

# From *Bosman* to Brexit: What next for EPPP and compensation in football?

In November, BBC Radio 5 aired an investigation into ‘the child footballers trapped by eye watering transfer deadlocks and whose careers are held to ransom by some of the game’s biggest clubs.’ In this article, Dan Chapman, Partner and Head of Sport at Leathes Prior, who contributed to the BBC Radio 5 investigation, sets out the concerns relating to claims that youth football players are being barred from joining a new club due to the ‘compensation payments’ demanded by their old club under the Elite Player Performance Plan (known as the EPPP), considers the merits to a potential legal challenge to the EPPP system, and sets out possible alternatives to finding a fair balance between the interests of the club and the player.

For most young footballers, being approached to join a Premier League (or Football League) academy seems like a dream come true. However, a vast majority of young people who are inducted into these academies will not become professional footballers, with far fewer achieving at the top level. Michael Calvin’s critique of Academy football, *No Hunger in Paradise*, concluded that: “The survivors of the system are statistical anomalies. Only 180 of the 1.5 million boys playing organised youth football in England at any given time will become a Premier League pro. That’s a success rate of 0.012 per cent. Less than one per cent of the boys who enter academies at the age of nine will make it!” What becomes of the others? The unfortunate reality for many such players is that they will never play at the top level for reasons of merit, but what of those that claim they are barred from joining a new club by ‘compensation payments’ demanded by their old clubs under the EPPP?

A November 2017 BBC Radio 5 investigation led by Adrian Goldberg concluded that there are significant problems in the system that are leaving some young players - even when on the face of it they are ‘out of contract’ - restrained from joining a new club<sup>2</sup>. In 2016, the *Daily Telegraph* concluded similarly; “children as young as 10 are being frozen out of the football academy system because of exorbitant compensation fees placed over their heads by controversial youth development rules<sup>3</sup>.” The situation seems even more bizarre when contrasted to the position of professional footballers. Alexis Sanchez, whose Arsenal contract expires at the end of the 2017/18 season so that he is free as of 1 July 2018 to join any other club in the world without Arsenal having any entitlement to recompense

- be it Forest Green Rovers or Real Madrid - has the freedom of movement and contract bestowed upon him by the so-called ‘*Bosman*’ transfer<sup>4</sup>. However, with Brexit on the horizon, could *Bosman* also be destined for the scrapheap?

## What, and who, was *Bosman*?

To properly consider this issue we must first remind ourselves of the detail of the *Bosman* case, which has so often been misreported. Around 1990, Jean-Marc Bosman, a midfielder, was plying his trade with Belgian side RC Liège. When he refused to sign a new contract (at a significantly reduced wage) he was placed on the transfer list with a compensation fee for his training set at a level of 11,743,000 Belgian Francs (£196,623.42). Bosman was unable to secure a transfer, and RC Liège suspended him. Bosman commenced court action, obtained an interim order and the matter was appealed to the ECJ, where Bosman argued that his ability to settle and work in another Member State had been unlawfully obstructed by the price placed on his head by the compensation scheme. The ECJ agreed, and concluded that Bosman should have been able to move between clubs without compensation.

In 2010 the ECJ had a second look at the matter when French defender Olivier Bernard sought to move from Olympique Lyonnais to Newcastle United, instead of signing his first professional contract with the French club<sup>5</sup>. Under the Charter of the French Football Association for the 1997/1998 season, a ‘*joueur espoir*’ should sign his first professional contract with the club that trained him and that, if he did not do so, substantial damages were due. The ECJ found that the Charter was an obstacle to free movement of workers,

however it found that a right of first refusal for a club could be acceptable in so far as it encourages clubs to provide training for young players. The Court stated that: “It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally<sup>7</sup>.” In this case, the ECJ held that a right to compensation must be calculated on the basis of the costs actually borne by the training club. Under the French Charter the payments due for Bernard were “not of compensation for training, but of damages<sup>8</sup>” and as such it failed on proportionality. At that time, in the UK, there was a tribunal system that determined levels of compensation that were due (on a discretionary basis by reference to the player’s talent and potential) if a youth player moved clubs (absent an agreement between the two clubs).

One year after the *Bernard* decision, EPPP was born. It is probably worth noting that both *Bosman* and *Bernard* were fought on the basis that the compensation schemes in force were obstacles to free movement under EU rules, as both involved a player moving between Member States. They did not strictly affect a player’s move within the UK, but the reality soon became that the domestic rules had to reflect *Bosman*. It may be that EPPP could be subject to a similar challenge for

## COMPENSATION

a cross-border move, however given the looming spectre of Brexit and the speed at which cases progress it is likely that such a challenge would be of limited value. But can we extrapolate principles from these cases, or at least understand why it is that a youth player can face financial restraints even if his period of registration (or contract) has expired? This article will now consider whether the EPPP compensation scheme accords with the principles of contract and employment law and consider the merits of a potential legal challenge; could it, too, succumb to a *Bosman*?

### What is EPPP?

EPPP is a part of the FA's Youth Development Rules, which in turn is incorporated into the rules of the Premier League and the Football League. Under the Rules, when a young player leaves an academy (unless the club release the player in certain circumstances), a compensation payment will be payable by any other club before they can sign the player. The amount due will depend on the category of the training club's academy (ranked from one to four, with one being the highest), the age of the child and the amount of time they spent at the club. Each season at a Category One academy between under-12 and under-16 level will generate a compensation fee of £40,000 to be met by a future club. If, for example, a player who has been at a Category One academy from the season in which they turn 12 wants to leave aged 15, a new club wishing to sign him will have a compensation bill of £160,000.

This may not seem like a lot in a world where Neymar can command a £198 million transfer fee, but our notional 15 year old is not Neymar, and it is extremely unlikely that he will ever reach that level. Instead, he may want to sign for a club in the third tier of English football - League One. The average entire transfer spend per club in League One in the 2017/2018 season was £135,300<sup>9</sup>. A club in League One is very unlikely to be able or willing to over double its season's transfer outlay on an untested 15 year old, with no experience beyond under-16 level, and make our 15 year old the sixth most expensive signing in League One this season<sup>10</sup>. Unless he finds a club who are willing and able to pay £160,000 to his former club, this player (who has never been paid for playing football) and all of his potential are lost to the game. This is the reality for many young people. Is this legal? For our hypothetical player, this is the £160,000 question.

The usual laws of the land (whether or not that incorporates EU law) apply in football as in every other walk of life, just as *Bosman* was able to demonstrate. On what basis, then, could the EPPP compensation scheme be challenged?

### Incorporating terms into a contract

At its most basic level, a contract requires 'a meeting of the minds' between the two parties; each party must know the terms of the agreement (or at least have the terms of the agreement available to them). Where one party later seeks to rely on terms which the other party hasn't seen and had no way of reviewing before the contract is formed, those terms cannot be included in the contract<sup>11</sup>. However, the Premier League has said, in a statement, that it sends its Charter out to parents only after their child has signed a contract with a Premier League club<sup>12</sup>. As in *Thornton*, (where onerous terms and conditions were only visible to customers when they had bought their ticket to enter a car park) it could be argued these terms are not included in the young player's contract, and therefore are not binding.

The Premier League may of course say that parents have accepted these terms by conduct, and that even if the term wasn't originally in the contract, it was verified by the parents' lack of opposition over the intervening period. It is perhaps surprising that the Premier League did not say that at the point the child signs with his first club, the registration forms amount to a contract which clearly incorporate and adopt the Youth Development Rules in their entirety (explained in more detail in the Charter). However, whether they were to contend this or rely on a conduct argument, onerous terms may still not be incorporated into the contract if insufficient attention was drawn to those terms. In *Thornton*, Lord Denning held: "I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient<sup>13</sup>."

The scheme is onerous in that it has the potential to prevent a young person playing football at a professional level and/or at another academy in the meantime. Far from being printed in red ink on every contract, the Premier League's stance would appear to be that they only provide full details of the compensation scheme after the contract is signed. Given that this contract also

involves a minor and a restraint of trade, it seems likely that the Court would take a strict view of these provisions.

### Restraint of trade

It is not uncommon for employment contracts to contain clauses which prevent employees from joining a particular competitor or competitors within a certain period of leaving their employment. In order to strike a balance between the interests of individuals and businesses, the law provides that restrictions in employment contracts must go no further than is reasonably necessary to protect the legitimate proprietary interests of the old employer<sup>14</sup>. However, young players at academy level are not employees. They are not paid to play football, and they are no more employees of their club than they are of their school.

How does this position of a school differ to that of an academy? Premier League clubs could say that a young person in their academy has the potential to be a top player and that their training contributed to the player's value, and therefore they deserve to recover at least an element of this value. The statistics paint a very different picture. In reality it is suggested that only 1% of academy players will play football at a professional level<sup>15</sup>. On the basis that a huge majority of academy players will never play professional football, it is difficult to identify the 'legitimate proprietary interest' which the EPPP compensation scheme seeks to protect. If there were a legitimate proprietary interest to protect in the registration of players who will most likely never play professional football or attract any transfer fee, clubs would then have to show that the level of compensation goes no further than is necessary to protect that legitimate interest. It could be said that the pre-EPPP system did this, since compensation was assessed on a case by case basis by a tribunal taking into account the specifics of that player and his real value.

Under the current system, it is not open to players to negotiate their own level of compensation. Whilst two clubs can agree a lower compensation figure for a young person (or agree to waive the fee altogether), the EPPP scheme gives a contractual right to demand up to the full amount. In the example of our notional 15 year old, his training club can prevent him from going to any other club which is not willing to pay £160,000. Further, whether our notional 15 year old is the

best 15 year old in the country or the worst; his compensation fee remains the same (unlike the former system, which would have placed wildly different valuations in these circumstances). Where the compensation fee is not linked at all to the merit of the player, can that really go no further than is necessary to protect the club's legitimate interest?

One might argue that employers can recoup training costs that they spend on an employee following the employee's departure, and so is not the EPPP system akin to that? The Court of Appeal has found that repayment of training costs provisions are arguably a restraint of trade, in that they provide a disincentive to leave the employer<sup>16</sup>. This Court also found it arguable that the repayment clause was not intended to secure repayment of training costs, but instead to prevent the employee from joining a competitor. It was a similar argument to that that proved fatal to Olympique Lyonnais' case in *Bernard*; the Charter provided for damages which acted as a disincentive for young players to leave, rather than compensation for training. So, even if the EPPP compensation scheme is not unenforceable *per se* as not protecting a legitimate proprietary interest, does it represent reasonable compensation for the training costs incurred in training the young player, or is it just a disincentive for players to move elsewhere?

Football clubs at the highest level place significant investment into youth development and understandably take the view that another club should not benefit from the fruits of their rivals' labour. In 2012, a study by the European Club Association reported that Premier League big hitters Arsenal spent €3 million (c. £2,375,700 at the time<sup>17</sup>) per year on their academy of circa 180 players (c. £13,198.33 per player<sup>18</sup>). Even on this analysis, it is easy to see how the EPPP scheme could lead to a club making a profit from their academy far in excess of the amount spent training a young player. Given that 99% of academy players will not end up playing professional football, it may be more enforceable to only apply compensation rules when a player signs their first professional contract, or has played a certain number of professional games, only. In any event, applying a blanket compensation fee to all young players simply because they have been at an academy seems to fall foul of the very limited circumstances in which restraints upon trade are acceptable. This would not be the case, perhaps, for the pre-EPPP system whereby compensation

was assessed by a tribunal taking into account all of the factors that go into arriving at the fair value of that player or the methodology used by the Professional Football Compensation Committee, for professional players outside of the EPPP system but aged under 24<sup>19</sup>.

### Ending the contract

Whilst the Premier League claim that last season compensation was waived in 87% of cases, and the Football League have reported that compensation was waived in 90% of cases in the last 12 months, this will be of little comfort to those who are forced out of the sport by EPPP compensation. Those statistics also miss the point somewhat; it is those youngsters that are unable to leave because of the system that are the primary issue. If, for whatever reason, a young person is unhappy at a club and wishes to leave, his parents will usually be presented with a Form YD10.

There are a number of ways in which a contract can be terminated. In order to terminate the contract for training, the YD10 must be a valid contract too, having all of the necessary elements of a contract. Moreover, as the academy player will be a minor, the law also places extra constraints on the types of contracts which may be valid and enforceable. For a contract to be formed, there must be some benefit (or consideration) conferred on either party. If one party enters into a contract whereby they promise to do something without getting anything in return, this contract will be unenforceable (unless entered into as a deed). So is the YD10 a binding contract terminating the earlier agreement, or just a bare promise?

From the club's point of view, there is a clear benefit emanating from the YD10; they are released from their obligations to provide training to the young player. From the point of view of the young person, the benefit is less easy to identify. A club may say a young person benefits from no longer being obliged to attend training. However, this is not a true benefit as a young person could decide, without having signed the YD10, not to attend training. A club may also suggest that the young player has benefitted in that he can sign for another club. Once again, this is not a benefit for the young person, as he could walk out of the club without signing a YD10 and the club would in all likelihood release him. He could sign for a new club and would be subject to the same compensation rules as if he had signed the YD10. A savvy player could also argue

that, due to the onerous compensation provisions, he couldn't sign for a new club at all. Signing the YD10 therefore doesn't provide any change to the young player's position. On the face of it, the YD10 is unenforceable for lack of consideration.

Another problem for clubs arises as a result of the young person's age. As a general rule, any contract entered into by a minor<sup>20</sup> is voidable at his option<sup>21</sup>. This is subject to certain exceptions: contracts for necessities, contracts of training, employment or apprenticeship and contracts which are beneficial to the minor. Does this mean that the whole training arrangement is potentially voidable? Some young sportspeople and performers have brought cases that seek to rescind contracts made during their minority in relation to their craft. In *Doyle v. White City Stadium Ltd*<sup>22</sup>, a professional boxer sought to rescind a contract he had made with the British Boxing Board of Control in which he agreed to forfeit any prize or appearance money if he was disqualified. The Court held that the contract had benefitted the minor and therefore he should not be allowed to rescind it.

In *De Francesco v. Barnum*<sup>23</sup> the Court considered a contract between a dance instructor and a student. The contract gave the teacher wide ranging discretion as to how he taught his students and when and where they performed. There was no indication that the teacher had misused his contractual discretion (and in fact the Court found quite the opposite) but that the contract "place[d] in his hands an inordinate power" and therefore the contract could not be upheld as being for the benefit of the minor<sup>24</sup>. May a court also find that the EPPP compensation scheme places in the hands of the clubs an 'inordinate power,' notwithstanding the claims by the Premier League and the Football league that this discretion was not misused? If that were the case it would have a huge impact on the academy system as a whole. However, it is more likely that a court would fall somewhere in the middle. In *Roberts v. Gray*<sup>25</sup> a young billiards player agreed to a world tour with John Roberts. The Court found that the young player was bound to benefit from playing with a player of Roberts' quality, and that the contract was therefore one for his benefit.

The YD10 on the other hand is not a contract for training, nor is it for the minor's benefit. Even if the YD10 is not void for lack of consideration, it is arguably voidable

at the option of the minor. If the YD10 falls away and this is reflected in the player registration system administered by the governing bodies, this would certainly strengthen the position of a young player seeking to move to a new club. The issues with the YD10 do not end there, as the writer is well aware from disputes he has seen that parents and young players are often provided with this document and encouraged to sign it without taking proper advice and/or are misled about the club's intentions with regard to compensation. In some more extreme cases, this may allow a player (or his parents) to rescind a contract for duress (where the pressure applied by one party had effectively deprived the other of practical choice) or as an unconscionable bargain (where one party takes illegitimate advantage of the other's lack of independent advice or inexperience). This will depend on the circumstances of each case, and it is not suggested that every club acts illegitimately when providing the YD10.

**What next?**

The *Bosman* and *Bernard* decisions were made on the EU principle of free movement of workers. These decisions were momentous for players, but resulted in clubs losing out financially. Whilst this article ponders the legitimacy of any form of compensation system for out of contract players, are the Premier League in turn eyeing a return of pre-*Bosman* style compensation arrangements once Britain withdraws from the EU? Officials at Premier League clubs are reportedly uneasy about the amount of money leaking out of the game to agents and players as a result of *Bosman* transfers<sup>26</sup>.

With free movement of workers between Britain and the EU looking likely to come to an end, the *Bosman* and *Bernard* decisions will no longer be binding on UK

courts; this would leave the FA free (from an EU perspective at least) to reintroduce compensation for senior players and/or strengthen the EPPP compensation rules.

Perhaps now is the time for a challenge to the EPPP system. It is more important than ever that the footballing authorities are reminded that their obligations under English law do not end in March 2019 and that they ought to have real concerns already about the compensation system (at least for youth players) before they even consider strengthening their position post-Brexit. However, until the next *Bosman* steps forward to take on the legal challenge, it is likely that football's institutions will continue to fail the young people who are barred from playing professional football by a compensation system that is as flawed as it is potentially unlawful.

**What would the alternatives be?**

One approach could be to allow a young player to move freely at the end of his period of registration with a club, but that the former club retain compensation rights that would become effective when that player signs his first professional contract or makes his professional debut. That approach would not be perfect and could still amount to a restraint of trade (one can imagine a scenario where a player is denied his first professional contract or debut as his then employer cannot afford it), but it is less restrictive than the current system. A second approach could be to introduce a tribunal system to determine a fair value where two clubs cannot agree terms.

Alternatively, if the EPPP must remain in its current form, then steps could and perhaps must be taken to ensure that parents and young players are given proper advice in advance of signing for

a club and again at the point of being presented with a Form YD10. Parents/players could then be made aware of their options and given the ability to negotiate or at least consider different arrangements, either on entry to the club or at the exit stage. Why is it that an adult employee cannot exit his or her employment on agreed terms unless he or she receives independent legal advice and signs a Settlement Agreement<sup>27</sup>, yet there is no such requirement to obtain independent legal advice when exiting a football club and signing a YD10? Why is the law less paternalistic towards the young footballer than it is the adult employee? The reality may be that the law has not been asked the question.

One final point which the footballing authorities may struggle to explain; when a professional footballer signs an employment contract with a club, represented by a FA Intermediary he nonetheless is advised to take independent legal advice as part of that transaction and must expressly declare whether he has chosen to do so<sup>28</sup>. However, no intermediary may approach a young player before 1 January in the year they turn 16<sup>29</sup>. This means that young players will usually not have the benefit of an intermediary until they have been at an academy for a number of years. That the governing bodies of football consider that a declaration of independent legal advice to be a vital requirement of the fair and binding transaction for the adult footballer who has the benefit of being represented by an FA Intermediary, but do not consider it a necessary requirement for a minor when he signs his contract with a club (or signs a Form YD10) is striking. One can also only speculate. Surely, though, the time for speculation will soon be at an end as somebody, using football parlance, will 'do a *Bosman*.'

1. No Hunger in Paradise; Michael Calvin. ISBN: 9781780896304.  
 2. <http://www.bbc.co.uk/sport/football/41839083>  
 3. <http://www.telegraph.co.uk/football/2016/12/21/youth-players-left-scrapheap-thanks-exorbitant-compensation/>  
 4. Named after the case of Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman C-415/93, in which the European Court of Justice ruled that an out of contract footballer could move to another club with no compensation fee.  
 5. Olympique Lyonnais v. Olivier Bernard and Newcastle United FC C-325/08.  
 6. Roughly 'Hopeful Player,' referring to players between the ages of 16 and 22 employed as trainees by a professional club, which Bernard was.  
 7. Olympique Lyonnais v. Olivier Bernard and Newcastle United FC C-325/08, para 45.  
 8. Ibid, para 46.  
 9. [https://www.transfermarkt.co.uk/league-one/transfers/wettbewerb/GB3/saison\\_id/2017](https://www.transfermarkt.co.uk/league-one/transfers/wettbewerb/GB3/saison_id/2017)  
 10. [https://www.transfermarkt.co.uk/league-one/toptransfers/wettbewerb/GB3/plus/?saison\\_id=2017&land\\_id=alle&ausrichtung=&spielerposition\\_id=alle&altersklasse=alle&w\\_s=&zuab=zu](https://www.transfermarkt.co.uk/league-one/toptransfers/wettbewerb/GB3/plus/?saison_id=2017&land_id=alle&ausrichtung=&spielerposition_id=alle&altersklasse=alle&w_s=&zuab=zu)  
 11. Thornton v. Shoe Lane Parking [1971] 2 Q.B. 163.  
 12. <http://www.bbc.co.uk/sport/football/41839083>  
 13. Thornton v. Shoe Lane Parking, per Lord Denning M.R.  
 14. Office Angels v. Rainer-Thomas and O'Connor [1991] IRLR 214.  
 15. <http://www.independent.co.uk/sport/football/premier-league/does-the-lack-of-academy-graduates-in-the-premier-league-simply-reflect-its-growing-quality-a6730551.html>  
 16. An unreported interlocutory hearing in Electronic Data Systems Ltd v. Hubble [1987] IDS Brief 363.  
 17. Based on an exchange rate of 1 EUR: 0.7919 GBP.  
 18. ECA Report on Youth Academies in Europe (August 2012).  
 19. i.e. the PFCC matter of Danny Ings: <http://www.liverpoolfc.com/news/first-team/218864-liverpool-fc-statement-on-danny-ings-fee-decision>  
 20. i.e. a person under 18 years of age, as per the Family Law Reform Act 1969.  
 21. i.e. he may elect to rescind the contract during his minority or within a reasonable time of reaching majority.  
 22. [1935] 1 K.B. 110.  
 23. (1890) 45 Ch. D. 430.  
 24. Ibid 443.  
 25. [1913] 1 K.B. 520.  
 26. <http://www.skysports.com/football/news/11095/11127389/premier-league-club-officials-growing-concerned-at-free-transfers-and-money-leaving-football>  
 27. Employment Rights Act 1996, Section 203.  
 28. <http://www.thefa.com/football-rules-governance/policies/intermediaries/standard-forms>  
 29. FA Regulations on Working with Intermediaries 2017-2018, Regulation B8.