

FIFPro's challenge to FIFA's football transfer system

The International Federation of Football Players ('FIFPro') recently lodged a competition law complaint with the European Commission challenging the current international player transfer system. FIFPro claims that the transfer market harms its members' rights to move between clubs alleging that it sets forth an unjust system that helps the bigger clubs stockpile players. FIFPro suggests abolishing transfer fees and replacing them with a collective bargaining system. The players union claims the global transfer market system governed by FIFA regulations is anti-competitive, unjustified and illegal. Martin Stopper and Simon Karlin of Lentze Stopper Rechtsanwälte, explain the status quo of the current system, the objectives and underlying arguments of FIFPro's complaint and provide legal analysis of the complaint while critically evaluating the potential outcome and the future of the international transfer system.

Status quo

The current transfer system is based on an informal agreement between the European Commission, FIFA and UEFA, the transfer regulations being incorporated in the amended 2001 FIFA Regulations on the Status and Transfer of Players ('RSTP').

Goals of the 2001 RSTP

The objectives of the RSTP include contractual stability, financial solidarity (redistribution of revenue), competitive balance, integrity and stability of competitions as well as the training of young players'. Within these



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objectives it is recognised that contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public. Contractual relations between players and clubs must be governed by a regulatory system which responds to the specific needs of football and which strikes a balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competitions.

RSTP 2001 principles

FIFA adopted the 2001 RSTP rules which were agreed by FIFPro following the principles accepted by the European Commission. The rules should find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of competitions. It has been accepted that EU and national law applies to football. The concessions granted by the European Commission were based basically on the specificity of sport. According to the provisions in the 2001 RSTP² and in case of dispute about their implementation, players may have recourse to arbitration on a voluntary basis or to recognised national courts. The 2001 RSTP is based in particular on the following principles³:

- Introduction of a system of training compensation for players aged under 23, rewarding the training efforts of clubs;
- Creation of solidarity mechanisms redistributing a significant proportion of income to clubs involved in the training and education of a player;
- International transfer of players aged under 18 to be allowed subject to agreed conditions. The football authorities

will establish and enforce a code of conduct to guarantee sporting, training and academic education are provided;

- Creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season;
- Minimum and maximum duration of contracts of one and five years respectively;
- Contracts to be protected for a period of three years up to the age of 28, two years thereafter;
- The system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competitions so that unilateral breaches of contract are only possible at the end of a season;
- Financial compensation and proportionate sporting sanctions in the event of a unilateral breach of contract without just cause during the protected period;
- Creation of FIFA's Dispute Resolution Chamber ('DRC') with representatives of FIFPro and clubs; and
- Voluntary arbitration not preventing recourse to national courts.

Cases based on RSTP

The RSTP regulations of 2001, in particular Article 17, have been legally challenged twice in the last 15 years.

The award rendered by the Court of Arbitration for Sport ('CAS') in the *Webster* case was the first challenge to the 2001 version of the RSTP which *inter alia* stipulated that players were able to unilaterally walk away from a contract after a fixed period, regardless of the duration of the contract itself. The CAS held that because of the potentially high amounts of compensation involved, giving clubs a regulatory right to the market value of players and allowing lost profits to be

claimed in such a manner would in effect bring the system partially back to the pre-*Bosman*⁵ days when players' freedom of movement was unduly hindered by transfer fees. According to the CAS, in view of the text and the history of Article 17 par. 1 of the RSTP, allowing any form of compensation that could have such an effect would clearly be anachronistic and legally unsound. The case hinted at more freedom of movement for players, but in practice it became a 'one-off' ruling.

The second relevant case was the '*Matuzalem case*' in 2011, brought to the CAS by a club previously employing a player⁶. The player had unilaterally terminated his agreement with Shaktar Donetsk to join Real Zaragoza. Based on Article 17 of the RSTP, CAS ordered the player to pay compensation to Shaktar Donetsk amounting to almost 10 yearly salaries of the player. This decision raised three issues:

- The application of a so-called principle of 'positive interest' in order to calculate the due compensation for unilateral termination without just cause;
- The market value of the player for the services provided by the player becomes compensable damage; and
- The re-introduction of a post-*Bosman* transfer system. Transfer compensation fees due after the expiry of a contract have been replaced by compensation due for the breach or undue termination of an existing agreement.

FIFPro's competitive law complaint

FIFPro claims that the purpose of the RSTP has not been complied with in terms of leveling the playing field, revenue sharing and protecting contractual stability. According to this organisation, the system has led to inflated transfer

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prices, an illegal restriction to the free movement of workers, the localised distribution of transfer proceeds and a lack of protection for player wages and work conditions. Therefore and in the light of the outlined context above, FIFPro launched a legal challenge against the current transfer system.

Intentions and objectives

FIFPro intends inter alia, to challenge the unnecessary restraints on labour and reform football's labour market to ensure players are no longer considered as tradable assets⁷. Furthermore, FIFPro wants to make sure that what has been informally agreed in 2001 between the European Commission, UEFA and FIFA is properly assessed and conclude whether the assumptions and/or goals of that informal agreement are valid. In addition hereto, the elementary goal of the complaint is to protect players fundamental rights under contract and labour law. In the end, it is the unilateral objective to achieve reciprocity of rights and protections for the unilateral breach of contracts for clubs and players. The final intention should be to develop better policies to ensure that legitimate interests such as the training of young players and financial solidarity amongst clubs are better served than under the current regulations.

Object of the complaint

The complaint has a fourfold objective targeting the so called 'post-*Bosman* transfer system', Article 17, paragraph 1, Article 17 paragraph 3 and Article 18 paragraph 3 of the RSTP⁸.

In general terms, it can be said that the complaint challenges the legality of the post-*Bosman* 'transfer market system', that is the system allowing clubs to trade players under contract with other

clubs. The regulatory foundation for the transfer market system can be found in the RSTP⁹ and therefore challenged as well. Transfer fees are paid as compensation for the waiver of any contractual and/or federative right of the club over the player.

According to FIFPro, transfer fees are allegedly restricting the competition between clubs. In a well functioning labour market, employers compete to attract the most valuable talent for their needs. The transfer system affects and reduces the ability of clubs to compete for football players and restrains competition amongst clubs to what is most valuable to them, the playing talent. Hence, transfer fees represent a barrier and disincentive to recruitment.

Following FIFPro's line of argument, that restriction also affects the player's position in the market. The transfer system affects the player's employment opportunities and the terms under which employment is offered. From a fundamental rights perspective FIFPro claims that such a trade of labour infringes that right to dignity.

After all, the restriction of competition would supposedly not pursue a legitimate objective, and would be unnecessary and disproportionate. The usual argument is that the transfer system is an income re-distribution mechanism in football, providing smaller clubs, leagues and associations with much needed finance. However, transfer rules would not be an adequate means of maintaining financial and competitive balance in the world of football. Only a limited number of clubs and countries benefit from the transfer system.

Regarding the number of transfers and the recent enormous rise in transfer fees, the question to be raised 14 years after the

amendment of the RSTP is: Have the objectives of the 2001 RSTP been realised, in particular the goal of protecting contractual stability?

FIFPro concludes it has not, thus they request the abolishment of the transfer system and the introduction of a collective bargaining system which should enhance the establishment of better labour market rules, balanced fairly against the needs of clubs together with an improved model of revenue distribution.

Analysis of the claim

There is a widespread opinion that 20 years after the *Bosman* case, these proceedings could lead to another milestone decision and a further revolution in football. But as usual the outcome of the complaint and the potential future implications on the transfer system are unpredictable.

The Commission's legal analysis of the claim will be based on a potential violation of European competition law. But competition law will only be the gateway for a legal evaluation of the challenged measures under the fundamental right to freedom of movement of workers - meaning a labour law analysis. Restraints of competition as well as those of freedom of movement must be justified to comply with European law. Therefore the key question in the analysis of this claim is: Are the restrictions on competition and/or labour law, these being the current 'transfer system' in correlation with the RSTP, nowadays justifiable with respect to the system's objectives of contractual stability, solidarity and competitive balance? Notwithstanding the outcome of the complaint which is hardly predictable, there are good arguments on both sides of the debate.

Critical evaluation



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The so called 'transfer system' is legally based on individual domestic labour law regulations. Since these regulations were not originally drafted to be applied to professional football, a proper functioning of the 'transfer system' is unlikely. The 'transfer system' can hardly even be deemed as a 'system', since a system in general is defined as a set of principles or procedures according to which something is done; an organised scheme or method. But in the end, transfers are the conclusion of employment contracts between players and clubs rather than the application of a system.

At least renewals of employment contracts between players and clubs are only made for the purpose of receiving transfer compensation due in the event of an early termination of a contract rather than the full execution of the employment contract.

The execution of a rapidly growing multi-million dollar business on the basis of compensation payments within labour law is irresponsible and cannot guarantee the required legal certainty in this field.

The outcome of the complaint should be clear. Even though the European Commission will allow the complaint, this will not necessarily lead to a total elimination of the compensation system. Anyhow, a redesign of the current transfer system is needed. There is still room for improvement in the current system by making it easier for players to extricate themselves from toxic contracts without necessarily having to wait for the next transfer period. A renegotiation of the set of rules should be reasonable for both sides since the problem of 'competitiveness' will not be solved in the short-term.

Since there is no limitation of transfer fees ('salary cap'), there are

persons participating in a transfer more or less unregulated (intermediaries, other third parties). It would strengthen the system to only allow the stakeholders involved (players, club, federations) to be part of the 'transfer game.' Proposals including the introduction of redistribution mechanisms (already existing in the UK) as well as a collective bargaining system should be considered and negotiated between stakeholders - and only between them. Because in the end the basic problem remains: uncontrolled capitalism with uninvolved people prevailing in a false market.

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1. <http://bit.ly/1FRNvP9>
2. Last amended in December 2014 and which came into force on 1 April 2015.
3. <http://bit.ly/1FRNvP9>
4. CAS 2007/A/1298 Wigan Athletic FC v. Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v. Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v. Heart of Midlothian, award of 30 January 2008.
5. Judgment of the Court of 15 December 1995. Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football ('UEFA') v. Jean-Marc Bosman. Case 415/-93.
6. CAS 2010/O/2132 Shakhtar Donetsk v. Ison Pereira Dias Junior; <http://bit.ly/1KB6YCr>
7. <http://bit.ly/1gNwVUt>
8. <http://bit.ly/1gNwVUt>
9. The RSTP contains chapter IV on 'maintenance of contractual stability between professionals and clubs' (Articles 13-18).