



## A LEGAL AND POLICY ANALYSIS OF FIFPRO'S PROPOSAL TO REFORM THE REGULATION OF PROFESSIONAL FOOTBALL CONTRACTS

Juan de Dios Crespo Pérez and Paolo Torchetti, Ruiz-Huerta & Crespo Sports Lawyers

On 18 September 2015 FIFPro, the Dutch-based organisation representing 65,000 professional footballers, filed a complaint with the European Commission challenging the legality of the post-*Bosman* transfer market system. The complaint alleges that the legal framework regulating the transfer of professional football players as set out by the FIFA Regulations on the Status and Transfer of Players (RSTP) violates European Union law as anti-competitive, unjustified and illegal.

This article will identify and evaluate the FIFPro complaint. In addition the authors will consider whether the ultimate objectives sought by the complaint will satisfy the various competing policy goals necessary to effectively govern the world football industry.

### THE TRANSFER FEE SYSTEM: THE COMPLAINT

FIFPro alleges that the transfer fee system restricts competition and ought to be abolished because it can no longer be justified by the “specificity of sport”, the analysis required when justifying a potentially restrictive practice that is part and parcel of the regulations used to organise professional sport. With specific respect to FIFA Regulations, FIFPro claims that the following articles of the FIFA RSTP sustain the transfer fee system and violate EU competition law:

- the party in breach must pay compensation where a contract is terminated without just cause (article 17(1));
- a breach of contract during the protected period results in the imposition of sporting sanctions (article 17(3)); and
- clubs may not negotiate contracts with players who are under contract with other clubs (article 18(3)).

FIFPro will also argue that the transfer fee system offends the EU Charter of Fundamental Rights because as labour becomes a commodity bought and sold to make profit it denigrates the right of every worker to working conditions “which respects his or her [...] dignity”.

### OTHER STRUCTURAL REFORMS DEMANDED BY FIFPRO

In addition to the challenge to the post-*Bosman* transfer fee system FIFPro has publicly identified the following reforms that it intends to pursue:

- limiting professional player contracts to four years;
- establishing a “protected period” where neither club nor player could break the contract within the first two or three years (unless the player was not playing) – the player could buy out the remainder of the contract and switch clubs once the protected period has elapsed;
- limiting agents’ fees;
- limiting squad sizes; and
- eliminating the loan system.

It is not clear whether these reforms are included in the FIFPro competition law complaint as the players’ union is refusing to disclose the complaint filed with the EC. Although the executive summary that has been released does not specifically mention these reforms, confusion arises because FIFPro secretary general Theo van Seggelen has discussed these issues in the same breath that he is promoting the EC complaint to media outlets.

### SPECIFICITY OF SPORT

The European Court of Justice (ECJ) in the *Meca-Medina* case (C-519/04P, *Meca-Medina and Majcen v Commission*, ECR 2006, I-6991) explained that the “specificity of sport” within the context

of an alleged competition law violation must be examined case by case as to whether the restrictive practices in the organisation of competitive professional sport are legitimate, necessary and proportional to the objective pursued. The reality, as recognised in the jurisprudence, is that the sports industry is not exempt from competition law, but that inherently restrictive practices are legally employed in the pursuit of these legitimate goals.

Although the term “specificity of sport” itself appears quite vague, various levels of courts and arbitration panels have contributed to the development of the concept over the course of the past 40 years since *Walrave and Koch v Association Union Cycliste Internationale* (Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405). Referring specifically to the structure of player transfer systems, the ECJ’s landmark *Bosman* decision declared that “the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate” (C-415/93 [1995] ECR I-4921, at page 106). In addition the ECJ has identified the imposition of transfer windows as a legitimate method of pursuing the integrity of competitions (C-176/96 *Lehtonen et al v FRSSB* [2000] ECR I-2681). In the end the European Union’s White Paper on Sport provides an authoritative synopsis reflecting and almost codifying European jurisprudence.

The result is that there are several recognised legitimate objectives professional sports organisations can pursue when adopting regulations that may be perceived to be restrictive. The FIFPro complaint must establish from an evidentiary standpoint that the current transfer fee system fails to promote the



legitimate objectives of contractual stability, financial solidarity, competitive balance, integrity and the stability of competitions and the training of young players, found in the jurisprudence and the EU White Paper, in a proportional manner.

FIFPro relies on evidence presented by economist Stefan Szymanski who, as reported by *The Guardian* on 18 September claimed:

*As it currently operates, the transfer system sustains the dominance of the elite clubs by ensuring that they are the only ones with the financial muscle to afford the transfer fees payable for the very best players. Thus, as it currently operates, the transfers system is not only unfair to players, it also promotes the opposite of what was intended.*

In the authors' estimation the relief sought by the FIFPro complaint is not legally sound as it fails to convince that the "specificity of sport" cannot justify the restrictions. FIFPro is merely picking and choosing the objectives that it wishes to promote to ensure that players' salaries increase without limitation, ignoring the greater good of the beautiful game.

FIFPro's claim that the transfer system does not promote the training of youth players is misguided. The transfer fee system provides a strong incentive for clubs to develop players in their youth academies. Smaller clubs can profit from the financially lucrative transfer fees paid for top young players in their youth academies. The escalation of transfer fees also provides an incentive for the largest clubs in the world to develop in-house youth talent to avoid paying increasingly high fees. The uncertainty of the outcome of the payment of a transfer fee can have the opposite effect for a larger club that is displeased with paying for the contractual rights of players that have not performed at their expected levels.

The most surreptitious aspect of FIFPro's claim regarding the training of youth players, however, is that the abolition of the transfer fee will effectively eliminate the solidarity mechanism and the payment of compensation. Articles 20 and 21 of the FIFA RSTP, by definition, calculate the quantum of such payments based on a transfer fee. A decision of the European Commission or ECJ reading

out or eliminating the transfer fee as a concept would eliminate two methods of compensation that provide for serious incentives for clubs to develop youth players. At this moment FIFPro does not publicly articulate a new system of payment redistribution to clubs that have previously trained players, entirely ignoring one of the fundamental legitimate objectives that ought to drive policy regulating professional football contracts.

With respect to the potential claim that the current transfer fee system harms competitive balance, FIFPro is promoting an untenable and unrealistic position. It is correct to say that the definition of the European market from a competition law perspective necessitates the scrutiny of the UEFA Champions League. The jurisprudence of competition law as it relates to the specificity of sport, however, requires that potentially restrictive policies are proportional to their objective. UEFA governs 54 national football federations, roughly double the number of countries that belong to the EU. The 54 countries under UEFA auspices differ widely in terms of political, economic and social climates. Some leagues are particularly rich with a wide fan base and others are poor and comparatively loosely followed.

It is impossible to expect that the 759 clubs that compete in a first division in Europe can do so on an even footing, each with a legitimate and credible expectation to compete for and win the Champions League without a rigid salary cap and an effective income redistribution scheme as employed in the United States' National Football League. To do so would violate the principle of proportionality as the effect of the ruling would pursue an objective that is simply out of reach. There is no foreseeable method to pursue ultimate and true competitive balance in European football across 54 countries. The elimination of transfer fees will not achieve competitive balance. Under the new system envisioned by FIFPro the richest teams can continue to attract the best players by paying the highest wages. It will only increase salaries paid to the world's most talented players and will eliminate a significant source of income redistribution to smaller clubs which will impede competitive balance.

As an aside, if a hard salary cap does pursue perfect competitive balance, the question is why FIFPro will not pursue that policy objective. The answer is obvious: it will limit the salaries of the world's highest paid players.

#### CONCLUSION: LITIGATION TO FORCE NEGOTIATION

The landmark complaint, if successful, may lead to the complete overhaul of the regulatory framework of world football. In this sense FIFPro secretary general Theo van Seggelen has been unapologetic, if not brazen, in stating that the time to address these issues through negotiation has passed by claiming, as reported in *The Guardian* on 18 September: "We've tried to solve this problem internally with FIFA and UEFA but I am 100 per cent convinced that they have left us with no choice. I have been used to negotiating my whole career, with FIFPro and the Dutch union. But it has come to an end."

What is interesting is that FIFPro is making noise over certain elements that presumably do not relate to the claim before EC: the temporal limitation to professional player contracts; limitation to agents' fees; restricting squad sizes; and the elimination the loan system. In this sense it seems quite disingenuous of FIFPro to make a legal claim striking down certain laws while publicly complaining about others without including those issues in the complaint.

It is quite obvious that FIFPro is attempting to leverage the risk of fatal consequences to the transfer system to gain advantages in entirely unrelated areas. Although some may view this tactic as shrewd negotiation, it does nothing to instill the trust and good faith required between business partners. The English Professional Footballers Association, perhaps football's most successful and effective players' union, has publicly questioned FIFPro's tactics stating: "We do have reservations that litigation taken outside of football can sometimes lead to entrenched positions and delay in change and improvement; it can also sometimes have unintended consequences which may not be foreseeable at this point."