

FIFPro's EU competition law complaint – executive summary

18 September 2015

I. What are the objectives of this complaint?

- Challenge unnecessary restraints on labour;
- Reform football's labour market so as to ensure players are no longer considered as tradable assets;
- Make sure that what has been informally agreed in 2001 between the EC, UEFA and FIFA is properly checked, and conclude whether the assumptions/goals of that informal agreement are valid;
- Protect players fundamental rights under contract and labour law, including the timely payment of salaries;
- Achieve reciprocity of rights and protections for the unilateral breach of contracts for clubs and players;
- 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 current regulations.

II. What is the object of the complaint? What is challenged?

The complaint has a fourfold object:

1. The post-Bosman transfer system;
2. Article 17 (1) of FIFA's RSTP;
3. Article 17 (3), last sentence, of the RSTP;
4. Article 18 (3) of the RSTP.

In general terms, it can be said that the complaint challenges the legality of the post-Bosman "**transfer market system**", that is the system that allows clubs to trade (i.e. 'buying' and 'selling') players under contract with other clubs. Players are traded as assets.

The regulatory foundation for the transfer market system can be found in FIFA's Regulations on the Status and Transfer of Players (RSTP).

The RSTP contains a chapter IV on 'maintenance of contractual stability between professionals and clubs' (Articles 13-18). Of particular importance are the following provisions:

- Article 17 (1) RSTP. Consequences of **unilateral termination without just cause** (): a financial compensation must be paid.¹ On the basis of this provision, a player is liable to compensate his/her own 'market value' when he/she terminates the agreement with the club. The due compensation reflects the 'market value'.
- Article 17 (3) last sentence of the RSTP. **Protected period**. If breach of contract during protected period: sporting sanctions can be imposed. A player can be banned for 4 months (6 months in case of aggravating circumstances). **Re-introduction of the protected period**: "The protected period starts again when, while renewing the contract, the duration of the previous contract is extended".
- Article 18 (3) RSTP: "A club intending to conclude a contract with a professional must inform the player's current club in writing before entering into negotiations with him. A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months. Any breach of this provision shall be subject to appropriate sanctions."

III. Historical perspective

- 1995: Bosman judgment of the Court of Justice. No transfer fees for players out of contract. Compare with the current transfer system: transfer fees for players under contract.
- 2001: informal agreement between European Commission, FIFA and UEFA
 - "It is recognized 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 the balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition".
- 2001: amended FIFA Regulations on the Status and Transfer of Players (RSTP). Introduction of the rules on contractual stability.
 - Questions after almost 15 years: (i) is there any contractual stability? Or contractual instability? (ii) what about the balance of interest between players and clubs? (iii) has the system attained the legitimate objectives pursued?
- 2007: Webster decision of the Court of Arbitration for Sport (CAS).
 - "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 manner would in effect bring the system partially back to the pre-Bosman days when players' freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously affected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable

¹ In addition, the RSTP provides that a contract can unilaterally be terminated (i) for just cause and (ii) for sporting just cause.

benefits without sharing the profit or taking corresponding risks. In view of the text and the history of article 17 par. 1 of the FIFA Status Regulations, allowing any form of compensation that could have such an effect would clearly be anachronistic and legally unsound”.

- 2008: Matuzalem decision of the CAS. Matuzalem has unilaterally terminated his agreement with Shaktar Donetsk to join Real Zaragoza. CAS has ordered the player to pay a compensation of EUR 11,858,934 (plus interest rate) to Shaktar Donetsk. This compensation amounted to almost ten yearly salaries.
 - Problem 1 = application of a so-called **principle of ‘positive interest’** (also principle of ‘expectation interest’) in order to calculate the due compensation for unilateral termination without just cause. “[CAS] will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitutio, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.”
 - Problem 2 = **market value** becomes compensable damage. “In the event of a breach by a player, a panel has therefore to analyze the amount necessary to acquire and keep the working force of the player. In doing so, the Panel only acknowledges economic reality in the world of football, i.e. that services provided by a player are traded and sought after on the market, are attributed an economic value and are – according to art. 17 FIFA Regulations – worth legal protection. The Panel is eager to point out that the sole object of this approach are the services provided by a player and not the human being as such”.
 - Problem 3 = **re-introduction of a post-Bosman transfer system**. “Art. 17 of the FIFA Regulations is part of chapter IV of the FIFA Regulations, i.e. of that part that deals with and try to foster the maintenance of contractual stability between professionals and clubs. Within the framework of the "reconstruction" of the FIFA and UEFA rules following the well-known *Bosman* decision, the concept of contractual stability was introduced to move forward and replace the former transfer fee system: accordingly, the pre-*Bosman* transfer fees due after the expiry of a contract have been replaced by compensations due for the breach or undue termination of an existing agreement”.²

IV. **The transfer system (main object of the complaint)**

1. **What is a transfer? What are transfer fees?**

Transfer fees can be regarded as the compensation for the waiver of any contractual and/or federative right of the club over the player:

² CAS, Matuzalem, point 79 (emphasis added).

- Contractual perspective: SZYMANSKI explains that, “[i]n economic terms, the transfer fee might be thought of as compensation for breach of contract”.³
- Federative perspective: GERRARD describes the transfer fee as the financial payment or the acquisition cost if the player’s registration (that is, the exclusive right to field the player in games) has been acquired from other teams.⁴

The **transfer** of a player under contract requires the consent of the three parties involved, i.e. the two clubs and the footballer.

2. Restriction of competition between clubs

In a well-functioning labor market, employers compete to attract the most valuable talent for their needs. Transfer system affects and reduces the ability of clubs to compete for football players. The transfer system restrains competition amongst clubs to what is most valuable to them – playing talent. Transfer fees are a barrier and disincentive to recruitment.

3. That restriction also affects the position of players

The transfer system affects the player’s employment *opportunities* and the *terms* under which employment is offered.

Fundamental rights perspective. Players are traded as assets. Their labour becomes a commodity, which is bought and sold to make profit. The EU Charter of Fundamental Rights grants the right to every worker to working conditions “which respects his or her [...] dignity”. Such a trade of labour infringes that right to dignity. See also the pressing problem of Third Party Ownership: investment funds buy ‘stakes’ in players.

4. The restriction of competition does not pursue a legitimate objective, and is unnecessary and disproportional

The usual argument is that the transfer system is an income re-distribution mechanism in football, providing smaller clubs, leagues and association with much needed finance. However, transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. In addition, recent data show that the redistributive power of the transfer market is limited. There is, in reality, a transfer fees spender pyramid. Only a limited number of clubs and countries benefit of the transfer system.

5. On contractual stability

- “Stability”: is this more about preserving the existing situation/status quo? That would be anti-competitive;
- Matuzalem: contractual stability was needed to introduce a post-Bosman transfer market;
- 14 years after the amendment of the RSTP: football industry seems to be characterized more by contractual *instability* – see the number of transfers and the rising transfer fees.

³ STEFAN SZYMANSKI, *Money and Soccer. A soccernomics Guide*, New York, Nation Books, 2015, p. 269.

⁴ B. GERRARD, “Achieving transactional efficiency in professional team sports: the theory and practice of player valuation” in F. GODDARD and P. SLOANE (eds.), *Handbook on the Economics of Professional Football*, Edward Elgar, 2014, p. 189.

V. Why should this complaint be a priority for the European Commission?

- The Commission is the guardian of the Treaties. If EU competition law or the freedom of movement of workers is infringed, the Commission should act.
- 2001 informal agreement. After almost 15 years, and 20 years after Bosman, the moment is there to verify whether the informal agreement with FIFA and UEFA has been based on accurate assumptions. Is 'contractual stability' a legitimate objective? Has FIFA been successful in its endeavors to establish contractual stability? Was contractual stability about contractual stability or about something else?
- The transfer system interferes with labour mobility and the conditions under which new employment opportunities are offered. According to president Juncker, free movement of workers and labour mobility are political priorities of the European Commission.
 - o See Mr. Juncker's opening statement in the European Parliament's plenary session on 15 July 2014 - 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change': "**Free movement of workers** has always been one of the key pillars of the internal market, which I will defend, while accepting the right of national authorities to fight abuse or fraudulent claims. I believe that we should see free movement as an economic opportunity, and not as a threat. We should therefore promote **labour mobility**, especially in fields with persistent vacancies and skills mismatches."
 - o See also Mr. Juncker's political priorities, available on his website: "Free movement is an opportunity, not a threat".
