European network on free movement of workers

Obstacles to free movement of young workers

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Preface

The European Commission would like to be informed of problems caused by legislation that is in fact designed to protect young workers, but effectively operates as an obstacle to free movement of persons in specific areas that cannot be justified by the aim of the national measure at stake. The point of departure in this report is the sporting sector, as that is the sector where for the time being obstacles have been encountered. For example the 'home grown players' rule is designed to protect young sportspersons, but could make it more difficult for players from other EU-countries to play at the highest level in another country. The main part of this report is dedicated to the sporting sector.

The report also describes the measures that could be encountered on the protection of young workers on the labour market, for instance by financial measures which stimulate access to the labour market for young persons, but which are residence based and therefore are not accessible to other EU citizens.

The report is only focused on the situations which cause obstacles to the free movement of young workers. It does not give an overview of the measures in general to protect young workers.

The obstacles of young workers in sport

1. The Protection of Minors[1]

The European labour market for professional footballers was significantly liberalised following the CJEU judgment in *Bosman*.[2] This led to a debate within football about how best to limit the international transfer of minors in order to protect their health and welfare. Most recently, the 2010 European Sports Forum held in Madrid discussed a number of issues related to the use of young people in sport including overtraining and exploitation, missed education opportunities, the use of doping substances, and sexual abuse and harassment. Linked to the debate on the transfer of minors is a concern that larger football clubs are attracting young overseas players to their academies and this is undermining the efforts of many smaller clubs to invest in the education and training of young talent. This has a consequential negative impact on competitive balance in European football.

Placing restrictions on the international transfer of minors has the potential to engage the EU's provisions on free movement of workers. However, the EU has long recognised as legitimate the need to protect minors in sport. For example, the 2000 Nice Declaration on Sport expressed 'concern about commercial transactions targeting minors in sport, including those from third countries, inasmuch as they do not comply with existing labour legislation or endanger the health and welfare of young sportsmen and –women'.[3] Similarly, the European Commission's 2007 White Paper on Sport expressed concerns that whilst the movement of minors in sport across frontiers may fall short of the legal definition of trafficking, the exploitation of young players continues to be a problem in the EU.[4] In particular, the Commission cited reports that an international network managed by agents takes very young players to Europe especially from Africa and Latin America. Those children who are not selected for competitions are then abandoned in that foreign country. This heightens the prospects of them falling into positions where they may experience further exploitation. This sentiment is shared by the European Parliament as expressed through recent European Parliamentary Reports such as the Belet and Mavrommatis Reports.[5]

Furthermore, the Member States have expressed a political commitment to this matter by agreeing Article 165 of the Treaty on the Functioning of the European Union which grants the EU a supporting competence in the field of sport. Article 165(2) states that Union action is to be aimed at developing the European dimension in sport, 'by pro-

1 This information has been provided by Prof. Richard Parrish, Edge Hill University, United Kingdom
2 Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921.
3 Declaration 29 to the Treaty of Amsterdam. Presidency Conclusions, (2000), 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies', Nice European Council Meeting, December 2000.
4 Commission of the European Communities (2007), 'White Paper on Sport', COM(2007) 391 final.
5 European Parliament (2007), 'Resolution of the European Parliament on the Future of Professional Football in Europe', A6-0036/2007, 29 March, (The Belet Report). European Parliament (2008), 'European Parliament Resolution of May 8 2008 on the White Paper on Sport' 2007/2261(INI), (The Mavrommatis Report).

moting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen. Whilst it is natural to focus on abuses within the system, it must also be recognised that the international transfer of minors can benefit young players, both in terms of their footballing and general education and also their general social development and financial security.6

Relevant Legislation

Article 45 TFEU establishes a worker's right to circulate within the territory of the EU linked to the pursuit of specific economic activities. The CJEU has adopted a broad definition of who is to be considered a worker. In *Lawrie Blum* the Court found that the 'essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration' and that this work must be 'effective and genuine'.[7] It must therefore be acknowledged that young footballers can be considered workers under the framework of EU law.

Nevertheless, the EU has recognised that minors are a particularly vulnerable category of worker and has enacted protective legislation. The objective of Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work is to ensure that the Member States prohibit the work of children. In that connection, Member States must ensure that the minimum working or employment age is not lower than the minimum age at which compulsory full-time schooling as imposed by national law ends or 15 years in any event.8 Further, the Directive seeks to ensure that the work of adolescents is strictly regulated and protected and that employers guarantee that young people have working conditions suitable for their age.9 The Directive states that Member States shall ensure that young people are protected against economic exploitation and against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardize their education. The Directive allows Member States to stipulate, subject to certain conditions, that the ban on the employment of children is not applicable, among others, to children employed for the purposes of cultural, artistic, sports or advertising activities, subject to prior authorisation by the competent authority in each individual case.

As far as the transfer of non-EU nationals is concerned, immigration control remains a matter for the Member States. However, as the White Paper acknowledges, Member States must apply the protective measures for unaccompanied minors envisaged by national legislation, where appropriate in accordance with Council Directive

6 For a discussion see Anderson, C. (2009), 'New FIFA Regulations on the Transfer of Minors', *World Sports Law Report*, 7(11), p.3-5.
7 Case 66/85, *Lawrie Blum v Land Baden-Württemberg* [1986] ECR 2135, paras.17 & 21.
8 94/33 Article 1(1).
9 94/33 Article 1(2) and 1(3).

2004/81/EC of 29 April 2004 on the residence permit. In line with the UN Convention on the Rights of the Child, the best interest of the child must be a primary consideration for Member States when applying national legislation, especially concerning education and social integration.[10] On 16 December 2008, the European Parliament and the Council of the European Union adopted Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.[11] The Directive states that the 'best interests of the child' should be the primary consideration of Member States when implementing the Directive.

Football

Article 19 of the FIFA Regulations for the Status and Transfer of Players provides that international transfers of players are only permitted if the player is over the age of 18. Three exceptions to this rule apply. First, if the player's parents move to the country in which the new club is located for reasons not linked to football. Second, the transfer takes place within the territory of the EU or EEA and the player is aged between 16 and 18, subject to the new club fulfilling a number of minimum obligations including the provision of education, training and accommodation. Third, the player lives no further than 50km from a national border, and the club for which the player wishes to be registered in the neighbouring Association is also within 50km of that border. The maximum distance between the player's domicile and the club's quarters shall be 100 km. In such cases, the player must continue to live at home and the two Associations concerned must give their explicit consent. FIFA has accepted two further exceptions. First where the players concerned could establish without any doubt that the reason for the relocation to another country was related to their studies, and not to their activities as football players. Second, in cases in which the national association of origin and the new club of the players concerned have signed an agreement within the scope of a development programme for young players under strict conditions.[12]

The conditions of Article 19 also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. In a 2009 amendment to the regulations, a subcommittee appointed by the Players' Status Committee is in charge of the examination and the approval of every international transfer of a minor player, and every first registration of a minor player who is not a national of the country in which he wishes to be registered for the first time. The application for approval shall be submitted by the association that wishes to register the player. This is a departure from the previous system in which national associations were responsible for ensuring compliance with Article 19. One observer has noted that should the new sub-committee be under-resourced and unreasonably delay transfer requests, it could act as a de facto prohibition on the interna-

10 Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, p. 51.
11 OJ L 348 of 24/12/08
12 See para 7.3.3 CAS 2008/A/1485 *Midtjylland v FIFA*.

tional transfer of minors and this could engage the free movement and competition law provisions of the TFEU.13

Also part of the 2009 amendment is Article 19bis which provides that clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors who attend the academy to the association upon whose territory the academy operates. It continues by stating that each association is obliged to ensure that all academies without legal, financial or de facto links to a club (a) run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or registered with the club itself; or (b) report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates. Each association is to keep a register comprising the names and dates of birth of the minors who have been reported to it by the clubs or academies.

In determining whether the application of the FIFA regulations conflicts with any EU laws, notably those regulating the free movement of workers within the EU, account must be taken of a number of issues. First, an EU minor who is considered a 'worker' can seek the relevant protections offered by Article 45 TFEU. Second, whilst the FIFA regulations fall short of an outright ban on the transfer of minors, they still amount to a restriction insofar as they place limitations on a minor's free movement. Third, restrictions must be justified on the basis that they pursue, in a proportionate manner, a legitimate objective. On this point, it is clear from numerous political statements detailed above that the protection of minors is considered by the EU a legitimate objective. In this connection, the regulations appear to represent a proportionate pursuit of this objective in that they permit cross border movement subject to minimum standards being observed.[14]

However, this assessment, particularly that concerning proportionality, depends on how the measures are practically implemented. For instance, in March 2009 the Court of Arbitration for Sport (CAS) heard the appeal of Danish club FC Midtjylland against sanctions imposed upon them by FIFA for breaches of Article 19 of the FIFA Regulations concerning the protection of minors.15 Midtjylland registered as amateurs a number of young Nigerian players previously registered to a Nigerian club. These players were granted a residence permit by the Danish immigration service allowing a short term stay as students. The players were provided with education in Denmark. On receipt of a complaint from the international football players union, FIFPro, FIFA issued a negative decision ('strong warning') against Midtjylland and the Danish Football Association. Midtjylland lodged an appeal before the CAS. Four issues were considered.

13 Anderson, C. (2009), 'New FIFA Regulations on the Transfer of Minors', *World Sports Law Report*, 7(11), p. 4.

14 This was broadly the opinion of the Court of Arbitration for Sport in CAS 2005/A 955, *Càdiz C.F., SAD v FIFA and Asociación Paraguaya de Fútbol*, CAS 2005/A/956, *Carlos Javier Acuña Caballero v FIFA and Asociación Paraguaya de Fútbol*.

15 CAS 2008/A/1485, *Midtjylland v FIFA*.

First, the club argued that Article 19 of the FIFA Regulations was applicable only to professional and not amateur minor players. The CAS found that Article 19 was applicable to both. If it were not, the intended objective of the provision which is the protection of minors, could be circumvented. Second, the CAS found that the exceptions to the prohibition on the international transfer of minors contained in Article 19 did not apply to the case. In particular, the club could produce no evidence that the relocation of the players to Denmark was not football related. Indeed, the club made claims on its website suggesting that its link with the Nigerian club was for the purpose of attracting new talent. Third, Midtjylland claimed that a strict application of Article 19 would contravene EU legislation, particularly the Cotonou Agreement. As has been established by the Court of Justice, non-EU nationals covered by such association agreements who are legally employed within a member state of the EU can claim non-discrimination rights in relation to employment conditions.[16] The CAS considered that as the players have no employment contract and are not therefore employed in Denmark, and given that the Danish immigration service defined the players as students and not workers, the relevant provisions of the Cotonou Agreement cannot be relied upon as the Agreement does not extend to the regulation of access to the employment market. Finally, the club argued that FIFA were inconsistent in the application of the rules contained in Article 19 and that they allowed one of the larger European clubs, Bayern Munich, to register a non-EU minor without sanction. The CAS found no evidence that it was the constant practice of FIFA to accept the registration of minor players from outside the EU. Based on the above arguments, the CAS dismissed Midtjylland's appeal.

Furthermore, one also needs to consider the application of the social advantage principle to situations involving young footballers who might not be considered workers. The principle of equal treatment in respect of social advantages stems from Article 7(2) of Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers and family members within the Community. As the White Paper on Sport acknowledges, the Court's case law has extended the right to equal treatment in the granting of social advantages to students and non-active persons who are lawfully resident in the host Member State. The Court has recognised the right of citizens of the Union who are lawfully resident in the territory of the host Member State to avail themselves of Article 18 TFEU (non-discrimination on the grounds of nationality) when they are in a situation which is identical to that of nationals.

Home-Grown Players

Since the introduction of UEFA's home-grown player, concern has been expressed that the measure may give rise to an increase in the number of minors moving internationally. The new eligibility criteria were incorporated into the 2006/07 UEFA regulations and these rules must be observed by all clubs entering European club competitions. The rule provides that squad lists for UEFA club competitions will continue to be limited to 25

16 Case C-438/00, *Deutscher Handballbund v Kolpak* [2003] ECR I-4135 and Case C-265/03, *Simutenkov* [2005] ECR I-2579.

players for the main 'A' list. From season 2006-2007, the final four places are reserved exclusively for 'locally trained players'. A locally trained player is either a 'club trained player' or an 'association trained player'. In the following two seasons, one additional place for a club trained player and one additional place for an association trained player is reserved on the A list with the final numbers of four club trained and four association trained players in place for the 2009 season. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between the age of 15 and 21. An association trained player fulfils the same criteria but with another club in the same association. In the event that a club fails to meet the new conditions for registration, the maximum number of players on the 'A' list will be reduced accordingly. Should a club list an ineligible player in the places reserved for home-grown players, those players will not be eligible to participate for the club in the UEFA club competition in question and the club will be unable to replace that player on list 'A'. UEFA made the recommendation for national associations to apply the same rule for domestic competitions. UEFA argues that the rule is needed to promote competitive balance, encourage the education and training of young players and protect national teams. The European Commission has indicated that the rule may be compatible with EU law on these grounds.[17]

English Premier League clubs entering UEFA club competitions must adhere to UEFA's home-grown rule. From the 2010/11 season, the Premier League will introduce a squad cap of 25 and a domestic home grown player quota of 8 from that 25 man squad. Since the 2009/10 season the Football League (those clubs not participating in the English Premier League) have operated a home-grown player rule requiring at least four players from clubs' sixteen man matchday squads to be registered domestically, for a minimum of three seasons, prior to their 21st birthday.18 In June 2010, the Football League announced that from the 2010/11 season, clubs will have to name 10 home-grown players in a squad restricted to 25 players aged over 21.[19]

The Commission has recently formed the opinion that UEFA's home-grown player rule is potentially compatible with EU law as although the measure may lead to indirect nationality discrimination, it pursues the legitimate objectives of promoting training for young players and consolidating the balance of competitions.20 However, in order to be able to assess the implications of the rule in terms of the principle of free movement of workers, the Commission has committed itself to closely monitor its implementation and undertake a further analysis of its consequences by 2012. One such possible consequence has been expressed by the European Parliament. In the Belet Report on the Future of Professional Football, the Parliament stated that it is 'convinced that additional arrangements are necessary to ensure that the home-grown players initiative

17 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.
18 The Football League Press Release, 'League clubs vote to introduce 'home-grown players' rule', 18/12/08.
19 Football League AGM Report, 08/06/10, www.football-league.co.uk
20 Commission Press Release IP/08/807, 'UEFA rule on home-grown players: compatibility with the principles of free movement of persons', 28/05/08.

does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age)' and that 'young players must be given the opportunity for general education and vocational training, in parallel with their club and training activities, and that the clubs should ensure that young players from third countries return safely home if their career does not take off in Europe.'

For the sake of completeness, it must also be noted that FIFA has proposed the adoption of a 6+5 rule according to which a football club must begin a game with at least six players entitled to play for the national team of the country where the club concerned is located. This means that a maximum of five players may be used at the beginning of the match who are not entitled to play for the national team of the league association concerned. FIFA's aims are to guarantee equality in sporting and financial terms between clubs, the promotion of junior players, to improve the quality of national teams, and to strengthen the regional and national identification of clubs and a corresponding link with the public.[21] On 28th May 2008, the 58th FIFA congress in Sydney adopted a resolution supporting the aims of the 6+5 rule. In the same opinion on the UEFA rule, the Commission considered the 6+5 rule incompatible with EU law on the grounds that it gives rise to direct nationality discrimination. In June 2010 it was reported that FIFA had abandoned the proposal.[22]

Protection of Minors – The Future

In the White Paper on Sport the Commission acknowledged that the protection of minors in sport would also benefit from more effective regulation of the activities of players' agents, better licensing systems for sport clubs, and social dialogue in the sport sector.[23] All three initiatives are at an early stage.

On agent regulation, the Commission launched a study as part of its White Paper Action Plan. The resulting study listed a number of ethical issues associated with the work of agents including problems relating to human trafficking and problems relating to the inadequate protection of minors.[24] Shortcomings of the current system have been acknowledged by the competent authority, FIFA and a new set of proposals are currently being drafted and are expected mid 2011.

Similarly, whilst UEFA has adopted a licensing system for clubs, a more comprehensive system is currently being discussed and the issue of the protection of minors will form part of these discussions. In the White Paper, the Commission committed itself to promote dialogue with sport organisations in order to address the implementation and

21 As stated in the Institute of European Affairs Report, 'Expert opinion regarding the compatibility of the 6+5 rule with European Community law', 24/10/08.
22 'FIFA scrap plans for home-grown player rule', www.bbc.co.uk, 10/06/10.
23 Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, p51.
24 KEA, CDES & EOSE (2009), 'Study on Sports Agents in the European Union', a study commissioned by the European Commission (Directorate-General for Education and Culture), Part 4. Summary and Recommendations, p. 3-4.

strengthening of self-regulatory licensing systems. Starting with football, the Commission intends to organise a conference with UEFA, EPFL, Fifpro, national associations and national leagues on licensing systems and best practices in this field.[25]

Social dialogue in European football has been taking place since the July 2008 creation of the social dialogue committee in professional football. Chaired by UEFA, the committee comprises members of employer interests (EPFL and the ECA) and employee interests (FIFPro). Negotiations within this committee can lead to an agreement between the parties on matters pertaining to the employment relationship between clubs and players. This could include a wide range of issues, including the status and transfer of players, contractual issues and the protection of minors.[26]

It must also be noted that a range of other measures designed to deter the international transfer of minors could be envisaged but these raise concerns as to their compatibility with EU law. First, a young player could be required to sign their first contract with training club. Clearly this would act as an obstacle to a player's free movement and would require justification based on the grounds discussed above. Second, the training compensation criteria for young players contained in the FIFA Regulations on the Status and Transfer of Players could be increased so as to deter clubs from poaching young players and as a way of ensuring training clubs are rewarded for their investment in youth development. One such increase was approved by FIFA in October 2008. However, in Bosman, the Court of Justice held that training compensation costs should relate to the actual cost incurred by the training club.[27]

In the White Paper, the Commission also committed itself to (1) monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. In this connection, the Commission launched a study on child labour as a complement to its monitoring of the implementation of the Directive. The issue of young players falling within the scope of the Directive will be taken into account in the study. (2) Propose to Member States and sport organisations to cooperate on the protection of the moral and physical integrity of young people through the dissemination of information on existing legislation, establishment of minimum standards and exchange of best practices.[28]

2. Specific Information by Country

In *Bulgaria* there are limitations to free movement of workers in the fields of volleyball and ice hockey, which also form an obstacle for young workers. According to Art.4 (6) of the Rules on the Competition Rights and Internal Transfer of the Bulgarian Volleyball

25 Commission of the European Communities (2007), 'White Paper on Sport', COM(2007) 391 final, points 46 & 47.
26 T.M.C Asser Institute (2008), 'Study into the identification of themes and issues which can be dealt with in a Social dialogue in the European professional football sector', Report for the European Commission co-authored by the T.M.C Asser Institute, Edge Hill University and the Katholieke Universiteit Leuven, May.
27 Case C-415/93, *Bosman*, para. 109 and Case C-325/08 *Olympic Lyonnais*.
28 Commission of the European Communities (2007), 'White Paper on Sport', COM(2007) 391 final, points 42 & 43.

Federation, a volleyball club from the prime league should not have more than three players with foreign nationality, and only two of them can play in a game at a time. There are no exceptions provided for EU citizens. The quotas rule does not apply to foreigners with long-term residence. According to Art.15 of the *Rules on the Status of Persons Participating in Training and Competition Activities and on the Transfer of Competition Rights of Ice Hockey Players in the Republic of Bulgaria*, adopted for the season 2008/2009, competition rights are recognized only with regard to Bulgarian citizens or foreigners with long-term residence in Bulgaria. There are no exceptions provided for EU citizens.

In *Cyprus* based on the regulations and information provided by sports officials it seems that there are no regulations of national sport federations and sport organisations limiting the access of EU migrants to sport.

In the *Czech Republic* there seems to be a problem in practice similar to the problem in the Bernard case (C-325/08).[29] This case concerned the compensation of training of young football players, the legitimacy of such compensation, and its justification under EU law. The Czech provision of the Football Association contains entitlement of a professional club to require that a young player (at the age between 15 -18), who is registered for the club, signs a contract as a professional player with this club preferentially. If the club offers such a contract and the player refuses to sign it, the consequence is that the player is not allowed to transfer to another club or to play as guest player there until his 18th year of age, except in the situation the original club allows so. If the club does not offer such a contract, then the situation is different and a person may sign a professional contract with another club. According to the judgment of the CJEU in the Bernard case a transfer of the player is in general possible (taking into account a proper compensation). According to the current Czech Association´s rules, however, no transfer is possible at all. This can be seen as an obstacle for exercising the young player´s right of free movement.

In *Denmark* in certain areas of the sporting sector, the concepts of *Home Grown players* and *training* or *education compensation* are applied. Most likely, the application within Danish football of the concept of Home Grown players in particular may de facto cause obstacles to the free movement of young sportspersons. It should be noted, however, that the consequence for not meeting the requirement of 8 Home Grown players does not seem to be of a severe character for the club in question. This is due to the fact that the number of players on the first team, normally consisting of 25 players, is reduced correspondingly with the number of missing Home Grown players.

According to the rules of the Danish Handball Association *education compensation* may be requested for contract players at the age of 16-23, who have been on contract within the past 12 months provided the player appears on the match report for the season on question. The education compensation may amount to a maximum of 2,500 Euro for each season the player has been on contract between the player's

29 Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010.

16th to 23th year. Moreover, an additional compensation of 500 Euro for each year the player has been on contract and played for a youth national team may be requested. Hence, the education compensation may amount to a maximum of 24,000 Euro (8 x 3,000).

In *Finland* no information is available on the application of home grown players rules or other such arrangements in the sport sector. In the Finnish football league there has been some debate on adoption of such rules, but no measures have been taken in this regard so far. In the Finnish ice-hockey league there is no need for such arrangements as the number of home-grown players is regarded to be sufficiently high.

In *France* rugby has been the subject of quota changes in 2009. Professional clubs must have 50% of their players who have had licenses to play for five consecutive seasons in France from the age of 21 or have been training at a recognized centre for three years between 16 and 21 years of age. These requirements result in a substantial advantage for French (young) players. Regarding football the rules on home grown players and the training or education compensation are applied. Problem is the fixation of the height of the compensation when a young players wants to play for foreign club.

In *Greece* an amateur basketball or volleyball player who reaches the age of 18 is required to sign a contract with the sports company that owns the club to which the player belongs, if the sports company so wishes. The duration of this contract is one to three years. A transfer to a club abroad is prohibited, without the approval of the sports company and the issue of a letter of clearance from the Greek Basketball Federation. If, contrary to these conditions, the player provides his services to another club or sports company outside Greece, he cannot play after his return to Greece for another club or sports company, before he has fulfilled his obligations to the club to which he was playing before his departure.

In *Italy,* in general a club which trained a young player enjoys the right to sign the first professional contract with him/her. If the club does not sign the contract, it is entitled to a compensation for the training provided (*premio di addestramento e formazione tecnica*: art.

As far as Football is concerned, the National Federation's rules (*Norme organizzative interne della Federazione Italiana giuoco calcio*) establish that players aged between 14 and 19 can be affiliated as "*giovani di serie*" by a club which trains them. This club enjoys the right to sign a professional contract with the young player. A player affiliated as "*giovane di serie*" can sign his/her first professional contract from the age of 16. The club which signs the first professional contract shall pay compensation to the club where the player performed his/her activity as "amateur". The maximum amount of compensation is established in an annex and is linked to the age of the player (the younger the player, the higher the compensation) and to the division the club takes part in (the higher the division, the higher the compensation).

As far as *basketball* is concerned, the National Federation's rules establish that a young player is linked to a club without the right to change from club ("*vincolo sportivo*") from the age of 12 to the age of 21 (men) or 26 (women) (Article 5 of the *Statuto della Federazione italiana Pallacanestro*). When the player is 21, his affiliation with a club ends. If another club affiliates him, it has to pay a compensation to the National Federation (Article 176 of the *Nuovo regolamento organico*), which will be divided between the club which affiliated the player during the previous year and the club which affiliated him as under 19. The compensation rules only applies to men.

In *Lithuania* there are several national rules in the sport sector, which aim at the protection of young professional sportsmen, which may be an obstacle to the mobility of these young workers outside the country. Generally, the Law on Physical Education and Sport of 20 December 1995 (new version of the law of 25 May 2010) provides for the sport activity contract of an under-age professional sportsman. According to this law, under-age professional sportsmen from 14 to 18 years of age may conclude sport activity contracts only with the consent of their parents or guardians. In *basketball*, transfers of players below 18 years of age are forbidden and may be allowed in exceptional cases only. If the player moves from sports' school/club to the basketball club, the club has an obligation to compensate the school for the preparation of the player. The scope of compensations for the transfer has been clarified in 2009 and depends on the league. This rule remains valid for up to four years from the graduation from sports' school.

In *Malta* with regard to *football*, the provisions of article 9 of the Competition Rules of the Malta Football Association (MFA) were for a while, the subject of controversy due to claims that these rules contravene the principles of free movement of persons enshrined in the EU Treaties. This rule has been interpreted to the effect that while non-Maltese football players, including those from EU Member States, can register with local football clubs without any limit, this is subject to a requirement that at least eight home-grown players must be playing on the field at any point in time during a football match in local competitions. Assuming that home-grown players are likely to be Maltese nationals, this means that, in practice, under the current Malta Football Association rules, no more than three 'foreign' players can play at any point in time during a football match.

In *Slovenia* the national basketball association adopted new Rules in 2009 in accordance with the rules of the International Basketball Federation (FIBA). According to these rules only 5 players, younger than 18 years, may leave the country per year (they get a Letter of Clearance) and only up to 5 players, younger than 18 years, may come into the country.

In *Spain* the rules on compensation regarding transfer of young football players are in line with the judgment of the CJEU in the Bernard case.

In *Sweden* the home grown players rule is more restrictive than the UEFA requirements. The Swedish Football Association (SFA) has implemented a home-grown players rule that stipulates that one half of a club's match squad must have been registered with a Swedish club for at least three years for payers between the ages of 15 and 21.[30] Consequently, the SFA-rule restricts movement even further than the UEFA requirement. The effects of the home-grown players rule on free movement is illustrated by a recent situation concerning a Swedish 3rd division amateur club, *Långholmen*, who had players from twenty-one different nations. Only after appeal did SFA grant the club a dispensation from the home-grown players rule on the grounds that it was an "immigrant club" in which most players had moved to Sweden for other reasons than sport. Such dispensation is however only awarded on a case-by-case basis, requires going through lengthy proceedings and are only awarded for one year at a time.[31] The Swedish rapporteur remarks that although sporting organizations have argued that the "Home-Grown Players rule" is consistent with EU law as it affects all players regardless of nationality[32], it should be noted that the CJEU has not yet examined the compatibility of the rules with EU law. While it is true that the rule is not directly discriminatory on the basis of nationality, it limits movement generally by making it less attractive and in other ways harder for a player to move to another club than that where he or she played while a youth. A player must either stay with his or her original club or be much better than the home-grown players in another club. Also, clubs may be reluctant to trade tradable home-grown players to the detriment of players who for one reason or another want to change clubs. In this manner, the home-grown players rule deters from movement or, in the alternative, may induce persons who choose to move from one Member State to another to give up sports.

The compensation system used in football appears less proportional compared to the compensation system implemented by the Swedish Ice hockey Federation. The system used in football appears less proportional when compared to the compensation system implemented by SIHA which is preferable from the perspective of Union law as it achieves the same thing but with little impairment of free movement. Each year, every professional Swedish ice hockey club pays a certain amount of money to a fund. When a young player for the first time signs with a professional club, a predetermined amount of money is paid to and divided between the clubs responsible for training the player.[33] This system allows the player to transfer between clubs without the club having the ability or an interest in hindering the transfer. No compensation is paid from the fund when a player takes up employment with a club in another Member State or when a player from another Member State takes up employment with a foreign club. However, in such situations the receiving club is still not required to reimburse training cost and thus no obstacle to free movement exists Each year, every professional Swedish ice hockey club pays a certain amount of money to a fund. When a young player for the first time

30 Svenska fotbollsförbundet, Representationsbestämmelser (2010), 19 § (hemmafostrade spelare).
31 The Local, "Långholmen wins opt-out on 'Swedish player' rule" (2010-03-25).
32 Cf. UEFA, "Investing in Local Training of Players – Key Message", available at http://www.uefa.com/MultimediaFiles/Download/uefa/UEFAMedia/273604_DOWNLOAD.pdf (2010-08-16).
33 SIHA, Utbildningsersättningssystem för säsongen 2009-2010.

signs with a professional club, a predetermined amount of money is paid to and divided between the clubs responsible for training the player.[34] This system allows the player to transfer between clubs without the club having the ability or an interest in hindering the transfer. No compensation is paid from the fund when a player takes up employment with a club in another Member State or when a player from another Member State takes up employment with a foreign club. However, in such situations the receiving club is still not required to reimburse training cost and thus no obstacle to free movement exists. This system is preferable from the perspective of Union law as it achieves the same goal but with little obstacles to the free movement of young workers.

In the *UK* the football rules (in accordance with FIFA regulations) provide that 'training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during *or at the end of the player's contract*'. Whilst this system places potential restrictions on a young player's free movement, the provisions can be justified with reference to the need to encourage investment into youth development. The Rugby League in the UK uses a home grown players system similar to the football system.

34 SIHA, Utbildningsersättningssystem för säsongen 2009-2010.

Other Obstacles

All Member States have rules regulating the access of young workers to their labour market which are geared to protect young workers. The criterion used is age rather than nationality or residence; therefore they apply to all young workers not just nationals or residents of the respective Member States. Special rules regulate, amongst others, working hours, rest time, holidays, working conditions, health and safety, parental consent and medical check ups to ascertain that the young worker in question is physically capable of performing the intended tasks. Special rules also ensure that young workers who are still in education can combine their education with their employment. The *Bulgarian, Cypriot, Czech, Danish, German, Greek, Luxembourg, Maltese, Italian* and *Slovakian* rapporteurs have stated explicitly that the applicable law in their Member States is not residence based and/or does not act as an obstacle for young workers from other EU Member States to take up employment in their Member State. The *Luxembourg* rapporteur does, however, point out that language requirements (Luxembourgish, French and German) might be required to fulfil a position.

The *German* rapporteur states that very little information is available on specific legislative and promotional measures that improve the situation of young workers. The latter are primarily a matter of private relations and programmes initiated by firms like Siemens and Volkswagen and apply to young workers in general. To determine whether these programmes operate as obstacles to a young worker's free movement rights requires a complicated factual analysis. Due to a lack of data on young EU-workers employed in *Hungary*, the Hungarian rapporteur emphasises that it is hard to identify whether young workers from other Member States are experiencing obstacles when exercising their right to free movement under EU law. She points out that there is a risk of irregular employment as non-nationals more often than not, do not have a taxation and social insurance registration number. The *Romanian* rapporteur has made a similar remark, pointing out that the limited number of EEA workers and the insignificant number of EEA-workers who qualify as 'young workers' do not allow to identify cases in which protective rules amount to an obstacle for a young worker exercising free movement rights.

The *German* rapporteur comments that the principle of territoriality is limited by virtue of a decision of the Constitutional Court (Federal Constitutional Court, *Neue Juristische Wochenschrift* 1998, p. 2963) that establishes that the principle of territoriality is, in principle, in line with German Constitutional law when it is used as a precondition for access to unemployment benefits. Unemployment benefits correspond to contributions paid previously into the scheme by the beneficiary. Workers who take up domicile abroad are not automatically excluded from unemployment benefits; they must, however, register as seeking employment.

In the *Belgian, Finnish, Irish, Lithuanian, Dutch, Slovenian* and *Swedish* reports (potential) obstacles for young workers are reported.

The *Belgian* report lists six measures which might operate as an obstacle for young EU workers seeking access to the Belgium labour market, either because they are conditional to being fully supported by the Belgium social security system to be eligible for financial assistance (*ACTIVA* and *WIN-WIN*), explicitly exclude EU citizens (*ACTIVA START*) or they include a residence condition (*APE*: *Assistance to the Promotion of Employment of Workers under 25*). Two further programmes are mentioned; *APE: Assistance to the Promotion of Employment for Local Authorities* (eligible for those unemployed) and the Low-*skilled young workers measure*. The latter does not elaborate on the position of EU citizens in general or EU young workers in particular.

Financial and other (e.g. workshops, salary support and labour market training) measures stimulating access to the labour market of young persons are in place in *Finland*. These measures are open to all young workers, irrespective of their nationality, but often require residence in Finland. Registration as a job-seeker is possible for young EU workers who are then eligible for most of the employment services, including salary support, subject to the condition that they are available for the Finnish labour market. The requirement on availability for the Finnish labour market is laid down *inter alia* in Section 8 of Chapter 1 of the Act on Public Employment Services (1295/2002) as a precondition for the application of this Act, as well as in Section 3 of Chapter 2 of the Act on Unemployment Security (1290/2002).[35] The requirement on availability for the Finnish labour market may constitute a hurdle for the access to support services, for instance in case of a family member of an EU worker who works in Finland but lives with her family in another member state. The practices of different regional employment offices regarding how the criteria on availability for the Finnish labour market are applied seems to vary to some degree. It, however, seems that in some cases only those who actually reside in Finland and whose permanent address is there are regarded to meet this condition, although this is not formally required by the legislation. No judicial decisions on this issue were, though, found. Employment services and benefits can also be subject to the condition that the person concerned is enrolled in the Finnish social security system, which requires registration as a permanent resident of Finland, as an EU worker or a family member of an EU citizen resident in Finland.

The *Irish* rapporteur has identified seven measures designed to assist young workers in entering the workforce, which are subdivided under the headings 'financial measures stimulating access to the labour market', 'apprenticeships and training courses' and 'third-level education'. Two of these measures might operate as an obstacle for young workers from other Member States; the *Labour Market Activation Fund* (established as part of the 2010 Budget and managed by the Department of Education and Skills) and *Grants for higher level education*. The former provides training and education

[35] Pursuant to Section 3 of Chapter 2 of the Act on Unemployment Security as a person not available for labour market is meant inter alia a person who is not available for labour market because of a trip abroad, military service, or other comparable ground. Apparently certain labour offices regard residence in another country than Finland as an 'other comparable ground'.

to the unemployed and, though it does not include a residence or nationality condition, requires (according to Ireland's National Learners Database website (www.qualifax.ie)) that the applicant must be in receipt of unemployment payment (i.e. a *Jobseeker's Allowance* or *Jobseeker's Benefit*) for at least three consecutive months before joining the programme. Though a *Jobseeker's Allowance* is not conditional on being an Irish national, it does require habitual residence in that Member State. Eligibility for a *Jobseeker's Benefit* depends on having made sufficient PRSI contributions, which includes social insurance paid in another Member State, but the applicant must have at least one reckonable contribution in Ireland. Students applying for a grant for higher education (*Higher Education Grants Scheme, Vocational Education Committees' Scholarship Scheme, Third Level Maintenance Grants Scheme for Trainees* and *Maintenance Grants Scheme for Students Attending Post-Leaving Certificate Courses*) will have to satisfy a residence condition that effectively requires proof of ordinary residence in Ireland for at least three of the preceding five years. The residence condition applies to all applications for 2010/2011 and anticipates an amendment to the 2008 *Student Support Bill*. It is not yet clear whether these measures are, in practice, impacting upon the free movement of workers.

In *Lithuania* young workers are experiencing difficulties accessing that Member State's labour market as for most positions they are required to have mastered the local language. Further, young workers are experiencing reluctance on behalf of potential employers to recognise their education and work experience acquired elsewhere. A further obstacle identified concerns the obligation to obtain a registration certificate where residence exceeds 90 days, as this certificate is only issued to those in employment and employment is subject to the possession of a registration certificate. A further practical problem in obtaining a registration certificate is that this requires notification of a place of residence (paragraph 18.7.8 of the Order of the Minister of Interior No. 1V-290 on Issuance of Certificate confirming the right of EU national to reside in Lithuania of 25 July 2008, states that place of residence or stay should be indicated in the application form). As accommodation is often rented from landlords who, for taxation or other reasons, are unwilling to provide the necessary documentation and allow to reveal this place of residence.

In Lithuania there are general obstacles for job seekers irrespective of their age. Job seeking is not mentioned among the grounds for legal stay in Lithuania for EU nationals. The application form for issuance of certificate confirming residence requires ticking on one of the boxes providing for a legal ground (employment, sufficient resources, studies, family member status).[36] From the list of documents required to be presented to confirm the legal ground of employment, it is clear that job seeking is not covered by this ground. It can only fall within legal grounds of residence if the person has good financial status (sufficient resources to maintain himself and his family, if any). Otherwise job seeking would not be considered a sufficient ground of stay in Lithuania following the expiry of 3 months period wherein formalities are not required. This may

[36] Paragraph 18.10.11 of the Order of the Minister of Interior No. 1V-290 on Issuance of Certificate confirming the right of EU national to reside in Lithuania of 25 July 2008.

have a direct impact on EU nationals who are job seekers in Lithuania as they would be prevented from obtaining residence permission for the purpose of seeking employment.

Finally, the 2008 *Government Programme concerning promotion of youth entrepreneurship* does not provide equal opportunities in obtaining financial support for young (aged 18-40) farmers from other EU Member States as they are not able to acquire agricultural land in Lithuania until May 2011 (unless they have had permanent residence in Lithuania during the past three years and during that period were engaged in an agricultural activity, or are a legal person or organisation with established representation in Lithuania) and are thus not eligible for support under the *Programme for Rural Development* that provides support for new buildings, reconstruction of old buildings, acquisition of land for agricultural purposes, the purchase of agricultural equipment and the erection and reconstruction of roads and water pipelines. Though it is possible to rent a plot of agricultural land this does not make one eligible for the aforementioned support. However, this obstacle is related to a Constitutional requirement prohibiting foreigners to acquire land in Lithuania.

The *Dutch Wet investeren in jongeren* (Wij) that aims at increasing labour market participation and improving the operation of the labour market in order to decrease the number of applicants for social benefits, applies to Dutch young workers aged 16-27, resident in the Netherlands and foreigners legally resident in the Netherlands alike. Though young EU workers are eligible for support if they are resident in the Netherlands, the residence condition, it is felt, might operate as an obstacle for young workers from other Member States.

Currently the special scheme that was established in 1978 in *Slovenia* under the *Employment and Unemployment Insurance Act,* establishing special agencies founded by student associations and universities that mediate between students and employers for the purpose of temporary or occasional work and allows students and secondary school pupils to become acquainted with working life, acquire work experience, establish contacts with potential future employers and earn some money, is only open to students registered at Slovenian universities. No provision is made for EU students. Plans to reform the system were initiated in 2004-2005, but to date the proposal for the *Mini Job Act* that should eventually replace the current system for paid employment of a temporary, casual or short duration by university students, secondary school pupils and retired, unemployed or non-active person has not been passed in parliament. This proposal explicitly includes students from non-Slovenian universities performing study obligations in Slovenia as beneficiaries (Article 5). The adoption of the proposal for a *Mini Job Act* should put an end to the current situation that operates as an obstacle to free movement by young workers.

Though the *Swedish* government has been careful to include young EU workers in its schemes to facilitate access to the labour market – e.g. lower taxes – there is a problem regarding a number of measures that require registration as a job-seeker in Sweden. The measures that thus operate as an obstacle to free movement rights are the

Jobbgaranti (assistance in finding employment where a young worker under 25 has been actively searching work during a period exceeding three months), *Nystartjobb* (tax relief for employers employing somebody who has been looking for work for a longer period) and *Arbetsmarknadsutbildning* (education for unemployed to enhance their chances of obtaining a position on the labour market).[37] Though there are no restrictions on the right to register as a job-seeker, it does require a commitment to move to Sweden for a longer period of time. Under such measures, foreign young workers who are not registered as active job-seekers are placed at a comparative disadvantage. Thus, while these measures intend to make it easier for young people who are in Sweden to find jobs, they make it more difficult for young job-seekers from other Member States to find jobs in Sweden.

Conclusions

Young workers encounter particular problems when seeking to exercise their free movement rights because of their age. While all Member States have legislation regulating entry into the labour market of young workers (and that legislation is by no means consistent across the Member States), it is generally accepted that such legislation is important to protect young workers and ensure that the scholarity of young people is not disrupted by too early entry into the labour market. However, there appear to be a some other obstacles which are not so clearly justified on the basis of the well being of the young worker which are present in some Member States. These obstacles fall into three main categories: the most important is that of obstacles related to residential requirements for the purpose of participating in programmes to assist labour market entry. This category includes not only the requirements of specific programmes but also access to social benefits tied to labour market access. The second category is around the privileging of labour market access through intermediaries between student associations and employers where EU nationals are unlikely to have access. The third category relates to language requirements.

The difficult economic situation in a number of Member States, has had a disproportionate impact on young workers. In some Member States unemployment among young workers has risen to levels which are politically sensitive. Accordingly, a number of existing programmes to assist young workers into the labour market and new initiatives to ease labour market access for first time entrants have been extended or developed. As the preceding review of the Member States indicates, this is particularly true in *Belgium*, *Finland*, *Ireland* and *Sweden*. The difficulty which some of the programmes pose for EU free movement of workers rules is that they are almost always linked to a residence requirement. By definition residence requirements are suspect as a potential obstacle to free movement, as the case law of the CJEU clearly shows.

Young workers are particularly vulnerable to residential requirements as an obstacle to free movement because if they move for the purpose of seeking work as they may be starting their working lives and thus have no previous residence in the host Member

[37] 3 § 2 st förordning (2007:813) om jobbgaranti för ungdomar, 3 § förordning (2006:1481) om stöd för nystartjobb och 8 § förordning (2000:634) om arbetsmarknadspolitiska program.

State. They are further hampered by the fact that they may have no history of work in their home Member State and thus no social security contributions which could act as a passport into the Regulation 883/2004 coordination system.

The objective of Member States' policies to assist young workers into employment is laudable. The question is to what extent the conditions for access to assistance in particular in the form of residential requirements and equivalents are compatible with young workers' right of free movement. As there are quite a number of different programmes even within one Member State (eg 6 in *Belgium* alone), let alone the 27, and the conditions for admission vary, it is difficult to generalize on the question of compatibility. The intersection between access to job creation programmes and social security is evident in many cases. Access to the programmes may be predicated on the young worker having been registered as unemployed within the state for a period of time after finishing studies (eg *Sweden*). Where the period is extended beyond the residence period permitted in Article 6 Directive 2004/38, the young worker may have difficulty establishing his or her continuing right of residence under Regulation 1612/68 as a work seeker let alone complying with the national rules on accessing unemployment benefits for an extended period of time so as to access employment stimulation programmes.

In some Member States access to non-state intermediaries between groups of young workers and employers may be an issue. *Slovenia* is an example of this where employment stimulation programmes are channeled through non-state agencies which work directly with students' associations. The difficulty for EU national young workers who are not also nationals of the host state is that they are not covered by the arrangements.

Language requirements may also be an obstacle for young workers. *Lithuania* is an example where the wide spread use of language requirements can have a disproportionate impact on EU nationals and in particular young workers who may not have had the opportunity to take Lithuanian as a second language in their home state. Access to language training programmes may have a particular importance for this group of workers.

Should the economic downturn experienced in some Member States become more generalized and extended in time across the EU, more attention may need to be paid to the issue of employment stimulation programmes at the national level and their impact on free movement of workers in general. The risk that non national workers and work seekers may be excluded by the criteria for such schemes (usually on the basis of either non-discriminatory obstacles or indirect discrimination) is substantial and a certain vigilance on the part of the Commission is called for.