¹⁶¹

In view of the above-mentioned, the current wording of Article 5 para 3 of Annex 4 of the RSTP has a counter-productive effect as it rather encourages the biggest European clubs to poach the most talented players aged 16–18 than constitutes an element of the framework aimed

to protect minor players from exploitation and encourage training and development of youth players by football clubs. Therefore, the wording of this article binding between 1 October 2009 and 31 July 2014 shall be restored, indicating that where the event giving rise to the right to training compensation occurs before the end of the season of the player's 18th birthday, training costs for players for the seasons between their 12th and 15th birthdays (i.e., four seasons) shall be based on training and education costs of the new club or—in the case of European clubs as pointed out in Article 6.1 a) of Annex 4 to the FIFA Regulations—on average training costs of the two clubs.¹⁶²

At the same time, due to the fact that higher training costs in the case of international transfers of underage players may discourage the free movement of players and act in an adverse manner to the life path of young people playing football who do not demonstrate the qualities of top football prospects and whose main objective is to change a club, not pursuing a professional football career and who are not recruited by top-notch clubs, FIFA shall consider the creation of a sub-committee of FIFA DRC analogous to the sub-committee created in FIFA Players' Status Committee for international transfer of minors, which could deal on a case-by-case basis with cases where lower training compensation seems to be justified and reasonable.

3.4 Analysis of transparency, monitoring and enforcement procedures related to solidarity payments

3.4.1 Analysis of current enforcement procedures related to solidarity compensation schemes

Development of the FIFA Transfer Matching System without a doubt constitutes a significant achievement toward a more transparent transfer market and since its entry into force on 1 October 2010, the system has enabled to create a comprehensive database of transactions within the football transfer market. As such, the TMS is also helpful in tracing the events entitling training clubs for training compensation or solidarity contribution payments. As pointed out in the KEA & CDES report, the decision to develop an electronic and centralized system for player registration within the TMS provided that solidarity contributions and training compensations are issued at least for players registered in the system since 2010 and those internationally transferred.¹⁶³ Additionally, on 1 October 2015, new Annex 6 was added to the RSTP, by means of which new, more effective procedures on handling claims

¹⁶¹ CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143, paras. 45–50.

¹⁶² FIFA Circular no. 1190, dated 20 May 2009.

¹⁶³ European Commission (2018), p. 52.

related to training compensation (Article 20 of the RSTP) and the solidarity mechanism (Article 21 of the RSTP) were introduced. The new Annex 6 of the RSTP establishes a procedure by means of which all claims related to training compensation and the solidarity mechanism are managed through the TMS, which should lead to a more effective way of handling claims.¹⁶⁴ The exact procedure is described in Annex 6 of the RSTP.¹⁶⁵

*Contrary to the above-mentioned assumptions, the FIFA GTM Report indicates that during 2017 only 1% (USD 63.8 million) of money flows in the transfer market represented solidarity contribution payments, while training compensation payments accounted to merely 0.3% (USD 20.3 million). Accordingly, ECA's 'Study on a transfer system in Europe' highlights that the biggest problem related to the operations of the solidarity mechanism is clubs avoiding their obligations to pay the solidarity mechanism, as while the total solidarity contribution payments for the seasons 2011/12 and 2012/13 amounted to USD 258 million, only USD 57.9 million were actually paid out. Therefore, instead of the total 5% provided for in the regulations, clubs only paid an equivalent of 1.15% of the total transfer expenditure incurred over the period.*¹⁶⁶

The present status stems mainly from the underdevelopment of the TMS mechanisms related to the collection of the solidarity compensation payments. First of all, the proceeding related to the non-payment of due compensation for a training club in accordance with training compensation and the solidarity contribution mechanism is a so-called application procedure, i.e., the club entitled for such a payment is required to submit a claim through the TMS system. Therefore, in the case the new club of the player fails to distribute the solidarity contribution to the player's training clubs indicated in his passport, it remains the sole responsibility of the training club to trace the player's movement giving the entitlement for a solidarity or training compensation payment, to contact representatives of the club responsible for the payment, as well as to enforce it (through an unofficial request for payment addressed to such a club or through a formal procedure in front of the sub-committee appointed by the FIFA DRC in accordance with Annex 6 of the RSTP). As a consequence,

¹⁶⁴ An additional change was the creation of a sub-committee appointed by the DRC, which comprises only DRC members, each of whom is able to pass a decision as a single judge. Consequently, Article 24 of the RSTP has been amended in such a way that new para. 3 has been included in this provision, which states: 'training compensation and solidarity mechanism claims handled through TMS (...) shall be decided by the sub-committee of the DRC.' See FIFA Circular no. 1500, dated 4 September 2015.

¹⁶⁵ See FIFA, RSTP Edition June 2018, Article 7.1 of Annex 6 & Article 10.1 of Annex 6.

¹⁶⁶ *Supra*, note 119.

many training clubs, in particular amateur or semi-professional ones, lack sufficient human resources, knowledge of the existing solidarity framework and language skills to find out about an event giving right to claim payments on the basis of Annex 6 of the RSTP and to undertake legal actions in order to enforce the payment.

Additionally, as the TMS is a platform dedicated to international transfers only, many training clubs operating mainly locally still have not opened or are not using their accounts on a regular basis. Such clubs are working and handling football- and transfer-related issues predominantly using systems developed and launched by national football associations, not integrated with the FIFA TMS framework. Although FIFA also introduced the DTMS platform, designated exclusively for its member associations, leagues and their affiliated professional football clubs and fully connected with the TMS, as of April 2018, only 5 national associations (including Netherlands as the only UEFA country) decided to introduce it internally. Subsequently, it is fair to assume that only tenths of a percent of all clubs worldwide (the biggest ones) comply with the requirement stipulated in Article 2.1 of Annex 6 of the RSTP to check the 'claims' tab in the TMS at regular intervals of at least three days.

3.4.2 Potential improvements of transparency, monitoring and enforcement of the current solidarity compensation schemes

Major problems with effectiveness of the solidarity system result from lack of transparency of money flows within the football market, in particular on a national level, where hardly any football association adopted the Domestic Transfer Matching System ('DTMS') proposed by FIFA.¹⁶⁷ Instead, they use systems developed internally or do not supervising transfer transactions in detail at all. Consequently, as emphasized by the European Commission in its 2018 report,¹⁶⁸ partial application of the monitoring system is unable to address the transparency issue in the football transfer market in a comprehensive manner. At the same time, enforcement of the solidarity schemes in relation to international transfers is limited at best, as demonstrated in points 5.1 and 5.2 above.

The European Commission report suggests improvements related to transparency in the football market, which should also have direct influence on better redistribution of revenues from solidarity and training contributions.

¹⁶⁷ As of March 2018, only 5 national football association adopted DTMS: Netherlands, Iran, Malawi, Nigeria and Ecuador.

¹⁶⁸ European Commission (2018), An update on change drivers and economic and legal implications of transfers of players. Final Report to the DG Education, Youth, Culture and Sport of the European Commission, March 2018, p. 12.

Particular attention should be given to the proposal to establish a Global Clearing House. Such an autonomous unit within the FIFA framework, composed of independent personalities competent in the field of crime prevention, shall specifically focus on tracking suspicious deals (notably on minors) and financial transactions beyond a certain threshold.¹⁶⁹ One of the key elements of the Global Clearing House is cooperation with public authorities for better monitoring the correct payment of transfer fees, including solidarity and training compensations.

The idea that all payments within the transfer market shall be made via a unit governed by FIFA—analogously to the system implemented in the English Football Association, where the FA makes all transfer- or intermediary-related payments on behalf of the acquiring club on the basis of the instruction filled in by such a club—needs to be supported. Undoubtedly, such a platform would eliminate vast parts of illegal practices connected with the football market, such as transfer-related payments made outside of the TMS system, increase transparency and strengthen the effectiveness of the current measures for the redistribution of the solidarity and training compensations, as suggested by the European Commission.¹⁷⁰ At the same time, clearing house would significantly improve transparency of the transfer practices and monitoring of unpaid transfer fees by the football governing bodies. Nonetheless, its possible creation leads to several concerns, which shall be addressed below.

A foremost issue is that—in order to be successful and have comprehensive application—the Global Clearing House needs to be integrated with clearing houses established on a national level by football associations. Otherwise, its functionalities would be limited only to international transfers managed by the TMS, which constitute only a small part of the transfer market, and—as such—such an international clearing house would become a fragmented approach to the problem with current lack of transparency and malpractices, not providing football industry with a holistic solution. Therefore, introduction of the Domestic Transfer Matching System as a standard platform for all national football associations—a second suggestion to improve transparency presented by the European Commission in its report¹⁷¹—needs to be explored. Making the DTMS platform commonly used is a prerequisite not only to have general knowledge about the working process of the whole football market, but also a necessary element to monitor the transfer activity of the clubs for better enforcement of the regulations on the solidarity compensation framework and, subsequently, to

encourage the training and development of young players. Additionally, the DTMS implemented in every national association would constitute an indispensable element when the solidarity contribution scheme is applicable to all transfers with international dimension, as proposed in point 6.1 above.

Another concern connected with the creation of the Global Clearing House is whether such a platform should be administered solely by FIFA, as proposed in the KEA & CDES 2013 report.¹⁷² Due notice shall be given in particular to the UEFA FFP regulations, which successfully address the issues connected with financial stability of football clubs through the establishment of a ‘break-even assessment’ and enhances the monitoring of unpaid debts by clubs. Taking this into account, it seems that the idea to create a clearing house managed on a continental basis by football confederations (integration of such platform with already developed mechanism such as the UEFA FFP regulation in order to sanction the clubs failing to pay transfer fees in due time needs to be explored, as well as responsibility of football confederations to monitor the activity of national clearing houses within relevant football associations), while pancontinental transfers would be managed by FIFA, seems to be a rational proposal.

While the above-mentioned considerations have a rather long-term nature, it needs to be noted that due to the flaws in both the monitoring and collection mechanisms of the solidarity contribution, as well as an incomplete or contradictory documentation of players’ historical registration clubs,¹⁷³ the current operation of the solidarity scheme is far from efficient. Therefore, although the introduction of Annex 6 of the RSTP slightly

¹⁷² *Supra*, note 8, p. 259.

¹⁷³ In many cases brought under the CAS and the FIFA DRC after the introduction of the solidarity mechanism in 2001, the panel could not be established on the basis of evidence other than testimonies (player’s passports, registration documents within the national federation), the player’s former registration clubs or evidence that the player actually completed a football education program at a given club in a given time. In several awards, CAS and the FIFA DRC rejected claims of federations for previous years’ contributions that remained unclaimed by clubs within their remit. FIFA and CAS decided that clear evidence of the development in at least one affiliated club was required. Since 2012, article 2.3 of Annex 5 of the RSTP has demanded a ‘clear proof’ of the link between the player and said club, as well as evidence that the club in question no longer exists of any National Association claiming the mechanism, which would in principle otherwise be due to one of its affiliated clubs. See CAS 2011/A/2635 Real Madrid Club de Futbol v. Confederacao Brasileira de Futbol (BF) and Sao Paulo FC, award of 25 July 2012, CAS 2011/A/2652 Bulgarian Football Union (BFU) v. Manchester City FC, award of 24 August 2012; CAS 2008/A/1751 Brazilian Football Federation v. Sport Lisboa e Benfica- Futebol S.A.D., award of 5 August 2009; Reck (2014) FIFA’s solidarity mechanism and the impact on the South American football, LawInSport.com, 13 March 2014, <http://www.lawinsport.com/blog/>. Accessed 29 July 2018.

¹⁶⁹ *Supra*, note 8, p. 259.

¹⁷⁰ European Commission (2018), p. 8.

¹⁷¹ *Ibid*, p. 58.

improved the speed of proceedings related to training compensation and solidarity contribution disputes, some additional improvements and functions of the TMS system shall be considered.

Bearing in mind numerous disputes concerning the amount of due solidarity contribution and training compensation payments, automatic calculation of due amounts by the TMS system should be introduced. Such calculations shall be based on the amount of the transfer of a player and other data introduced in their instruction by the clubs involved in the transaction and the player passport uploaded to the TMS. Therefore, the club acquiring registration rights to the player would not be required to make the calculation on its own, having respective amounts generated by the system.

Moreover, taking into account amateur or semi-professional status of many training clubs of professional footballers, as well as lack of transparency within the football transfer market, it is advisable to introduce automatic notifications within the TMS system for each club indicated in the player's passport about each transfer of its former player involving a transfer fee, along with the exact amount of remuneration due to such a club and the payment schedule (especially if the transfer fee is to be paid in installments). Such a functionality would undoubtedly shift the burden to trace all transfers of its former players from a training club and enhance monitoring and enforcement of solidarity payments.

Additionally, the standardized form of a claim related to training compensation and solidarity contribution, to be submitted to the sub-committee of FIFA DRC through the FIFA TMS platform, shall be drafted and made available to all football clubs.

Finally, some amendments to the procedure governing claims shall be considered. For instance, such claims should be processed in the most simplified and expedited manner possible, including no hearings, short deadlines to submit a statement by the club liable for payments (e.g., a 5-day deadline), the possibility of settling payment deadlines according to a standardized formula and the possibility of representing a club by an employee. Any failure of settling the outstanding amounts within short time limits set by the FIFA DRC should result in imposing restrictive disciplinary measures (e.g., a ban on registering any new players in the following registration period and severe financial penalties). Furthermore, information about outstanding payments should be sent to all of the club's appropriate licensing authorities, including relevant bodies of a national football association.

4 Review of alternative approaches to solidarity compensation in football

It is difficult to contend that training activities of football clubs have undergone a significant erosion process within the last 20 years. There is a wide variety of reasons for this very case and it is impossible to establish the main factor. On the one hand, the entry of the principle of free movement of workers to professional football as a result of the *Bosman* ruling of the CJEU encouraged clubs to use the transfer system and services of foreign mature players to build their squads, limiting the role of young local players and therefore putting investment in training and development of home-grown players into question.¹⁷⁴ On the other hand, progressive commercialization and globalization of the sport sector and growth of financial aspects in the football market, including acquisition of the biggest European clubs by foreign investors ready to inject significant private funds into their transfer budgets, resulted in further limitation of the feature of the transfer market as means to promote competitive balance and redistribute income between professional and amateur clubs. Nonetheless, undoubtedly such a process is not efficiently mitigated by the regulatory environment created and enforced by football governing bodies. As mentioned above, football governing bodies failed to deliver a solidarity compensation framework, including one regulated in Articles 20 and 21 of the RSTP, a mechanism protecting and supporting training clubs. Therefore, currently there is no effective mechanism pursuing one of the key objectives justifying the existence of the football transfer market in the shape agreed in 2001 between football governing bodies and the EC. What is more, lack of such a framework brings into question the legality of the whole transfer system as an unjustified restriction of the EU freedom of movement of players and the competition law principles.

The debate concerning the inefficiencies of the current transfer market has never been so intense, with nearly all football stakeholders and EU institutions highlighting the disadvantages of the transfer system, including also solidarity schemes. In its 'An update on change drivers and economic and legal implications of transfers of players' published in March 2018, the European Commission emphasizes that football transfer rules 'are designed to preserve fairness in competition, for example by compensating smaller clubs for the training and development of young players' as well as that 'redistribution linked to transfers has no significant positive impact on addressing the competitive balance' and 'more efforts should be made in this direction' as the solidarity contributions are stagnating at best, whereas the overall transfer market

¹⁷⁴ Zylberstein (2010), p. 62.

boosts.¹⁷⁵ Additionally, in the Annex to the Commission Decision adopting the Arrangement for Cooperation between the European Commission and the UEFA, on 19 February 2018, both parties confirmed their awareness of ‘the alleged concerns of some stakeholders regarding the current operations of the football transfer system, such as a general lack of transparency, excessive fees, hoarding of players, lack of investment in local talent.’ They also acknowledged that ‘training and development of players throughout Europe needs to be further encouraged, including but not limited to ensuring that small- and medium-sized clubs have the necessary financial and sporting incentives to invest in such training and development,’ ‘re-affirmed their support for financial solidarity mechanisms within sport, which help to establish and reinforce the necessary link between professional and amateur sport, as well as financing less profitable competitions which are nonetheless important for long-term development.’¹⁷⁶ Finally, President of FIFA Gianni Infantino notes that while transfer fees and commissions paid to intermediaries rise significantly, ‘the money redistributed through the game and spent on training young players is falling.’¹⁷⁷ Therefore, he calls for re-thinking the current solidarity framework as well as developing certain specific ideas, such as a central clearing house where all transfer and solidarity payments shall be made and FIFA or the confederations shall then redistribute them to the clubs responsible for the players’ training.¹⁷⁸

With this in mind and having regard to the above-mentioned ineffectiveness of the FIFA training compensation system and the FIFA solidarity contribution system stipulated above, it is justified to conclude that we are currently witnessing a systemic failure of the solidarity compensation framework. Therefore, football governing bodies should perform a detailed analysis of the system and its inefficiencies in order to establish which approach shall be followed: a significant revision of the existing framework, i.e., elimination of its shortcomings and

strengthening the enforcement of current rules, including application of some of the ideas already pointed out in this article, or a complete re-thinking of the model of distribution of revenue within the football transfer market by replacing solidarity contribution and training compensation schemes with an entirely new framework.

What follows are some specific requests to change the FIFA system concerning compensation of training costs as well as protection of training clubs. For the sake of transparency and cohesion, such proposals do not form a closed list of recommendations set out in sports law literature, but a selection of ideas which might increase the efficiency of the solidarity framework and protection of training clubs. Although ideas presented below and the deficiencies of the current system are often contradictory, the author of the this article believes that only through an in-depth analysis of all potential capacities a new comprehensive approach on solidarity within football market can be developed.

4.1 New football solidarity fund based on player’s salaries

The solidarity mechanism aimed to redistribute a significant proportion of income from transfers of a player to clubs involved in his training and education, in particular amateur/grassroots clubs.¹⁷⁹ As discussed in point 3.1.1 of this article, the current solidarity framework based on transfer fees is ineffective and outdated and, as a consequence, fails to pursue its aim. In particular, redistribution of funds based on transfer fees does not correspond with the realities of the current football market, as the number of permanent transfers and loans with a transfer fee decreases gradually and in 2017 only amounted to 15.8% of all international transfers,¹⁸⁰ not mentioning the fact that due to the applicability of solidarity contribution only to international transfers, the solidarity contribution scheme applies to less than 25% of the overall number of transfers.¹⁸¹ As such, the solidarity levy, agreed upon in 2001 between football governing bodies and the European Commission as a 5% levy on each compensation payment for a transfer, giving the training clubs of the player a share in his added value, applies currently to no more than 5% of all transfers within professional football. Additionally, clubs extensively avoid their obligations to pay the solidarity mechanism and out of 5% of transfer expenditure in

¹⁷⁵ European Commission (2018), pp. 10, 21 and 59.

¹⁷⁶ European Commission (2018), Annex to the Commission Decision adopting the Arrangement for Cooperation between the European Commission and the Union of the European Football Associations (UEFA), 19 February 2018, C(2018) 876 final, https://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/EuropeanUnion/02/53/98/34/2539834_DOWNLOAD.pdf. Accessed 22 July 2018.

¹⁷⁷ Conn (2018), Agents’ runaway gravy train set to be derailed in bid to curb excessive fees, the Guardian, 1 February 2018, <https://www.theguardian.com/football/2018/feb/01/agents-gravy-train-curb-excessive-fees>. Accessed: 18 July 2018); G. Marcotti, FIFA president Gianni Infantino backs transfer-market reform, ESPN, 14 February 2018, <http://www.espn.com/soccer/fifa-world-cup/story/3383510/fifa-president-gianni-infantino-backs-sweeping-transfer-market-reform>. Accessed 19 July 2018.

¹⁷⁸ *Ibid.*

¹⁷⁹ Weatherill (2014), p. 253.

¹⁸⁰ *Supra*, note 99.

¹⁸¹ Unfortunately KEA & CDES Report, FIFA GTM or ECA 2013 study do not provide with any reliable information on the number of national transfers made globally.

transfers which are included in the solidarity framework, only 1.15% (less than 25%) is actually distributed between training clubs of the player.¹⁸² These facts constitute overwhelming proof of the inefficiency of the current solidarity scheme.

As pointed out by Advocate General Lenz in his opinion in the *Bosman* ruling, '(...) the transfer fees are generally calculated on the basis of the players' earnings. Since the bigger clubs usually pay higher wages, the smaller clubs will probably hardly ever be in a position themselves to acquire good players from those clubs (...).'¹⁸³ Although made more than 20 years ago, it is still an extremely pertinent and important observation on also the realities of the football market. Furthermore, taking in consideration the inefficiencies connected with the solidarity framework in force based on a deteriorating transfer market and the fact that such a scheme shall pursue an objective that training clubs receive a part of the player's added value, it shall be concluded that currently the only factor demonstrating a professional footballer's market value is in fact his remuneration received from the club of his registration. Therefore, there are reasonable grounds to analyze the impact of shifting the basis of the solidarity scheme in football from transfer fees to a player's annual income obtained in connection with a professional footballer's services. In the case a comprehensive system based on this idea was established, connected with the idea of the FIFA Global Clearing House and new enforcement mechanism, the collapse of the current training compensation scheme could also be considered.

For instance, one can imagine a system where a solidarity fee amounting to 5, 7 or 10% of the player's net annual income from his club of registration—both on the basis of a professional contract, any bonus regulations, image rights agreements and/or any other source of income connected with the performance of services of a professional football player—shall be paid toward any club the player was formerly registered with between the seasons of his 12th and 23rd birthday. Distribution of this fee could take place in a manner analogous to the solidarity contribution distribution system indicated in Article 1 of Annex 5 of the RSTP. As the establishment of the true income of the player would undoubtedly create discussions and suspicions, such a system shall be accompanied by a new feature of the FIFA TMS and obligatory FIFA DTMS application in every national association, where all clubs shall be required to disclose all payments made to the player within a given calendar year as well to submit a declaration that all

amounts transferred by both a club and any subsidiaries and/or related entities has been duly disclosed. Moreover, detailed monitoring and enforcement procedures shall be adopted. For instance, as the deadline for making solidarity payments could be established as of 31 March of the calendar year after the year for which the payment shall be made, in the case of lack of payment within the due time the club shall be subject to automatic disciplinary sanctions including the ban on registration of new players in the following transfer window and high interests to be paid to the entitled clubs. Additionally, all payments could be made through the clearing house established by FIFA, which would give FIFA the possibility to verify the timely execution of obligations connected with solidarity payments.

Such an idea naturally raises the question regarding its legality and justification on the grounds of the EU law. Nonetheless, it appears to have less restrictive effects on the ability of clubs to recruit the players than the current solidarity contribution scheme, at the same time significantly increasing solidarity between clubs in the football industry. Referring to the *Wouters* and *Meca-Medina* rulings of the CJEU, to determine whether the consequential restrictive effects of such a scheme are inherent in the proportionate pursuit of the legitimate objective, due account must be taken of 'the overall context in which the decision of the association of undertakings was taken or produces its effects.'¹⁸⁴ As current Article 21 and Annex 5 to the RSTP clearly fail to properly balance football competitions and give incentives to clubs to train and promote young players as they are mismatched to the current realities of the transfer market (only 15.8% of the total number of transfers equals to transfers with a transfer fee resulting in solidarity payments),¹⁸⁵ it seems that restrictive effects of the solidarity fund based on the player's salaries will be not only more efficient (although it is very hard to establish the actual financial level of the increase in solidarity within the football market) but also not associated with obstacles to the freedom of movement of players or infringements of the EU competition law regulations. On the contrary, such a system is not directly influencing the remuneration of the player in the club as the solidarity premium is paid on top of the total player's annual salary, it does not increase the transfer fee paid for the player as it is not in any way related to transfer fees, and it has no 'hindrance effect' as it is strictly connected with the player's earnings in the club and does not constitute an additional obstacle for a young player to

¹⁸² *Supra*, note 119.

¹⁸³ Opinion of Mr. Advocate General Lenz in case C-415/93 *Union Royale Belge des Societes de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:293, para. 224, p. 87.

¹⁸⁴ CJEU, case C-309/99 *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, dated 19 February 2002, ECLI:EU:C:2002:98, para. 90, 110; CJEU, case C-519/04 *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492; See also Parrish (2015), p. 271.

¹⁸⁵ *Supra*, note 99.

change the club of his registration, as in the case of the training compensation scheme.

4.2 New football solidarity fund replacing current solidarity compensation schemes

Alternatively to the solidarity fund based on a player's salary, football governing bodies are developing principles of a system aimed to replace current solidarity contribution and training compensation schemes with a new solidarity fund established by FIFA. It includes establishment of a fund connected with the FIFA Global Clearing House, which would collect part of all transfer fees (5–7%) paid on the transfer market and distribute compensation generated in such a fund to training clubs. Distribution parameters of the new model are still to be determined, but while the idea of removing the 'hindrance effect' (training compensation payments may be considered an equivalent of a transfer fee having a deteriorate effect on the careers of young footballers) shall be welcomed, at least two key risks need to be identified.

As in the case of adoption of such a system the new club would not be required to pay any compensation to the training clubs for acquiring the registration rights to a young player (as the training club would be remunerated by FIFA from a general fund), the risk of a significant increase in the number of international transfers of young players (including minor players between 16 and 18 within the European Union and the European Economic Area) is material. Contrary to transfers of senior players, clubs would be entitled to acquire the registration rights to players who have not finished football training and education yet without any transfer fee. Therefore, such a change would undoubtedly encourage clubs to concentrate on acquiring young players still in the development phase and, as a result, would decrease the level of protection of training clubs and young athletes.

Additionally, any solidarity system based on a transfer fee, as demonstrated in point 5.1 above, is inefficient and counterproductive. Therefore, even if the amounts distributed on the basis of the FIFA solidarity fund increased significantly in relation to the current solidarity payments, a newly established system would not reflect the reality of the current football market, i.e., it would not apply in the case of a change of the club by a 'free agent.' Moreover, such a system would de facto remove the solidarity contribution model, i.e., the participation of the training club in the increase in the market value of the player.

In the view of the above-mentioned, football governing bodies need to be extremely cautious while developing such a solidarity fund.

4.3 Amendments to the length of a contract for players under the age of 18

In accordance with Article 18 para 2 of the RSTP, the maximum length of a professional football contract can be five years from its effective date, while players under the age of 18 are restricted to sign contracts for a term not longer than three years. At the same time, any provision referring to a longer effective period shall not be recognized by football authorities.¹⁸⁶ As indicated by the RSTP Official Commentary, the maximum duration of a football contract has been established as a compromise between the interests of clubs and footballers.¹⁸⁷ It provides the football club with stability of employment of the player for a sufficient time in order to set up a competitive squad on the one hand, while on the other—not to impede the development of the player's career. FIFA also explained that the rationale behind the limitation of the length of a contract signed by underage players is the need to safeguard the best interests of such players, in particular not to hinder their progress through an excessive bound by the employment relationship with a club.

Irrespective from the soundness and rationality of the restriction from the perspective of young players, it shall be noted that on the flip side it severely weakens the competitive position of training clubs, in particular those purely amateur, semi-professional or from not leading football association. As indicated in the opinion of Advocate General Sharpston in the *Bernard* case, for gifted youngsters, being approached by a big club is 'a magic key opening the door to a professional career,' while training clubs 'are understandably reluctant to see "their" best young hopefuls, in whose training they have invested heavily, poached by other clubs,' as it represents a real threat to both economic and sporting survival of smaller football clubs.¹⁸⁸ In fact, it should be recalled that it is impossible for a training club to predict with any certainty the sporting future of a young player in whose training and development such a club invests significantly. As only a very limited number of trainees in football academies progress to professional football, whereas a greater number must be trained in order for that minority to be revealed, it shall be the issue of the utmost importance from the perspective of football governing bodies to provide training clubs with rational protection and incentives to train and develop young footballers. However, the current framework does not seem to guarantee fulfillment of these

¹⁸⁶ FIFA, RSTP Edition June 2018, Article 18.2, p. 19.

¹⁸⁷ *Supra*, note 69, p. 53.

¹⁸⁸ Opinion of Advocate General Sharpston in CJEU case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:14, para. 1.

objectives. As indicated in the *Bernard* case, a rule of the national football association or provision of a bilateral agreement between the club and the player and his legal guardians aimed to establish high compensation—unrelated to the actual costs of training in the case a club-trained player decides to sign a professional contract with another club at the end of his training period—was considered a breach of the EU law. At the same time, as demonstrated in point 4 above, training clubs are not sufficiently protected by the current solidarity scheme or the training compensation mechanism.

Undoubtedly, currently money constitutes the decisive factor in shaping the professional career path of a young footballer and the competitive structure of the football system has been progressively deteriorating in the last years. In the 2017/2018 season, in the Round of 16 of the UEFA Champions League, all teams are affiliated to the ‘Big 5 leagues,’ while in the 2016/2017 season, only one team out of the ‘Big 5 leagues’—a Portuguese powerhouse SL Benfica Lisbon participated at this level (and was eliminated). It is then clear that the European football market is characteristic of being dominated by a small number of clubs (3–4 per league) from a small number of leagues (Portuguese, Dutch, Belgian and, to some extent, Russian besides the ‘Big 5 leagues’). Such clubs holds the dominant position due to economic strength (which results mainly from broadcasting contracts, marketing, sponsorship and merchandising activity as well as flow of transfer fees between a small number of the biggest clubs) as well as lack of efficient and comprehensive protection from football governing bodies and the EU institutions, in particular schemes aimed to protect the ‘level playing field’ and competitive balance in European football.

As a result, training clubs are unable to keep their top talents within the their own teams until they start to play a significant role in the first senior teams, as bigger clubs acting as predators are able to attract any talented players by offering them higher salaries and better training facilities. These processes exist both between the biggest and small-size or medium-size clubs known for their excellent training facilities, as well as between clubs from smaller national associations (e.g., Czech FA, Hungarian FA, Croatian FA) and clubs from more developed leagues which have higher financial resources (e.g., clubs from the Belgian FA, Portuguese FA and/or Dutch FA). At the same time, FIFA rules on transfers of minors allow a transfer of a player after his 16th birthday provided that the transfer takes place within the territory of the EU and the European Economic Area. Such rules, albeit voted necessary in light of the EU law—together with the limitation of the maximum duration of a professional football contract to 3 years and severe inefficiencies in training compensation mechanism, including in particular unfair categorization of

training clubs (resulting in artificial reduction of the available training compensation payment for clubs from smaller national association), as well as current wording of Article 5 para 3 of Annex 4 of the RSTP, which irrationally reduce the training compensation payment for seasons of a player’s 12–15 birthdays (as discussed below)—seems to be counterproductive and contrary to the pursued aim, which is to promote international transfers of underage players. Therefore, FIFA statements highlighting that social and cultural implications related to the migration of young players have to prevail over the purely sporting interests of (acquiring) clubs and players who benefit from international transfer¹⁸⁹ are groundless and unfortunately unrelated to operations of the football transfer system.

Following insufficient protection on the basis of football regulations, training clubs are required to adopt additional means in order to secure their investments in youth training. An example of such actions is the policy of Anderlecht Brussels disclosed in the so-called Lokiko case. Considering the limits of the training compensation system, Anderlecht has reverted to remedies available in its national public law, i.e., it signs surety agreements with parents of promising players, on the basis of which the player and his parents receive remuneration for irrevocable obligation of the player to sign his first professional contract with the club once he reaches the legally required age (16 in Belgium).¹⁹⁰ Material threats encountered by clubs aimed to provide young players with top-class football education and training, as well as with academic training and optimum living standards, in particular risk to lose the most talented and promising players without compensation accounting for the costs borne by the clubs in training both future professional players and those who will never play professionally,¹⁹¹ shall be considered by all football stakeholders as dangerous for the entire football market and some remedies need to be pursued. Thus, the comment of a FIFPro representative, who named surety agreement ‘nothing less than a scandal,’¹⁹² is unfortunate and demonstrates that FIFPro is either unaware of failings of the current youth framework or it only advocates for ‘a one side of a coin,’ namely the interest of players, without a proper analysis of the grounds for such a practice of Anderlecht.

¹⁸⁹ La Porta (2017), p. 47.

¹⁹⁰ Kint et al. (2017), pp. 97–98.

¹⁹¹ CJEU, case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI: EU: C:2010:143., para. 45; CJEU, case C-415/93 *Union Royale Belge des Societes de Football Association and others v. Bosman and others*, ECLI: EU: C:1995:463, para. 109.

¹⁹² Van Seggelen (2017), p. 101.

¹⁹³ *Supra*, note 8, p. 256.

In view of the above-mentioned, in particular in order to decrease the number of poaching practices of the richer football clubs related to underage foreign players, and to enhance protection of training clubs of young players, extension of the maximum length of the contracts signed by underage players to five years shall be discussed and analyzed. It shall be noted that such an idea was also indicated in the KEA & CDES study among proposed measures to improve competitive balance and rules on minors.¹⁹³ Nonetheless, in the opinion of the author of this article, such possibility should be available to clubs only in relation to a club-trained player, i.e., a player who is registered to a club for at least 24 months or 2 full football seasons before signing a contract and provided that the club provides such a player with adequate football education and/or training, academic education and optimum living standards—with a host family or in the club's accommodation—on the sole cost of the club. As it would only be an option available to the parties of a football contract, such an amendment would also significantly increase protection of the training club and youth players from financial poaching practices and be legitimate in light of the EU law. At the same time, no change in relation to the term of the contract shall apply to a relationship between a club and player who does not meet the criteria to be considered a club-trained player in accordance with the definition stipulated above.

4.4 Other alternatives to the transfer system attaining solidarity and competitive balance between football clubs

In his opinion delivered to the CJEU in the *Bosman* case, General Advocate Lenz mentioned that there are alternatives to the transfer rules with which the objective pursued by those rules can be attained, in particular protection of training clubs, protection of the integrity of the competitions and competitive balance between football clubs.¹⁹⁴

Although General Advocate Lenz proposed to determine specific limits for the salaries to be paid to players by clubs by a collective wage agreement, he believes such an idea was not developed and seems to be practically impossible to adopt in the current realities of the football market. A set cap on transfer fees based on mathematical formulas and objective criteria, such as categories of clubs or the salaries of a player, do not seem like an option worth considering, as it would further promote the current imbalance between the wealthiest and other football teams, not having a positive impact on the creation of a 'level playing field' and competitive balance in European football. Analogously, establishment of one players' wage limit for all European

clubs is unrealistic due to huge differences between clubs both on European and each national association level in terms of financial resources. However, in order to eliminate the practices of some of the wealthiest European clubs which contract more than 70 professional young senior football players—including the majority without a chance to compete for a place in a match squad of such a team—and serve as so-called incubator clubs by loaning them to another clubs while holding economic rights to the players, squad limits in line with the UEFA rules on the eligibility of players along with the limitation of the number of senior players being on loan at the same time shall be analyzed. In line with such a proposal, each club shall be entitled to register up to 25 players on a List A, including at least 2 goalkeepers and a set number of club-grown and association-grown players, and on a List B—an unlimited number of players who turn 21 or are younger in the given football season, provided that they were registered with the club for at least 2–3 years (the loan of the player to another club shall be considered equal to registration) plus up to 5 players within the age limit stipulated above, who do not fulfill the above-mentioned restriction. Such a limit would promote competitive balance and conclude the practices of the richest clubs to gather all top talents irrespective of their place in the playing squad.

Furthermore, General Advocate Lenz stated that it would be conceivable to distribute the clubs' receipts among the clubs.¹⁹⁵ Specifically, part of their income from broadcasting rights, advertising, merchandising, sponsorship agreements, ticket revenues and commercial activities should be paid to a special fund through which such an income would be redistributed to other clubs. The idea may be extended toward creation of solidarity funds in three dimensions: national (leagues and national cups), European (UEFA competition and European championships) and international (qualifications and World Cup finals).¹⁹⁶ Subsequently, each of these funds would be jointly divided between all participants of these competitions (in the case of national leagues, proportionally to all leagues registered within a given national federation). However, the above-mentioned proposition seems to be not only impossible to implement, taking into account the current operation of the football market, but also distorting the nature of sports competition and professionalization of the competition. It does not give any answer to the question why the clubs which operate exquisitely, have the biggest number of fans, are able to attract the most lucrative sponsorship and marketing contracts as well as generate the most significant revenues from match days would be obliged to share their legally generated income with clubs which have a negative

¹⁹⁴ *Ibid.*, para. 226, p. 88.

¹⁹⁵ *Ibid.*, para. 226, p. 88.

¹⁹⁶ Blanpain (1999), p. 320.

financial result due to poor management, flawed transfer policy or inability to attract fans to the stadium. It cannot be disputed that changes within the compensation system should take place immediately, have a wide scope and involve promoting training of young players by establishing real and significant fees due to the clubs that train best. However, the idea of solidarity funds as presented above, albeit being a more efficient way to distribute money through the football market than through the transfer system, seems to be more adequate to closed leagues systems such as MLS or NFL instead of systems which include hundreds of thousands of clubs across the globe, with a huge number of amateur/grassroots clubs which do not have any teams in professional senior competitions.

5 Conclusion

The KEA & CDES 2013 Report fairly points out that ‘the evolution of the transfer market has contributed to undermining the fairness of competition’¹⁹⁷ by being counter-productive with regard to competitive balance and having a marginal effect on protection of training clubs and development of young players.¹⁹⁸ It should be assumed that one of the key reasons for this is that a framework intended by football governing bodies to pursue competitive balance, protect training clubs and encourage them to develop young players, i.e., the FIFA training compensation and FIFA solidarity contribution mechanisms were not properly implemented, not supported by an effective enforcement system and transparency requirements and, in particular, not adjusted to the changing realities of the football industry since 2001.

In view of the shortcomings and systemic failings of the current solidarity contribution framework presented in this article it is disputable whether any—even significant—amendments to the solidarity contribution mechanism based on transfer fees may fix its inefficiencies. Since the *Bosman* ruling of the CJEU the percentage of transfers and loans with the transfer fee in relation to the total number of international transfers gradually decreases. In 2017 it amounted to only 15.8%.¹⁹⁹ Although the total amount of paid transfer fees increased significantly, solidarity compensations remained at the same level. Therefore, maintaining the status quo in this regard does not seem to be a reasonable and equitable option and a completely new approach toward solidarity contribution in football shall be seriously considered, in particular a system based on

player’s salaries for each year in the club of their registration. Implementation of such a system entails however a question whether the transfer system—in the case of removing the solidarity scheme based on transfer fees—would (still?) be justified in light of the EU law and would it survive a potential challenge based on the EU free movement or competition law arguments.

Nevertheless, it is difficult to support criticism of the transfer market and calls for its replacement by ‘least restrictive alternatives such as financial incentives to produce talented players’²⁰⁰ without detailed and feasible proposals concerning a new system, which—on the one hand—would reduce restrictions on the free movement of players and anti-competitive features of the current system, and on the other—would effectively protect the fairness of competition, enhance competitive balance and incentivize investments in the training and development of young players. Moreover, assumption that it is transfer windows, not the payment of transfer fees, that maintain sporting integrity of competitions, lacks support in evidence and seems to be detached from the realities of the football industry.²⁰¹ After all, in particular from the perspective of a football club from a smaller national association, contractual stability is what gives a club a chance to retain the registration rights to a player for the residual term of the contract and it is the transfer fees that allow a club to find a suitable replacement for a player transferred before the end of the contract. Bearing in mind the fact that in the vast majority of cases, players transferred with a transfer compensation were an important part of the releasing club roster, abolishment of the transfer market would remove one of the last constraints on further centralization of the best football players in several dozens of the richest clubs from the few biggest national leagues (including ‘Big 5 Leagues’).

Therefore, it appears that as of today, although the current transfer market failed to pursue its legitimate aims agreed in 2001, its systemic restoration, not abolishment, needs to be advocated. Most likely this is also the position of the European Commission, which awaits for amendments to the current framework and prefers dialogue with football stakeholders²⁰² rather than commencement of the next clash with football governing bodies on current football regulatory regime. Analogously, the CJEU also seems to accept the compensation schemes designed to promote training and development of young players (currently strictly connected with the transfer market) as a matter of the EU law, ‘even if the result is that in some way a player’s exercise of contractual freedom and right to move

¹⁹⁷ *Supra*, note 8, p. 250.

¹⁹⁸ *Supra*, note 8, p. 250; Pearson (2015), pp. 234–235.

¹⁹⁹ *Supra*, note 99.

²⁰⁰ Pearson (2015), p. 235.

²⁰¹ *Ibid.*

²⁰² *Supra*, note 78.

²⁰³ Weatherill (2008), p. 4.

between Member State is affected in a way that would not be tolerated in a normal industry.²⁰³ As such, the football governing bodies appear to maintain their extensive autonomy for the self-regulations of the football market, including shaping the solidarity framework.

In view of the above-mentioned, not only a new approach toward the solidarity contribution mechanism should be proposed, but also a feasibility study on additional measures aimed to pursue competitive balance and encouragement for training and development of young players, such as squad limits, restrictions on the number of loans, the UEFA home-grown players rule or even broadcasting rights distribution system. Nonetheless, in case the solidarity fund based on the player's salaries is not introduced, maintenance of the FIFA training compensation mechanism and its adjustment to the realities of the present football market are of particular importance. Regardless of its current ineffectiveness and the 'hindrance effect,' the mechanism introduces the only appreciable protection from the training clubs' perspective and limits international transfers of the most talented youngsters, including players aged 16–18 from smaller associations from the EU/European Economic Area ('EEA').²⁰⁴ In the case of removal of training compensation fees connected with acquiring young players by foreign clubs, it is highly likely that the football market will experience a dramatic 'muscle drain' process of smaller clubs (including the acquisition of the registration rights to the vast majority of talented players aged 16–18 from the EU/EEA small/medium associations by clubs from richer EU/EEA associations), as well as a systemic decrease in the level of protection of training clubs, contrary to the aim pursued. In particular, the idea to replace the training compensation system with an increase by adding 1–2% of the solidarity contribution share must be evaluated negatively. Such a proposal will not only discourage training clubs from investing in youth training and promoting young players in their senior squads as the solidarity payment will be entirely conditional upon the potential future international transfer of such a player, but will also incentivize the wealthiest clubs to attract all young foreign talents free of charge as soon as possible (in the case of the EU/EEA—players between 16 and 18 years of age, contrary to the FIFA policy to generally prohibit international transfers of minors).²⁰⁵

Finally, any amendments to the current approach of the football governing bodies regarding solidarity on the football market shall be supported by structural changes in

the transparency requirements and effective enforcement system, including processing of all solidarity payments through the FIFA clearing house, a global harmonization of the registration system by requiring national association to use a FIFA DTMS platform, and strengthening of the penalties in the case a solidarity payment is not regulated in due time.

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²⁰⁴ In accordance with Article 19 of the RSTP, international transfers of minors are prohibited. However, three exceptions to this rule apply, including a transfer of a player aged between 16 and 18, which takes place within the territory of the EU or the European Economic Area (EEA). See: FIFA, RSTP Edition June 2018, p. 23.

²⁰⁵ *Ibid.*

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