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Legal and economic aspects of transfer of players in football in the European Union

BACHELOR THESIS

Author: Arturs Jāzeps Lazdiņš
LL.B 2016/2017 year student
student number B016061

(Pāvels Tjusevs)

SUPERVISOR: *(Associate / Assistant Attorney at Law)*

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

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ABSTRACT

The main aim of this research is to analyze the legal and economic issues between the current football transfer system and European Union laws. In order to do so, the author looked at the history and development behind the transfer system, the sports specificity, the key cases and their interpretation by courts in different instances, and the statistics regarding implementation of various regulations and their impact on players and clubs. The obtained results demonstrated that there are major issues in the current transfer system, specifically, that it hinders the freedom of movement for football players and it can also be challenged under EU competition law. Additionally, the findings indicated that the football market is very polarized and continues to grow at an outstanding rate. In the conclusion, the author also provides a few suggestions that could improve the current system and maintain a more balanced football market.

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SUMMARY

This paper analyzes the legal and economic aspects of the transfer of players in football. More specifically, it looks at the transfers system's legality regarding the freedom of movement guaranteed under Article 45 TFEU as well as from the EU competition law perspective. The research is structured and divided into two bigger parts, accordingly, the legal and economic part, giving more emphasis on the legal part. Furthermore, they are divided into smaller sections beginning with an introduction and more of a historical development through the leading case in this matter - the Bosman case. The paper continues with highlighting specific issues regarding the relationship between the European Union and transfer system, and the European Commission and transfer rules. Followingly, the author examines the dispute resolution mechanism for transfers, especially looking at the Court of Arbitration for Sports' (CAS) interpretation of regulations and their decisions on cases, in particular, regarding the Article 17 FIFA Regulations on the Status and Transfer of Players (RSTP) or the compensation applicable in the case of terminating a contract without just cause. The differentiating decisions and judgments made by the CAS have been seen as another issue that also contradicts with the values inherited in the EU.

By analyzing the regulations implemented by the sport's governing bodies, it is clear that the current transfer system still hinders the players' movement and thus goes against Article 45 TFEU. However, when analyzing these issues, we have to take into account the fact that sports' industry is clearly very different from any other industry, thus have to consider the specificity of sports. Furthermore, from the economic point of view, the football market, and transfer fees in the recent years have grown significantly. Consequently, another issue is that the adapted regulations like the Financial Fair Play (FFP) regulations have created an even more polarized football market. The FFP regulations have made investors more reluctant to invest in the smaller clubs, and together with the fact that the top clubs earn a significant amount of revenue from broadcasting rights, sponsorship deals and other commercial activities compared to smaller clubs, the football market is highly divided with the top European clubs responsible for more than 70% of all transfer fee payment in the world.

Moreover, the system limits the choice of players that clubs can employ, thus intervening with the market's supply and demand. Consequently, as clubs do not have unlimited resources, it only strengthens the position of wealthier clubs that can afford to spend more money on transfer fees and wages.

Nevertheless, it seems that the Commission is reluctant to begin any new infringement proceedings against UEFA/FIFA, thus the players will probably have to rely on the FIFPro to see any changes that are favoring the players' position. In the conclusion part of this paper, the author also indicates a couple of suggestions with which it would be possible to improve the football world and the transfer market as such.

1. INTRODUCTION

Transfer of players in sport is highly regulated by a complicated set of rules in multiple layers - under national, European Union, and international level, as well as by different sports governing bodies, for example, FIFA for football and FIBA for basketball. These international sports institutions play an enormous role in the standardization of rules for a particular sport with an aim to make them universally recognizable and applicable, which would facilitate more transfers between teams under international environment. The main characteristic that stands out compared to other industries is that sports governing bodies are granted extensive autonomy for the self-regulation of their activities.¹ This can be clearly seen when looking at the contracts between players and teams. Unlike employment contracts and rules in other industries, the employment rules, more specifically, the rules of transfer in contracts, have major restrictions in the freedom of players to move between employers, in this case - teams, which is a large part of most athletes' career as they want to play for better teams or, for example, be closer to family and home.

For instance, Article 13 of the FIFA Regulations on the Status and Transfer of Players (RSTP) states that "a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement."² Additionally, as stated in Article 14, the contract can only be terminated without any consequences of any kind (either payment of compensation or imposition of sporting sanctions) by either party where there is just cause.³ Furthermore, Article 15 also acknowledges that termination of contract is only possible by just cause, but giving more specific details for terminating a contract with sporting just cause, stating that:

*"an established professional who has, in the course of the season, appeared in fewer than ten percent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause."*⁴

If a sporting just cause is found, sporting sanctions will not be imposed, though compensation may be payable.

It is evident that, although the structure and meaning behind the transfer system is to preserve just and balanced competition, and there is a transfer fee system between clubs, which excludes the possibility to completely ban players' mobility, the whole system favors

¹ KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 1, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 5 March 2019

² FIFA Regulations on the Status and Transfer of Players, Article 13

³ FIFA Regulations on the Status and Transfer of Players, Article 14

⁴ FIFA Regulations on the Status and Transfer of Players, Article 15

employers not the players.⁵ Therefore, the question still stands whether these restrictions are justifiable and if there really is not a better way how to maintain a fair and balanced competition?

This has been a highly debated topic for many years with the most notable development happening in 1995 with the European Court of Justice ruling on the Bosman case, which had a crucial effect on the free movement of labor and the transfers of players in the EU. Before this case, it was possible for a club's team management to prevent players from playing for another club in a different country even when their contracts had expired. Jean Marc Bosman, the applicant before the European Court of Justice in this case, wanted to move to another club as his contract with the Belgian first division football club RC Liege had expired. However, the Belgian football club demanded a transfer fee from the Dunkerque - a French football club that Bosman had considered as his next destination in his professional football career. As an EU citizen, Mr. Bosman believed that it was a clear violation of his right to the freedom of movement guaranteed under Article 48 of the Treaty on the Functioning of the European Union⁶ (ex. Article 42 of the Treaty establishing the European Community), and The Court agreed with him. It stated that the: "*freedom of movement for workers is one of the fundamental principles of the Community,*"⁷ and since these transfer rules guaranteed that professional football players cannot pursue their activity with a new club based in a different Member State unless that club has paid an agreed transfer fee to their previous club, it, therefore, constituted as an obstacle to freedom of movement for workers.⁸ Moreover, this judgment also forced international sporting bodies like FIFA to review the rules on transfers and make them consistent with the EU laws on the free movement of people, nationality and competition. Consequently, a few years after the Bosman judgment, in 2001, the European Commission and international football bodies came to an informal agreement, which influenced adjustments to the FIFA transfer rules provisions.⁹

However, even though the Bosman judgment and the informal agreement that followed after it had greatly changed the previous transfer system, there are still many economic and legal issues that arise from the current transfer system. Like any other field, the European and the global football market continues to grow significantly - new stadiums and football clubs are being established and the overall number of football players worldwide

⁵ KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 1, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 5 March 2019

⁶ See Article 48 TFEU

⁷ Case C-415/93, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0415&from=EN> para 93

⁸ Ibid. para 100

⁹ Supra note 5, p. 29

increases, thus, subsequently, the number and value of transfers rise as well. Out of all 6 FIFA Confederations - the AFC in Asia, CAF in Africa, the Football Confederation (CONCACAF) in North and Central America and the Caribbean, CONMEBOL in South America, the OFC in Oceania and the UEFA in Europe¹⁰, the latter has seen the greatest international transfer activity out of all mentioned. As stated in the 2017 Global Club Football Report, in 2016, most EU countries received more new players coming from clubs abroad than players transferred out of the country.¹¹

Although this paper will analyze the issues within the EU, the following challenges in football and sports overall can be observed all across the globe, especially in the less regulated areas. These issues include challenges fighting corruption and illegal betting, trafficking of players, intentional rule and agreement violations, as well as sector's financial and contractual stability during economic crisis or political tensions. Furthermore, federations' role in regulating and organizing the game is in question, as clubs are essentially businesses that are expected to deliver financial results to their shareholders, thus creating a possible subject to corruption and fraud.¹² Furthermore, sports governing bodies after the Bosman judgment viewed that this decision has caused problems for the training of athletes, because often times clubs do not receive any compensation in return for the training of their football players' as they decided to leave for a better club, thus widening the economic gap between clubs as well as individual athletes. Additionally, fiscal legislation and taxation vary across the EU, thus creating a source of inequality between the EU Member States and clubs.¹³ Additionally, this paper will also look at the economic situation of the football market and the key economic drivers behind its quickly growing value, especially for top-level clubs and leagues.

¹⁰ FIFA.com. "Associations and Confederations - Associations and Confederations" available on: <https://www.fifa.com/associations/> accessed on: 10 March 2019

¹¹ FIFA Global Club Football Report 2017 available on: https://resources.fifa.com/mm/document/footballdevelopment/proffootballdept/02/90/12/72/clubfootballreport_29.6.2017_neutral.pdf p. 102, accessed on: 10 March 2019

¹² KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 1, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 10 March 2019

¹³ Brussels, 10.12.1999 COM(1999) 644 final, available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF> p. 6, accessed on: 10 March 2019

2. LEGAL ASPECTS OF TRANSFERS

2.1. European Union and the Transfer System

One of the key matters in sports' governance, especially in football, are the transfer rules,¹⁴ which has created a widely debated discussions in the European Union when looking at the relationship between sports and EU law.¹⁵ As the free movement of workers across national boundaries, as well as non-discrimination, are general principles of EU law, it, therefore, makes it a Commission's duty to guarantee and assure that amateur and professional football players and other athletes can freely move throughout the EU. However, it also has to take into account that the sports' sector has its own specific characteristics and needs for different disciplines. Therefore, there is a strong need to establish a balance between what is necessary in order to guarantee fair and balanced competition in sports while ensuring the previously mentioned European Union's fundamental freedoms.¹⁶

Even though throughout the last decade the market size of the European professional football market has grown almost twice, from 13.6 billion in 2007 to 25.5 billion in 2017¹⁷, thus indicating a spectacular commercial development in this sector, a professional football is and always has been a tradition-based game. Football governing bodies like FIFA and UEFA have the power to run and organize competitions not because of the legal position outside of ad hoc contractual agreement, but through complicated continuous economic and political exchange amongst organizations, public authorities and different other stakeholders. FIFA's vertical channel of authority has enabled football to adopt monopoly regulations and practices that are also traditionally rooted.¹⁸ Taking that into account, the Bosman judgment, in which the European Court of Justice decided that the transfer fees for players whose contracts have expired were unlawful, generated a negative response from the football community and the respective governing bodies, which believed that EU law would destroy the fundamental football traditions. Therefore, EU institutions had to take a step forward to improve the connection between sport and EU law by taking into consideration the sport's specificity that is contrary to other industries. Requirements to recognize the specificity of sports by EU

¹⁴ KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 33, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 16 March 2019

¹⁵ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 223

¹⁶ "Free Movement of Sportspeople." Sport - European Commission, available on: https://ec.europa.eu/sport/policy/organisation-of-sport/free-movement-sport-people_en accessed on 20 March 2019.

¹⁷ "European Football Market Size 2006-2017 | Statistic." Statista, available on: <https://www.statista.com/statistics/261223/european-soccer-market-total-revenue/> accessed on: 20 March 2019

¹⁸ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 222

institutions and to work with stakeholders in order to resolve conflicts between sporting practices and constancy of free movement and competition law were established in the Treaty of Amsterdam 1997, Declaration 29, which states that:

*“The Conference emphasises the social significance of sport, in particular, its role in forging an identity and bringing people together. The Conference, therefore, calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue...”*¹⁹

Furthermore, these requirements were also drafted into the Treaty of Nice 2000²⁰, following the report on sport submitted to the European Council by the European Commission in Helsinki in December 1999²¹, stating that:

*“Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.”*²²

Although, sports were to be considered worthy of special treatment, and the concept of sport’s specificity, which sets the inherent characteristics of sport apart from other economic and social activities was acknowledged in Article 165 TFEU²³, there was still uncertainty on how to precisely treat it as a special case in the EU.²⁴

Nonetheless, there are some commentators that do not agree with the way how sport is claimed to be special. For instance, Weatherill indicates that even though when we compare it with other industries, in the sport’s sector the protection of ‘competitive balance’ is unique, however, the development and training of young persons is not.²⁵ He argues that:

*“professional football, in particular, has made much of the virtue of tradition, but in so far as it deploys its defence as a camouflage for the maintenance of inefficient or unfair practices in a world of increasing commercial exploitation of the sport’s attractions, its subjection to EC trade law is entirely proper.”*²⁶

¹⁹ Treaty of Amsterdam 1997, Declaration 29

²⁰ Treaty of Nice 2000, Annex IV

²¹ Brussels, 10.12.1999 COM(1999) 644 final, available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF> p. 6, accessed on: 10 March 2019

²² Treaty of Nice 2000, Annex IV, point 1, available on:

http://www.europarl.europa.eu/summits/nice2_en.htm#an4

²³ See Article 165 TFEU

²⁴ E. Szyzszak “Competition and Sport”, (2007) 32 European Law Review 95, 98.

²⁵ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 224

²⁶ S. Weatherill, “Sport as Culture in EC Law”, p. 151

The main point that arises from this is that sports industry is a unique one, yet a difference exists between defending rules that are necessary in order to have a successfully functioning system and protecting rules which are possibly outdated, and tradition based. Despite that, the current transfer system was designed during this chaotic stage of the EU's relationship with sport.²⁷ Accordingly, to combat losing players during the time period when their contracts expired, thus not receiving any fee, clubs urged to sign longer contracts with players to reserve the possibility to claim fees for mid-contract transfers.²⁸

Even though this system does not guarantee contractual stability for players who want to remain at a club, there are several benefits for players, for example, a guaranteed compensation if they are being transferred. Furthermore, from various decisions that have been made by the FIFA Dispute Resolution Chamber (DRC), it is evident that repeated or long-term injuries cannot be a sufficient enough basis on which to terminate players' contracts, thus giving players more contractual stability if they have suffered such injury. Even if under many countries' national employment laws this reason could be seen as a fair excuse to terminate a contract, on the other hand, the International Players Union (FIFPro) has stated that it does not think that this compensates for players' inability to unilaterally terminate contracts as it is a common practice for football clubs to use short fixed-term contracts, thus creating less contractual stability for players.²⁹ As notice periods were not included in the contracts, when players wanted to move to another club by submitting requests for transfer, their freedom to movement relied on a new employer's interest to match initial club's valuation of them. Consequently, this resulted in many cases when players were forced to continue playing for their current clubs even though they had requested a transfer.³⁰ One of the most famous cases regarding this was when Nicolas Anelka wished to move from Arsenal to Real Madrid³¹, clearly restricting EU's principle of free movement as he wanted to move from working in the UK to working in Spain, but being one of the best players was limited to joining a small number of teams.³² Moreover, when Nicolas Anelka's prolonged transfer was finally completed in 1999, it came with an astonishing transfer fee of 22,3 million pounds.³³

²⁷ G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 224

²⁸ See A. Caigner and J. O'Leary, "The End of the Affair: The Anelka Doctrine - The Problem of Contractual Stability in English Professional Football"

²⁹ G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 222

³⁰ *Ibid.*

³¹ See A. Caigner and J. O'Leary, "The End of the Affair: The Anelka Doctrine - The Problem of Contractual Stability in English Professional Football"

³² G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 222

³³ Nicolas ANELKA - Premiership Appearances - Arsenal FC." Sporting Heroes, available on: http://www.sporting-heroes.net/football/arsenal-fc/nicolas-anelka-9265/premiership-appearances_a10950/ accessed on: 25 March 2019

2.2. Transfer rules and the European Commission

Although FIFA and UEFA originally had informed the European Commission that the international transfer system would no longer be relevant to those players who changed clubs to play in another country throughout the European Economic Area at the end of their contracts, they did not officially abolish the rules. As a result, the Commission opened an infringement procedure against FIFA in 1998, bringing up the matter of competition policy to the area of public enforcement. As players would be the main beneficiaries of a refined player market liberalization, the Commission considered FIFPro to be their natural ally. FIFPro had failed to persuade the football governing bodies to lift players' mobility restrictions before the Bosman judgment, however, the newly initiated infringement procedure by the Commission presented a great opportunity for FIFPro to challenge the transfer system.³⁴ Roughly two years later, on October 31, 2000, proposals to address the Commission's objections were received from FIFA and other involved parties in the football community. Although these proposals were an important development, some parts were still in need of clarification and understanding of how it could work in practice, thus the Commission also encouraged FIFA to:

*“hold further discussions notably with the international players' union FIFPro with a view to finding a negotiated compromise that reflects the mutual basic rights and obligations of both players and clubs.”*³⁵

Furthermore, from the competition law perspective, there were concerns whether the post-Bosman transfer system meddled with the player supply market for clubs, specifically by constraining the capacity for smaller clubs to exist in the elite player market. Commissioner Mario Monti also stated that this system was founded on carelessly calculated fees that in no way reflected the real training costs, thus should be forbidden. Furthermore, he also declared that the system demanded restrictions on the duration of the contract, unilateral right to terminate the contract and non-discretionary compensation for premature breach of the contract.³⁶

³⁴ GARCIA, B. and MEIER, H.-E., 2011. Limits of interest empowerment in the European Union: The case of football. *Journal of European Integration* (Forthcoming publication), available on: <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/8918/1/Garcia2.pdf> p. 18

³⁵ European Commission - PRESS RELEASES - Press Release - Football Transfers: Commission Underlines the Prospect of Further Progress, available on: http://europa.eu/rapid/press-release_IP-00-1417_en.htm accessed on: 25 March 2019

³⁶ G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 225

Instead of finding incompatibility, a compromise solution was endorsed by Nice Declaration and open political pressure, which also included a press release from German Chancellor Schroeder and UK Prime Minister Blair). They claimed that such a profound transfer system reform would endanger the survivability of smaller clubs which rely on incoming fees. However, even though FIFPro were disregarded in the final stages of negotiations, a change in the transfer system was finally agreed upon, with new regulations entering into force in September 2001.³⁷ Furthermore, nearly a year later in June 2002, the European Commission reported that it had closed investigations into FIFA regulations on international football transfers.³⁸ The Competition Commissioner, Mario Monti, stated that:

“The new rules find a balance between the players’ fundamental right to free movement and stability of contracts together with the legitimate objective of the integrity of the sport and the stability of championships.”

However, looking at the freshly adopted FIFA rules in international transfers, it seems impossible to carry out this balance in the newly developed system.³⁹ In order to improve the contractual stability, the new FIFA rules included the creation of two transfer periods per season, the second one being a limited mid-season window,⁴⁰ thus restricting players’ ability to move between clubs during only these 2 ‘windows’. Furthermore, they also implemented a contract duration timeframe for a minimum and maximum of 1 and 5 years, respectively. In addition, the new rules also have a 3-year protection period for contracts for players up to 28 years old, and a 2-year protection period for players older than 28 years. By imposing sanctions and financial compensation for the respective parties, when the contract is breached unilaterally, this system intends to maintain a more stable and regular functioning of sporting competition.⁴¹ Interestingly enough, there were no references to the payment of transfer fees in the adopted rules, thus eliminating the previously set practice completely.

However, although some of these changes do have positive effects on players, but when looking overall, these new rules on sanctions, training compensations, sporting suspensions and transfer windows themselves, in essence, have limited players ability to

³⁷ Ibid.

³⁸ European Commission - PRESS RELEASES - Press Release - Commission Closes Investigations into FIFA Regulations on International Football Transfers, available on: http://europa.eu/rapid/press-release_IP-02-824_en.htm accessed on: 2 April 2019

³⁹ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 225

⁴⁰ European Commission - PRESS RELEASES - Press Release - Commission Closes Investigations into FIFA Regulations on International Football Transfers, available on: http://europa.eu/rapid/press-release_IP-02-824_en.htm accessed on: 2 April 2019

⁴¹ Ibid.

freedom of movement within the EU.⁴² Additionally, the Author believes that the previously mentioned norms have considerably restrained smaller clubs from having a chance at acquiring top-tier players as wealthier clubs will still be able to pay larger sums for these players, thus having a far greater chance at winning championships and eventually only widening the gap between different clubs.

2.3. Resolution of disputes on transfers

In sports, similarly as in many other sectors, there is a strong need to have a well-established dispute resolution mechanism, which guarantees that the set rules are successfully enforced.⁴³ In football, its international governing body FIFA is responsible for providing: “*the necessary institutional means to resolve any dispute that may arise between Member, Confederations, clubs, Officials and Players.*”⁴⁴ Accordingly, there are two decision-making bodies under FIFA that are responsible for settling disputes that are related to international transfers.⁴⁵ Firstly, the Players’ Status Committee (PSC), which as written under Articles 22 and 23 of the FIFA RSTP, mostly decide on the employment-related disputes that arise between a club and a coach of an international dimension.⁴⁶ Furthermore, the second decision-making body under FIFA is the Dispute Resolution Chamber (DRC). It adjudicates cases and is responsible for disputes that fall under one of the following situations:

1. Contractual stability set out under article 13-18 of FIFA RSTP;
2. Employment-related disputes of an international scope between a player and a club;
3. Disputes that arise between different associations’ clubs regarding training compensation and solidarity mechanism under articles 20 and 21, respectively.⁴⁷

Naturally, there are some exceptions from the mentioned rules, and in some cases to expedite the dispute resolution process, the two individual independent judges, that are also mentioned under articles 23 and 24 of FIFA RSTP, will decide on several specific issues.

⁴² G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 226

⁴³ KEA and CDES study (2013) *The Economic and Legal Aspects of Transfers of Players* p. 62, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 7 April 2019

⁴⁴ FIFA Statutes 2011, Article 4.2.

⁴⁵ KEA and CDES study (2013) *The Economic and Legal Aspects of Transfers of Players* p. 62, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 7 April 2019

⁴⁶ See FIFA RSTP, Article 22 and 23

⁴⁷ See FIFA RSTP, Article 22 and 24

Furthermore, when there is a case of an appeal, the Court of Arbitration for Sport (CAS) is the institution competent to decide such sports-related issues through mediation and arbitration. Despite the fact that CAS is an institution that is independent of any sports organization,⁴⁸ many sports' federations have recognized it as the final instance or the 'Court of Appeal' for internal bodies.⁴⁹ It has even gained a reputation by many as the world's 'Supreme Court of Sports.'⁵⁰ Even though it is possible to appeal a decision made by the Court of Arbitration of Sport by bringing the case before the Swiss Federal Tribunal, it is a rare occasion as an arbitration's award can only be annulled in a few instances that are mentioned in the Swiss Federal Statute on Private International Law.⁵¹

Arbitration cases for sports-related disputes at the national level have also seen an increase in recent years. Sports arbitration bodies are usually connected to the particular national Olympic committee. As dispute resolutions by arbitration are more popular with football-related issues, accordingly 'football nations' like Italy, Spain and France have their own well-established national sports arbitration bodies. On the other hand, there are certain countries, for instance, England, where it is possible for the parties that are involved in a dispute to settle their matter through arbitration bodies that do not specialize in sports-related disputes.⁵²

Due to the tangled nature between rules governing sports and different national and international laws, the question of the applicable law for sports-related disputes could appear to be a tricky one. Yet, it turns out to be quite direct as for the national disputes, the law applicable will be the particular territory's domestic law. However, for international disputes, it depends on international conventions and the hierarchy of laws for each country, but as most transnational sports disputes are heard before the CAS, the choice of applicable law is left to its discretion.⁵³ Subsequently, Article R58 of the Code of Arbitration for sports lays out the law applicable to the merits, stating that: "*The Panel shall decide the dispute according to*

⁴⁸ Frequently Asked Questions - Tribunal Arbitral Du Sport / Court of Arbitration for Sport, available on: <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> accessed on: 7 April 2019

⁴⁹ KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 96, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 7 April 2019

⁵⁰ The Court of Arbitration for Sport: "The Supreme Court of Sports." Lakshmi Kumaran & Sridharan Attorneys. available on: <https://www.lakshmisri.com/News-and-Publications/Archives/Publication/The-Court-of-Arbitration-for-Sport-%E2%80%98The-Supreme-Court-of-Sports> Accessed on: 10 April 2019

⁵¹ Swiss Federal Statute on Private International Law of 18 December 1987, Article 190 (a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted; b) if the arbitral tribunal wrongly accepted or declined jurisdiction; c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim; d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated; e) if the award is incompatible with public policy.)

⁵² KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 97, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 7 April 2019

⁵³ Ibid.

the applicable regulations and, subsidiarity, to the rules of law chosen by the parties..."⁵⁴

Furthermore, if the parties have not agreed to the rules of law, then in such cases, the Panel chooses to apply the rules of law of the country where the specific federation or association has been registered,⁵⁵ which in most cases is Switzerland as it is very appealing to sports bodies because they benefit from the association status, which under Swiss law enjoy tax breaks and flexible legal terms.⁵⁶ Moreover, FIFA and UEFA are also based in Switzerland, more precisely, in Zurich and Canton Vaud, respectively.⁵⁷

2.4. Transfer System and the CAS

As previously stated, the biggest proportion of international disputes comes from football, and in most cases, these disputes arise from the contractual stability issues. These issues are mainly regarding the unilateral termination of a contract and the unclear financial payment structure in such cases.⁵⁸ The most controversial issue and possibly the main reason why so many players are reluctant to unilaterally breach their contracts before its term without just cause specified in Article 17 of FIFA RSTP⁵⁹ is because of the vagueness of the said article in terms of determining the amount or compensation payable.⁶⁰ Article 17 of the RSTP states that the party which has terminated the contract without just cause has to pay compensation to the other party.⁶¹ However, the most critiqued issue lies not within the compensation payable but rather than the criteria and unclarity of the exact amount that should be payable in such situations.⁶² The idea behind the discussions and negotiations in the late 1990s and early 2000s between the European Commission and FIFA, was to give the possibility for players to unilaterally breach their contracts after a stability period by simply paying compensation that is equal to the remaining wage that would have been paid to the player if he/she remained at the same club. However, as the FIFPro Vice-President, Philippe Piat, said:

⁵⁴ Court of Arbitration for Sport Procedural Rules, Article R58

⁵⁵ Ibid.

⁵⁶ "Sports Bodies Bring CHF1 Billion a Year for Swiss." SWI Swissinfo.ch, available on: https://www.swissinfo.ch/eng/money-spinner_sports-bodies-bring-chf1-billion-a-year-for-swiss/41371778
Accessed on: 10 April

⁵⁷ Ibid.

⁵⁸ KEA and CDES study (2013) The Economic and Legal Aspects of Transfers of Players p. 99, available on: <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> Accessed on: 10 April 2019

⁵⁹ Ibid.

⁶⁰ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 227

⁶¹ Article 17.1 FIFA RSTP

⁶² Supra note 58

*“FIFA had no intention of setting out clearly the details of the terms for breach at the initiative of a player. The objective was to maintain the vagueness and imprecision involved specifically in calculating compensation in the event of a unilateral breach, in order to safeguard the previous system,”*⁶³

thus, RSTP Article 17, still to this day, embodies the ambiguous meaning of the actual compensation payable by hiding behind the words - *“compensation for the breach shall be calculated with due consideration for the law for the country concerned, the specificity of sport, and any other objective criteria.”*⁶⁴

Moreover, although FIFA had created an official document that set out basic calculation principles for the compensation for breach of contract, these principles were never drafted and adapted in the regulations.⁶⁵ Thereof, it is evident that such obscurity in rules will definitely discourage players from terminating contracts without just cause, thus being indirectly forced to not enjoy the freedom of movement for workers.

It would at least help and give some kind of clarity about the compensation’s amount in such cases if the Court of Arbitration for Sport’s decisions would be consistent when interpreting and applying FIFA’s regulations, but it has failed to do that. The CAS does not derive its rulings from previous cases or precedents, and thus, has subsequently made contradictory decisions on how compensation regarding breach of Article 17 RSTP should be calculated. The following cases best illustrate differentiating decisions made by the CAS in similar circumstances.

CAS 2003/O/482 Ariel Ortega v. Fenerbahçe and Fédération Internationale de Football Association

This was the first case brought before the CAS by a football player, Arnaldo Ariel Ortega, who unilaterally breached a contract after the revised FIFA RSTP regulations in 2001. Mr. Ortega was transferred from an Argentinian club Atletico River Plate to a Turkish club Fenerbahçe Spor Kulübü in May 2002, for a sum of USD 7,5 million. During the following season, he suffered an injury, and as the Turkish club could not provide the necessary treatment, he returned to Argentina to receive it from his personal physiotherapist. However, in the following months, some conflicts arose from both sides as Mr. Ortega had not returned from Argentina for a long time, but the Turkish club had not paid him for December and

⁶³ "The Stability of Contract Principle No Longer Exists." FIFPro World Players' Union, available on: https://fifpro.org/en/?option=com_content&view=article&catid=27&id=2882 Accessed on: 15 April 2019

⁶⁴ Article 17.1 FIFA RSTP

⁶⁵ Supra note 63

January on time. In April, not having heard back from Mr. Ortega after they had sent him a request to immediately return back to the Turkish club, the aforementioned club submitted a claim against him before the FIFA DRC. Consequently, on 6 June 2003, without Mr. Ortega or any of his representatives being present, the FIFA DRC ruled that Mr. Ortega had breached the contract without just cause, therefore demanded him to pay USD 11 million as compensation for that. Furthermore, as the football player was still in the protected period, the FIFA DRC stated that he would not be eligible to play for any club till the end of the year. Followingly, Ariel Ortega submitted an appeal before the CAS to set aside the decision. Panel held a hearing on the 19 September 2003, in which it decided in favor of the Turkish club, awarding it with the final reimbursement amount of USD 11 million, therefore sticking with the FIFA DRC previously made decision.⁶⁶

As this was the first case after the amended FIFA RSTP regulations concerning unilateral breach of a contract, it would have been great if it had created a distinct precedent with clear answers to the questions arising from the FIFA RSTP Article 17. Moreover, it did not provide academics and interested readers with an answer to, in author's opinion, the most important question regarding the amount of compensation to be paid in the case of a unilateral breach of a contract. Accordingly, both courts did not provide a distinct answer on how the amount of USD 11 million was calculated precisely. It seems that the CAS was reluctant to make any adjustments to the FIFA DRC's decision, therefore choosing the easy route and just accepting their ruling on this matter. For that reason, players would be unwilling to unilaterally end contracts before their term, which in the broader view was probably FIFA's intention all along.

CAS 2005/A/902-903 P. Mexès and AS Roma v. AJ Auxerre and AJ Auxerre v. P. Mexès and AS Roma

In this instance, a French football player Philippe Mexès had signed a youth contract with the French club Auxerre for five years. After two years, in 2000, he replaced it with a professional football player's contract for an additional five-year period, and later on, agreed to extend the latter contract by an extra year. Auxerre had raised the player's salary and agreed to pay him a transfer bonus if he decided to play for another club. However, when Mr. Mexès asked the club what the transfer fee would be if they agreed to mutually terminate the contract, the French club did not reply, stating that they expect him to respect the contract which expires on 30th of June 2006. Moreover, the Italian club AS Roma, expressed an interest in signing Mr. Mexès for EUR 4.5 million, but Auxerre was not interested. As a

⁶⁶ CAS 2003/O/482 Ariel Ortega v/ Fenerbahçe & Fédération Internationale de Football Association (FIFA)

result, the French football player appealed to FIFA asking to be released from the contract, stating that Auxerre had unilaterally breached the contract. Moreover, in less than 24 hours, Mr. Mexès had already signed a new contract with AS Roma.⁶⁷

Overall, this issue with the same facts expanded into multiple cases between different parties - for sporting sanctions, for the compensation payable, and for the sporting sanctions against the Italian club⁶⁸, but for the purposes of comparing the compensation payable for a unilateral breach of a contract in similar cases, the author will only take into account cases regarding compensation. The FIFA DRC, in this instance, decided that Mr. Mexès would have to pay EUR 8 million to Auxerre for a breach of contract. FIFA DRC's decision took into account the remaining value of player's contract with Auxerre, the fact that Mr. Mexès had been training for 7 years at the said club (including his youth contract), and other special circumstances of the case and objective criteria. Nevertheless, both parties were not pleased with this decision, therefore they both appealed this decision before the CAS.⁶⁹

The CAS reviewed the facts of the case and stated that the FIFA DRC's decision lacked in providing a clear method of calculation for the compensation payable. Therefore, the Panel set out to do that by providing its own explanation. Firstly, it looked at what the French Club had 'invested' in the player, taking into account salaries, contract extension, and the bonus plus the fee paid for the agent when he signed the agreement, which amounted to a sum of EUR 2,289,644. Secondly, the Panel also considered the future earnings for the player's transfer that Auxerre evidently had lost due to the early termination of a contract. Since AS Roma was the only team that had showed any interest in the transfer of Mr. Mexès during that time, the Panel took its offer of EUR 4.5 million into indemnity calculations, even though Auxerre said that his market value was much higher by comparing his talents and value with other similar players that had been transferred previously.⁷⁰ Therefore, in the end, the Panel decided that Auxerre should receive EUR 7 million for the costs incurred by the club amounting to EUR 2,289,644 and Roma's offer of EUR 4.5 million, plus the other criteria that the Panel had taken into account. Interestingly, the Panel did not specify what exactly was included in the 'other criteria' compensation, hesitating to give clear calculations on why it decided to reduce the FIFA DRC's original judgment that amounted to EUR 8 million.⁷¹

⁶⁷ CAS 2005/A/902-903 P. Mexès and AS Roma v. AJ Auxerre and AJ Auxerre v. P. Mexès and AS Roma

⁶⁸ ASSER International Sports Law Series, CAS and Football Landmark Cases, p. 47

⁶⁹ "AJ Auxerre v. Philippe Mexes and AS Roma CAS Award: Commentary." Available on: <https://www.thefreelibrary.com/AJ+Auxerre+v.+Philippe+Mexes+and+AS+Roma+CAS+Award%3A+commentary.-a0352250384> Accessed on: 20 April 2019.

⁷⁰ Supra note 68, p. 54

⁷¹ Ibid., pp. 56-57

Although in this case the CAS decision did not determine the amount payable for every criterion that it included in its final judgment's calculations, comparing to the previous case, where the FIFA DRC and CAS did not give any explanations regarding how they came up with the final indemnity amount, this decision seemed to give at least a bit clearer frame of reference for future cases. However, it still seems strange that the CAS decided to reduce the total compensation payable by 1 million not giving any justifications, as previously it had just accepted the FIFA DRC's given assessment.

CAS 2007/A/1298-1300 Webster v. Heart of Midlothian

In this case, in 2007, a football player Andrew Webster had an agreement with Scottish club Heart of Midlothian and during his employment, as the club became interested in retaining him for a longer period of time offered Mr. Webster to extend the contract for two more seasons, on improved terms. However, the proposed and afterward re-negotiated agreement did not satisfy the player's expectations, thus he refused to sign a new agreement. Consequently, during that time, Webster was not selected to play in the first team matches, creating an impression that the club was forcing him to sign the new deal or he would not be allowed to play. Therefore, after seeking advice from the Scottish Professional Footballer's Association (SPFA), he decided to unilaterally terminate his contract without just cause as his contract was out of the protected period. Accordingly, the club claimed compensation at the estimated transfer value of 4.9 million pounds, but the CAS in its decision awarded only 150 000 pounds (the residual salary on Webster's contract), not taking into account training investment, Scottish law and other measures written in Article 17 RSTP.⁷²

This decision seemed to have greatly increased the freedom of movement for players, as well as improved the chances for smaller clubs to compete with larger clubs for the top players, thus aligning with the Commission's previously stated desires in this matter. Nevertheless, the approach of the CAS to the award given in this case seemed very contrasting to the previous cases. Here, the CAS decided that one of the criteria specified under Article 17 FIFA RSTP to be evaluated in the case of a unilateral breach of a contract - the specificity of sport - should be: "*about balancing the need for contractual stability with the need to ensure the free movement of players.*"⁷³ Therefore, as the CAS added, the compensation should be calculated on equal grounds for both, the club and the player, making sure that the calculated compensation is based on the criteria that can be claimed or is

⁷² See case Heart of Midlothian v. Webster and Wigan Athletic [2008] CAS Decision 2007/A/1298-1300

⁷³ ASSER International Sports Law Series, CAS and Football Landmark Cases, p. 74

required to be paid from both sides.⁷⁴ In this case, taking into consideration that the player was out of the protected period, it means that the player should pay only the amount of money that the club would have paid if he had stayed - the residual value of the contract.

CAS 2008/2/1519 Shakhtar Donetsk v. Matuzalem

However, only a year later, after the Court's positive decision, from the player's perspective, made in the previous case, the decision made in the following case resulted in a different outcome. In 2008, a football player, Matuzalem Francelino da Silva, was in a similar situation, that is, he unilaterally breached his contract with Ukrainian football club Shakhtar Donetsk after the protected period.⁷⁵ However, this time the CAS ruled that in order to determine the compensation payable, other measures besides the remaining value of a contract should be taken into account, hence it also accounted for the market value of the player and future salary obligations of third parties.⁷⁶ Here, the CAS decided that: "*the award of damages had to be based upon the principle of 'positive interest,'*"⁷⁷ or in other words, looking at the conditions that would have been for the injured party if there had not been a breach of a contract.

In this case, as the factual circumstances differed from the *Webster* case, the CAS did not apply its previous reasoning. Here, when calculating the compensation, the Panel took into consideration the non-amortized transfer sum and the sports-related damages and accordingly ordered Matuzalem to pay EUR 11,858,934 plus interest to the Ukrainian club. This decision also indicated that there are no definite conditions that readers or lawyers could take into account to guarantee the way how the compensation amount will be calculated in future cases regarding breach of Article 17. In addition, even the sports lawyer, Juan de Dios Crespo Pérez, who was on the winning side of both previous cases, admitted that his first thoughts after this decision: "*was that Article 17 of the FIFA Regulations for the Status and Transfer of Players is like the 1001 Nights of the legendary Arabian tales: 'all different and marvelous'.*"⁷⁸

Looking back at these cases, they all have one connecting link - unilateral termination of a contract without just cause which falls under the Article 17 FIFA RSTP. However, the decisions made by the FIFA DRC and the CAS have significantly varied, especially, regarding the compensation payable for this kind of a breach. The Ortega case, being the first

⁷⁴ Supra note 72

⁷⁵ See case Shakhtar Donetsk v. Matuzalem [2008] CAS: 2008/A/1519

⁷⁶ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 228

⁷⁷ F. M. de Weger, Webster Matuzalem, De Sanctis and the Future, available on: https://www.asser.nl/media/2072/islj_2011_3-4.pdf p. 42, accessed on: 20 April 2019

⁷⁸ Juan de Dios Crespo Pérez commentary in CAS and Football Landmark Cases, p.79

case regarding the breach of contract before the CAS, did not provide any explanations on how the total sum of compensation was calculated, therefore, it appeared that both courts had just come up with the number out of nowhere.

Secondly, the Mexès case gave some hope for the interested parties when the CAS in its judgment stated that the FIFA DRC had not clarified how it had made the calculations regarding compensation. Hence, the Panel made an effort to explain how it came up with the final amount itself. However, it really did not provide any specifics on all included costs, therefore making people still wonder about this issue.

Thirdly, the Webster case gave expectations to players that they would enjoy more freedom being able to terminate their contracts after the protected period without just cause by simply paying the residual value as compensation. However, only a year later, the CAS specified in the Matuzalem case that the termination of a contract, even after the protected period and following the relevant notice period, remained a serious breach of duty to respect an existing contract. Furthermore, stating that Article 17 RSTP does not provide a free possibility for players or clubs to unilaterally breach contracts at a fixed price or no price at all.⁷⁹ As previously mentioned, these cases, although similar in substance, provided different outcomes as the CAS panel has refused to follow the previous rulings, thus leaving this issue unanswered.

CAS 2010/A/2145-47 Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD

Nevertheless, a few years later the *De Sanctis* case appeared to clarify a more conclusive answer regarding the amount of compensation to be paid in the case of a termination of a contract by a player after the protected period.⁸⁰ Similarly as in the earlier mentioned cases, in this case, the Italian football player, Morgan de Sanctis, terminated his contract with the Italian club Udinese outside the protected period. The Italian football club claimed that the amount of compensation should be based on the principle of ‘positive interest’ as it was in the Matuzalem’s ruling. On the other hand, of course, the player hoped that this ruling would go the same way as in the Webster’s case, namely, that he will only have to pay the remaining value of the contract.⁸¹ However, both judicial bodies - DRC and CAS decided that additional damages apart from the contract’s residual value itself could be claimed. As a result, even though the methods of calculating such costs varied between cases, it was apparent that the remaining value was not the only component in determining the

⁷⁹ Shakhtar Donetsk v. Matuzalem [2008] CAS Decisions: 2008/2/1519 para 63.

⁸⁰ F. M. de Weger, Webster Matuzalem, De Sanctis and the Future, available on: https://www.asser.nl/media/2072/islj_2011_3-4.pdf p. 47, accessed on: 20 April 2019

⁸¹ See CAS 2010/A/2145-2147

amount of compensation payable, therefore, will be judged on a case by case basis.⁸² In addition to this, in 2017, in the case of *FC Shakhtar Donetsk v. Olexandr Vladimirovich Zinchenko, FC UFA & FIFA*,⁸³ the CAS stated that the calculation methods regarding compensation for the breach of a contract previously developed by the CAS Panel should never be used over one another, expressly indicating that each case should be looked at separately, on a case by case basis, giving each CAS panel the ability to find the most suitable method by always applying FIFA RSTP Article 17.⁸⁴

The author thinks that the inconsistencies in the CAS decisions, that make even the top sports lawyers question the possibility to predict the outcome for future cases, directly as well as indirectly conflict with the principles that the EU nurtures.

With this in mind, the problem is that these two systems, one that, as the Commission intended to, allows players to unilaterally breach contracts and the second, in which the transfer fees are still payable, cannot work together. The old system's method, which allows for considering 'market value' in previous cases, completely conflicts with the new system's notion of granting player's more freedom by eliminating these exact payments. The aforementioned cases and other Court of Arbitration for Sport's judgments have essentially hindered European Union's efforts to develop the transfer system by liberalizing the player market, thus raising questions whether CAS and other sports arbitration bodies are capable of working under the autonomy that is given to sports governing bodies.⁸⁵

Moreover, the CAS has not only adjudicated on contractual stability and compensation matters, but also on cases that help us better understand what actually constitutes as a transfer. The FIFA RSTP does not provide a definite explanation of what is necessary in order for an action to be considered as a transfer, thus sports lawyers have to interpret this matter by taking into account cases and decisions made by sports arbitration body CAS as well as other legal sources, in particular, Swiss law, as it stated in Article 57 of the FIFA Statutes: "*CAS shall primarily apply the various regulations of FIFA and, additionally Swiss law.*"⁸⁶ The two leading cases from the CAS, best known as *Keita*⁸⁷ and *Zarate*⁸⁸ case, both looked at the question of whether a transfer had taken place for the purposes of the FIFA RSTP from different points of view.

⁸² Supra note 80, p. 43

⁸³ See CAS 2017/A/4935

⁸⁴ See CAS 2017/A/4935

⁸⁵ G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 229

⁸⁶ FIFA Statutes, Article 57.2

⁸⁷ See CAS 2010/A/2098

⁸⁸ See CAS 2011/A/2356

The Keita and Zarate cases

In the first case, a football player Seydou Keita was involved in a transfer process moving from the French club RC Lens to the Spanish club Sevilla Club de Fútbol S.A.D. Both clubs signed a memorandum of understanding, or in other words, the transfer agreement, which laid out the rules and conditions of the said transfer. This agreement also included a “Sell-On Clause” under Article 2.2.4., which explicitly stated that in a case of resale of Mr. Keita, the RC Lens would also receive a particular percentage out of it, based on the capital gain amount.⁸⁹ Despite that, later Mr. Keita relying on Spanish legislation “Real Decreto” unilaterally terminated his employment contract with the Spanish club after paying the specified amount. However, the main dispute that followed from this case was whether actions taken by the player were equivalent to a sale.⁹⁰

In the second case, a football player Mauro Matias Zarate and his previous club in the player’s contract had agreed to a specific amount to be paid if Mr. Zarate wanted to unilaterally terminate his contract before its deadline, which is generally recognized as a ‘buy-out clause’. Here, the main problem was whether the utilization of the buy-out clause could be seen as a transfer.

In both of the previously mentioned situations, football players made use of different methods in order to terminate their original employment contracts so that they could sign a new employment contract with a different club. Nevertheless, it remains uncertain whether these transactions might be considered as transfers within the meaning of Article 21 FIFA RSTP, thereby activating the right to solidarity contribution expressed from the said article.⁹¹

In the Zarate case, the CAS distinguished the four components that identified the transfer of a player between clubs for the purposes of the solidarity contribution mechanism. As the CAS panel stated, these are:

1. Firstly, there must be a consent of the club of origin to the early termination of its contract with the player.
2. Secondly, the willingness and consent of the club of destiny to acquire the player’s rights.
3. Thirdly, the consent of the player to move from one club to the other.

⁸⁹ See CAS 2010/A/2098

⁹⁰ Kulkarni, Manali. "When Does a Buy-out Clause Trigger a "transfer" under FIFA Regulations?" LawInSport, available on: [https://www.lawinsport.com/topics/articles/item/when-does-a-buy-out-clause-triggers-a-transfer-under-fifa-regulations?highlight=WyJidXlvdXQiLCJjbGF1c2UiLCJjbGF1c2UncyIsImJJeW91dCBjbGF1c2UiXQ==#references](https://www.lawinsport.com/topics/articles/item/when-does-a-buy-out-clause-triggers-a-transfer-under-fifa-regulations?highlight=WyJidXlvdXQiLCJjbGF1c2UiLCJjbGF1c2UnIiwY2xhdXNIJywiLCJjbGF1c2UncyIsImJJeW91dCBjbGF1c2UiXQ==#references). Accessed on: 25 April 2019

⁹¹ Ibid.

4. Lastly, the price or value of the transaction.⁹²

Additionally, as the CAS Panel stated in the Zarate case, that in order to decide whether a specific transaction involves a transfer with respect to FIFA RSTP, it is crucial that:

*“the reality and the substance of the transaction shall prevail over discussions about forms or schemes of transfers, especially when the FIFA provisions do not impose such schemes or forms for the payment of the solidarity contribution.”*⁹³

It is evident that the latter three conditions have been satisfied in both beforementioned cases. Nevertheless, the first condition regarding the original club’s consent for the early termination is still arguable in each of the cases, as the CAS’ judgment differed in seemingly alike cases. According to the CAS, the decision was based differently because in the Zarate case the fact that the club had preliminarily determined the sum of money to be paid by Zarate if he prematurely terminated the contract, could not be seen as the same as Sevilla’s approach in defining the compensation to be paid by Keita in advance in the event that the player wished to bring the contract to an end.⁹⁴

Once again it turns out that the decisions made by the CAS seem to be unpredictable and thus not giving any guarantees for players and clubs in the future cases, which also hinders the development of one of the publicly most recognized issues regarding transparency of sports governing bodies and their rules. However, in April 2018 FIFA made a step forward in the right direction by making amendments to the RSTP, most notably to Article 17, which now gives a better understanding to the potential financial consequences when either party decides to terminate a contract without just cause.⁹⁵ The newly adopted amendments now provide a distinction between players who remain unemployed and those who have found new employment after there has been a breach of the contract without just cause, thus differentiating the amount of compensation payable between these cases.⁹⁶ Because of these amendments, players and clubs now have a better understanding of consequences in such

⁹² See CAS 2011/A/2356

⁹³ Ibid.

⁹⁴ Supra note 90.

⁹⁵ Gunawardena, Tiran. "FIFA's April 2018 Amendments to Its Regulations on the Status and Transfer of Players (RSTP)." LawInSport, available on: <https://www.lawinsport.com/topics/sports/item/fifa-s-april-2018-amendments-to-its-regulations-on-the-status-and-transfer-of-players-rstp> Accessed on: 28 April 2019.

⁹⁶ Amendments to the Regulations on the Status and Transfer of Players (Circular no. 1625) available on: <https://resources.fifa.com/image/upload/1625-amendments-to-the-regulations-on-the-status-and-transfer-of-players.pdf?cloudid=bmkwifiiyexkdnicpsip> Accessed on 28 April.

situations, which certainly is an improvement from the previous method. Nevertheless, the CAS will still enjoy some discretion within this regulatory framework.⁹⁷

2.5 Transfer System's legality under EU law

Bearing in mind the previously mentioned and analyzed matters of sports specificity, sports governing bodies and their regulations, dispute resolution matters and the European Union which is in the midst of all of that, it is clear that there are substantial issues concerning the current transfer system's consistency and certainty, or as it would be put more precisely - inconsistency and uncertainty. Furthermore, because of the regulations and their unreliable interpretation from arbitral bodies, players cannot make informed financial decisions. Therefore, as they do not want to risk paying potentially huge compensations, they are reluctant to unilaterally breach contracts without just cause, thus remaining loyal to the traditional system of transfer fee payments, consequently continuing to hinder the freedom of movement for EU workers guaranteed under Article 45 TFEU in practice.⁹⁸

Another issue regarding the impediment of the freedom of movement can be found when looking at a different example in which a club refuses to issue an international transfer certificate (ITC). For example, such issue happened in the so-called 'Bosman II' case in 1998 between Hungarian player Tibor Balog and Royal Charleroi Sporting Club ASBL⁹⁹ even though in the end, it did not even reach the final verdict because the parties managed to come to a settlement and dropped the case. In this case, a professional football player from Hungary, who in the middle of 1990s was playing for a previously mentioned Belgian first division team, did not want to sign a new agreement with his club as they did not seem to agree on the future plans. Consequently, he was placed on the transfer list, and for some time no club appeared to be interested in paying the transfer fee. However, because the Belgian federation had not delivered the international transfer certificate upon the party's request at the time when a Norwegian club wanted to hire Balog, the transfer still could not take place. Therefore, it raises a question of what happens when a club wishes to hire a player who has unilaterally terminated his employment contract with the former club prior to its expiration, but after having signed a contract with the new club, which has requested the particular ITC through its national association, the latter refuses to deliver it instructed by the former club of the player?¹⁰⁰

⁹⁷ Supra note 95.

⁹⁸ G. Pearson, *European Law Journal*, Vol. 21, No. 2, March 2015, p. 229

⁹⁹ See Case 264/98 *Tibor Balog v. Royal Charleroi Sporting Club*

¹⁰⁰ Refusal to Deliver the ITC in International Transfers of Football Players and Free Movement of Workers within the EU - Entry B." *LawInSport*, available on:

<https://www.lawinsport.com/topics/sports/football/item/refusal-to-deliver-the-itc-in-international-transfers-of->

In this case, during that time, Hungary was not part of the European Union, and as Balog had a Hungarian nationality, he could not depend on the Bosman ruling that concerned nationals of EU. For that reason, as he had not benefited from the Bosman ruling, he decided to contest the transfer rules on the basis of EC competition law.¹⁰¹

However, stepping aside from this particular case at the moment, the question is what would happen in the event when an EU citizen would be confronted with such an issue? And can this situation be legally justified? Firstly, by not issuing the ITC for a player who is eligible to be transferred, it hinders the registration with the new club, thus blocking his/her right to play. Article 45 TFEU¹⁰² implies that any direct discrimination on the grounds of nationality is prohibited. Moreover, it indicated that any indirect discrimination and obstacles that are hindering the exercise of the freedom of movement, which is not proportionate, necessary and justified to the legitimate aim pursued must be eliminated.¹⁰³ Therefore, it is possible to determine that in such cases, it would be viewed as an illegal action, because there is no legitimate aim, that could be considered as necessary or justified, for a club to create an obstacle that hinders the exercise of the right to free movement for a player that has already signed a new contract with another club.

Furthermore, the *Olympique Lyonnais v. Olivier Bernard and Newcastle United*¹⁰⁴ case provided additional guidance for evaluating whether a specific provision may constitute as a barrier to sportsmen's freedom of movement.¹⁰⁵ In this case, a young French football player, Oliver Bernard, had signed a 'joueur espoir' contract with Olympique Lyonnais for three seasons. Before the expiration of the contract, the French club offered him a professional contract, which he refused to sign, and followingly signed a professional contract with Newcastle United FC. Consequently, the former club sued him, seeking damages from Mr. Bernard and Newcastle United FC for the amount of EUR 53,357,16. They claimed that this amount was equal to the salary that Mr. Bernard would have received if he had signed their offered agreement. In this instance, the Court had to determine whether the:

[football-players-and-free-movement-of-workers-within-the-eu-entry-b?category_id=153](#) Accessed on 2 May 2019

¹⁰¹ A. Vermeersch, All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport, JCER Volume 3 Issue 3, p. 240

¹⁰² See Article 45, TFEU

¹⁰³ Parliamentary questions answered by Mr. Andor on behalf of the Commission on 7 September 2011, available on: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-007547&language=EN> Accessed on: 3 May 2019

¹⁰⁴ Judgment of the Court (Grand Chamber) on 16 March 2010, reference for a preliminary ruling under Article 234 EC in Case C-325/08, available on: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=645F956726BC123EAE51C6A9FBE2C69D?text=&docid=80365&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=876898>

¹⁰⁵ Supra note 100

*“provision of national law pursuant to which a ‘joueur espoir’ who at the end of his training period signs a professional player’s contract with a club of another Member State of the European Union may be ordered to pay damages,”*¹⁰⁶

is contrary to the principle of freedom of the movement under Article 45 TFEU. Here, the Court decided that:

*“Even though, as Olympique Lyonnais states, such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less makes the exercise of that right less attractive,”*¹⁰⁷

hence, such rules contradict with the freedom of movement guaranteed under Article 45 TFEU.¹⁰⁸ Additionally, the Advocate General Eleanor V. E. Sharpston in her opinion of this case agreed with the previously stated, but added that if the obstacle to freedom of movement for workers is too uncertain or indirect, then it cannot be recognized as a violation of Article 45 TFEU.¹⁰⁹

To a certain extent, the impediment of the refusal to issue the ITC may be uncertain or indirect. Firstly, because it essentially depends on the actions taken by the previous club, and, secondly, because it indirectly restricts the player to sign an employment contract with his new club.¹¹⁰ Accordingly, the FIFA RSTP Article 9 clearly states that players who are already registered with a club can only register with a new one after the latter has received an ITC from the previous club.¹¹¹ Even though there is an alternative route, it only applies in limited circumstances, which following a special process allows FIFA to issue a provisional ITC.¹¹² Furthermore, the FIFA RSTP states that if the contract between the player and the former club has not expired or there is no mutual agreement for its premature termination, then the former club can reject the new club’s ITC request.¹¹³

The author believes that such a right for an association to reject an ITC request, only because there is no mutual agreement regarding the player’s premature termination of a contract, creates a significant obstacle for a player to enjoy his rights to play for other clubs in different EU Member States, since he cannot be registered to a new club without the ITC.

¹⁰⁶ Supra note 104, para 16

¹⁰⁷ *ibid.* para 36

¹⁰⁸ *ibid.* para 37

¹⁰⁹ Opinion of Advocate General Sharpston delivered on 16 July 2009 (1) Case C-325/08 *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, available on:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=645F956726BC123EAE51C6A9FBE2C69D?text=&docid=76319&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=876898> para 39

¹¹⁰ Supra note 100

¹¹¹ FIFA RSTP Article 9

¹¹² Supra note 100

¹¹³ FIFA RSTP Annex 3 Article 8.2.4

Naturally, it is also logical that clubs themselves are unwilling to hire players who still have some contractual conflicts with their previous clubs as they also might become liable for their previous actions, therefore adding to the indirect restriction for a player even further. Even though some may argue that this can be justifiable to ensure transparency in international transfers, the author thinks that it cannot be considered as a legitimate aim for something that so significantly obstructs players' rights to enjoy the freedom of movement of workers. Additionally, this issue presents an opportunity for football clubs to take an adverse advantage of this rule and FIFA's slowness in adapting regulations and issuing decisions.¹¹⁴ In my point of view, this FIFA RSTP rule should be modified in such a way that it does not allow former clubs to reject the delivery of the ITC, therefore making it mandatory to deliver it, but in the same time, informing the new club whether there remains a dispute between the previous parties. This way, the player enjoys the possibility to freely sign a contract with new clubs in different states, but the new club can see whether there are ongoing disputes between the player and the former club and decide whether to hire the player.¹¹⁵

That being said, when taking a step back and looking at the so-called *Bosman II* case, it was unfortunate that this case did not reach a verdict as it was withdrawn, because this would be the first ruling by the ECJ on the application of competition law to sports. However, the Advocate General Stix-Hackl, who was supposed to deliver the Opinion on the day that both parties settled the case, later co-wrote an article declaring that both systems, before and after the Bosman ruling, were in breach with the competition law rules. As the authors Egger and Stix-Hackl noted, football clubs have limited resources, yet both transfer systems potentially separate clubs which are wealthy and poor, restricting the choice available for the latter clubs to acquire high-level players, therefore tampering with the supply and demand of the player market.¹¹⁶ As a result, it seems that this system only strengthens clubs that are already economically dominant in respect to smaller clubs, hence it hinders the advancement of clubs' overall performance.

For a while, the European Court of Justice was reluctant to judge on the relationship and applicability of the EU competition law to sports, therefore, there were no policies regarding EC competition rule applicability to sports for some time. However, as the sports sector had started to grow significantly throughout the second part of the 20th century, it could not avoid the inevitable, thus bringing the question of sports connection with competition law to the ECJ and the Commission. Accordingly, the European Commission

¹¹⁴ Supra note 100

¹¹⁵ Ibid.

¹¹⁶ A. Egger and C. Stix-Hackl, 'Sports and Competition Law: A Never-Ending Story?' (2002) 23/2 European Competition Law Review, p. 87–88.

attempted to set a number of guidelines on the application of competition law to sport in 1999.¹¹⁷ It thereof determined four categories under which the rules of sports federations could be grouped, accordingly:

1. Rules that do not come under Article 85(1) of the EC Treaty, given that they are necessary for a sports organization;
2. Rules, which if have a significant effect on trade between the Member States are prohibited;
3. Rules that qualify for an exemption although they are restricting competition;
4. Rules that fall under Article 86 of the EC as being abusive of dominant position.¹¹⁸

Albeit, the said categories may seem to be straightforward, in practice, they are not, which is why there was a need to clarify these guidelines through the Court's interpretation of different cases, particularly in Piau¹¹⁹ and Meca-Medina¹²⁰ cases. Additionally, both of these cases also offered an opportunity for the Court of Justice to explain what exactly the sports special characteristics are.¹²¹ However, there are two ways how different EU institutions look at the special characteristics of sports. From the one side, sport is considered from the social and political point of view, which is more concerned with the educational, youth development, and promoting health-enhancing aspects. Yet, from a different perspective, special characteristics of sports are scrutinized from legal and economic angles with the help of the European Commission and other institutions that look at the relationship between EU laws and sports. Furthermore, in many cases, including the previously mentioned Bosman and Meca-Medina cases, it has been demonstrated that the Commission's and ECJ's decisions have included and considered sports' characteristics to apply Treaty rules to the sports sector. Moreover, courts have clearly recognized the fundamental role of sports governing bodies in regulating sporting leagues and their competitions.¹²² Best examples of this can be observed through famous cases like Lehtonen¹²³, in which transfer windows were deemed legal; Deliege,¹²⁴ regarding the selection criteria for international competitions; and Meca-Medina¹²⁵

¹¹⁷ A. Vermeersch, All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport, JCER Volume 3 Issue 3, p. 240

¹¹⁸ Commission debates application of its competition rules to sport IP/99/133

¹¹⁹ See Case T-193/02

¹²⁰ See Case C-519/04 P

¹²¹ Supra note 117

¹²² Ibid. p. 241

¹²³ See Case C-176/96

¹²⁴ See joined cases C-51/96 and C-191/97

¹²⁵ Supra note 120

case concerning doping rules. They were all formed by the governing bodies to fulfill “*their roles as guardians of their respective sports; a role recognized in the judgments.*”¹²⁶

Nonetheless, almost all of the previously mentioned cases throughout this paper have been adjudicated around the turn of the 21st century, and even though, the CAS had settled many disputes over the years, the last real case that challenged the transfer system before the ECJ was in 2001. However, since the agreement in 2001, the legal framework on how sports are viewed throughout the EU has changed considerably.

Firstly, the aforementioned Meca-Medina case in 2006 set a precedent establishing EU law’s primacy over sports federations. Sporting rules that had an economic effect before this case was protected to challenges simply because they were sporting rules. However, in this case, the two professional swimmers David Meca-Medina and Igor Majcen, who both tested positive in a doping test, sought declaration that certain rules adopted by the International Olympic Committee (IOC) and “certain practices relating to doping control were incompatible with the Community rules on competition and freedom to provide services.”¹²⁷ In this case, the Court of Justice stepped away from differentiating between sporting and economic aspects of the sporting activity on the line. Furthermore, the Court of First Instance (CFI) also had previously stated that “high-level sport has become, to a great extent, an economic activity.”¹²⁸ Additionally, the ECJ in its decision stated that:

*“the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.”*¹²⁹

Consequently, although this particular case was brought up by professional swimmers, not football players, this decision may indicate a serious shift in the way the CJEU approaches sports-related cases, giving courts more freedom when examining sporting justifications.¹³⁰

Secondly, after the Treaty of Lisbon came into force in 2009, the Article 165 TFEU provided that the European Union should assist to the advancement of European sporting issues by taking into consideration sport’s specific nature.¹³¹ In addition, it is also stated that the EU activities shall aim to develop the European dimension in sport by promoting fairness

¹²⁶ Supra note 122

¹²⁷ Supra note 120

¹²⁸ A. Vermeersch, All’s Fair in Sport and Competition? The Application of EC Competition Rules to Sport, JCER Volume 3 Issue 3, p. 242

¹²⁹ See Case C-519/04 P, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0519> para 27

¹³⁰ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 231

¹³¹ TFEU Article 165(1)

and openness in sporting competitions as well as cooperation among sporting bodies.¹³² It seems that the Lisbon Treaty will reaffirm ECJ decisions in regards to applying the Treaty's provisions on the payment of transfer fees, as the Court, already before the Lisbon Treaty, had recognized the sports specific nature and viewed it as special. However, the wording of Article 165 TFEU regarding fairness and openness can potentially be used to tackle the current system, especially by smaller clubs that wish to compete for the top-level players' market.¹³³

However, even with these advancements from the EU side and a few attempts from the UEFA/FIFA side, like the establishment of the Financial Fair Play Regulations (FFP), which aims to handle the financial stability of football clubs through the creation of the 'break-even assessment', the FIFA's global Third Party Ownership (TPO) Ban, which aims to improve the fairness and integrity of football competitions¹³⁴, and other regulations, the current system still continues to impose limitations for players from the perspective of free movement. Additionally, it has not proven to have a positive effect for the smaller clubs to compete for elite-player market and to maintain a competitive balance, as: *"the current system continues to artificially restrict the market for players to those clubs that could afford to pay high transfer fees."*¹³⁵

Taking into account the above mentioned, it is evident that the European Commission's intentions with the 2001 agreement with UEFA/FIFA have not produced the kind of a system that would go well along with the European Union's laws and principles. This system has not benefited players and smaller clubs, thus, ultimately, having a negative impact on competitive balance. Moreover, it seems that the Commission has no intention of reopening its investigation into the transfer system, thereby leaving it in the hands of FIFPro to possibly challenge the current system.

¹³² TFEU Article 165(2)

¹³³ Supra note 130, p. 232

¹³⁴ An update on change drivers and economic and legal implications of transfers of players, Final Report to the DG Education, Youth, Culture and Sport of the European Commission by KEA and ECORYS, available on: <https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf> p. 11, accessed on: 9 May 2019

¹³⁵ G. Pearson, European Law Journal, Vol. 21, No. 2, March 2015, p. 235

3. ECONOMIC ASPECTS OF TRANSFERS

In this part, the author will discuss the transfer market's main characteristics, its key economic drivers and the data related to the football market's immense growth during the last decade. The following part will also look at the impact and the economy of the 'big five' European leagues with respect to other leagues and football world overall.

During the last years, the transfer market has witnessed numbers and values of transfers that have never been seen before. The total number of international transfers has been consistently growing year to year throughout the last decade without any exceptions. Consequently, in 2018 the number of international transfers per year had raised by almost 72% since 2011, amounting to 16533 international transfers in 2018.¹³⁶ Out of all 6 FIFA confederations, the UEFA has seen the greatest transfer activity, in both, the incoming and the outgoing transfers, which made up for almost 57% of transfers worldwide, therefore, proving that the EU football market is the most dominant in the world.¹³⁷ Additionally, regarding the value of transfers, the European clubs spent USD 6,2 billion on international transfer fees, which made up for 87,7% of the spending around the world.¹³⁸ This is in most part owing to the European 'big five' leagues - the Premier League in England, the Primera Division in Spain, the Germany's Bundesliga, and the Seria A and Ligue 1 in Italy and France, accordingly. Moreover, clubs from the 'big five' leagues in 2018 spent a total of USD 5,14 billion on transfers, which equals to 73,1% of worldwide spending on transfers. To put this in perspective, the next largest spenders, China, and Saudi Arabia, spent only a bit more than USD 0,36 billion combined together.¹³⁹

However, even though the international football market, like any other market, has experienced the globalization phenomenon, the geographical location and proximity appear to have a major impact on transfers, and the data proves it. Consequently, all confederations, except one, have seen that their clubs in most cases have transferred players to a different club within the same confederation.¹⁴⁰ Nevertheless, when looking at the distribution of transfer types between confederations, the data provides an interesting insight. Despite the fact that the most popular transfer type throughout all confederations is the same, that is, the transfer of player out of contract, which can be defined as: *“the type of transfer conducted when a player signs for a new club when he is not contractually bound to any former club and no transfer*

¹³⁶ FIFA TMS, Global Transfer Market Report 2018, available on: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf p. 7, accessed on: 10 May 2019

¹³⁷ Ibid., p. 11

¹³⁸ Ibid., p. 25

¹³⁹ Ibid., p. 27

¹⁴⁰ Ibid., p. 11

agreement exists,¹⁴¹ there are significant differences amongst confederations in regards to the percentage of such transfers. What is rather noteworthy, in my point of view, is that the UEFA leads the group with the smallest percentage of international transfers that are out of the contract. The data from the 2018 Global Transfer Market Report by the FIFA TMS provides that, in the case of UEFA, only 58,4% of transfers involved players out of contract, which is far less than in other confederations, for example, CAF - 84,7% and OFC - 85,7%, consequently, also lower than the worldwide percentage, which stands at 65,4%.¹⁴² For this reason, it seems that in some part the European Union and its principles have impacted the European football and its transfer market in respect to other confederations, where there might be rather greater obstacles for transfers that are not out of the contract. However, these statistics should not be considered as a conclusive factor as there are many other variables that could impact this result.

As previously mentioned, the transfer market has seen an incredible increase in numbers of transfers during the last years, but the ones that stand out from the rest of the field are not quite ordinary, often including gigantic transfer fees, like the record-breaking transfer fee for Neymar's transfer from Barcelona to PSG for EUR 222 million in the 2017 summer,¹⁴³ or other factors that immediately attract the media and football fans. However, only a small portion amounting to 15% of all transfers included a transfer fee in 2018, which is in large part to the fact that most transfers do not include two clubs, but simply a player and a club.¹⁴⁴ Nevertheless, the continuously growing market prices and fees for players' transfers, along with the previously mentioned category of record-breaking transfers, should not overlook the fact that most transfers include significantly lower amounts, as for an example in 2016 the average transfer fee was USD 2,3 million.¹⁴⁵

3.1. European football market

It is apparent that the European football clubs are the key players in the transfer market, and the gap between the UEFA and the rest of the world is only widening. Moreover, the gap between the 'big five' European leagues and other leagues in Europe is also expanding quite rapidly. In the 2015/16 season, the European football market size was

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ "Neymar - Transfer History." Transfermarkt, available on:

https://www.transfermarkt.com/jumplist/transfers/spieler/68290/transfer_id/1866385 Accessed on: 10 May 2019

¹⁴⁴ FIFA TMS, Global Transfer Market Report 2018, available on: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2019/01/GTM-2018_Men_online_v1.2.pdf p. 21, accessed on: 10 May 2019

¹⁴⁵ An update on change drivers and economic and legal implications of transfers of players, Final Report to the DG Education, Youth, Culture and Sport of the European Commission by KEA and ECORYS, available on: <https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf> p. 18, accessed on: 9 May 2019

estimated to be EUR 24,6 billion, which divided into smaller sections provided the following information. The 'big five' made up for 54% or EUR 13,4 billion of the overall market, while the non 'big five' leagues represented 19% of the European football market, their respective countries' other leagues - 11%, and FIFA, UEFA and National Associations - 13%. Yet, in the 2016/17 season, the 'big five' leagues' market size, in comparison to the overall European football market, had increased by 4%, which amounted to 14,7 billion.¹⁴⁶ This 4% change is a lot, especially if it happened during over a period of only one year, therefore proving that the football market in Europe continuous to become more polarized, as other leagues cannot match this fast growing rate.

Nevertheless, it important to understand what the main economic drivers behind the overall boom of the transfer market in recent years are. The KEA's 2018 study on the economic and legal implications of transfers of players set out the key economic drivers behind these trends which will be discussed in the following parts.

3.2 Broadcasting rights

Firstly, it stated that the increased television rights, which is especially true in England, play a major role.¹⁴⁷ Additionally, the data obtained by *Deloitte* and its additional commentary on this matter also added to the point, stating that the financial results and increasing revenues from the 'big five' European leagues are due to the new broadcasting deals.¹⁴⁸ Consequently, this is also the reason why previously mentioned 4% increase in the market size happened during one season, as many of these leagues entered new broadcasting rights cycles in that year.¹⁴⁹ Even more impressive is the fact that from the 2011/12 season, the revenues arising out of broadcasting rights had increased from EUR 4,2 billion to EUR 8,5 billion in 2017/18, therefore had grown more than double during a 6-year period. As a result, revenues stemming from broadcasting arrangements for the 'big five' leagues amounted to 54,3% of the total growth between 2011/12 and 2015/16.¹⁵⁰

The highly competitive market for broadcasting rights is the reason why the prices and revenues have escalated so quickly. This is best seen with the Premier League, where there is a fierce competition between the main two broadcasters - Sky and BT. Furthermore, there

¹⁴⁶ Deloitte, Annual Review of Football Finance 2018, available on: https://www2.deloitte.com/content/dam/Deloitte/cz/Documents/consumer-business/cz_annual_review_of_football_finance_2018.pdf p. 10, accessed on: 11 May 2019

¹⁴⁷ Supra note 145, p. 15

¹⁴⁸ "Soccer-Big Five European Leagues Enjoy Record Revenues - Deloitte." Reuters, available on: <https://www.reuters.com/article/soccer-england-deloitte/soccer-big-five-european-leagues-enjoy-record-revenues-deloitte-idUSL5N1T82X4> Accessed on: 11 May 2019

¹⁴⁹ Supra note 146

¹⁵⁰ Supra note 145, p. 24

have been rumors that even tech giants like Amazon and Facebook are interested in bidding for the Premier League streaming rights, which would definitely raise the prices even further.¹⁵¹ However, the overall broadcasting market throughout Europe is very segregated. To put this diversity in perspective, all 400 clubs outside the top 20 leagues have a cumulative domestic TV revenue of less than half of what an average single club in Premier League has.¹⁵² All in all, even though, in general, the revenues for clubs have increased considerably during the last years, because of this continuously widening gap between the top clubs and the smaller ones, clubs within one league as well as clubs between different leagues have become more polarized.¹⁵³

In my view, this polarized upwards trend will continue, and it is only logical that top leagues will attract more fans and attention. Unfortunately, this means that less popular leagues like domestic leagues will experience lower attendance which will result in lower wages and revenues for players and clubs. Additionally, this will most likely increase illegal actions taken by clubs and players, such as match-fixing, corruption, illegal betting and intentional contractual arrangements that are against the law.

3.3 Club ownership

The second economic driver behind the rapidly growing transfer market is that there is an increasing interest from private investors to acquire football clubs.¹⁵⁴ Nowadays, private party ownership makes up for a majority of all top-division clubs. In Europe, there are 41 leagues in which there is at least some kind of private club ownership. Moreover, even though these clubs are mainly (around 77%) under domestic private ownership, meaning, that the owners are from the same country as the club in which they have invested, the foreign private investment is becoming more and more popular. This is especially true in the English Premier League, where there are almost twice as many foreign private ownership clubs than domestic ones. Furthermore, together with the France's Ligue 1 and Italy's Serie A, these leagues together gather more than 40% of all foreign owners.¹⁵⁵ Naturally, foreign investment from other European countries is the most popular type, which makes up for only a bit less than half of all foreign investments. However, investment from the US-based owners together with

¹⁵¹ Conn, David. "Amazon and Facebook Keen on Premier League Rights, Say Manchester United." The Guardian, available on: <https://www.theguardian.com/football/2017/sep/21/amazon-facebook-premier-league-rights-manchester-united> Accessed on: 11 May 2019

¹⁵² UEFA Club Licensing Benchmarking Report Financial Year 2017, available on: https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/59/40/27/2594027_DOWNLOAD.pdf p. 56, accessed on: 11 May 2019

¹⁵³ Supra note 145, p. 27

¹⁵⁴ Ibid.

¹⁵⁵ Supra note 152, p. 24

the Chinese investors also make up for almost half of the foreign ownership. Accordingly, investors from the North America are the second most reported foreign club owners, as they account for seven separate European leagues, with the most popular being the aforementioned Premier League. Only just behind the US in numbers are the foreign owners from China, who have controlling shares in 7 European clubs, including clubs from the main European 'football countries' like England, France, Italy, and Spain.¹⁵⁶ However, we may ask what does nationality and ownership have to do with transfers and why does it matter who are the club owners? Well, the data itself, as well as several research papers, have displayed that there is a strong correlation between club ownership and the amount of money spent on transfers. Data shows that clubs which are privately owned, especially by foreign investors, spend substantially more money on transfers than those which are not privately owned. Moreover, even the nationality of owners has been proved to play an important role in these statistics.¹⁵⁷ Adding to this point is the fact that during the years 2010 to 2016, 70% of the top 20 transfer market top-spending clubs were privately owned, from which only two clubs were owned by European investors.¹⁵⁸

This closely linked relationship between the type of ownership and the money spent on transfers makes me question whether it does not destroy the competitive balance. If this private club ownership trend continues to grow, then it can distort the entertainment and traditions behind football, becoming purely business oriented.

3.4 Sponsorship and commercial revenues

Another key economic driver for the transfer market's expansion is the commercial revenues stemming from sponsorships, marketing campaigns, merchandising and alternative activities. During the last decade, European clubs have seen an increase of an additional EUR 2,6 billion in sponsorship and commercial revenues.¹⁵⁹ Revenues from commercial activity can mostly be connected with the overall quality of the team as well as individual players who are well-known and are very marketable.¹⁶⁰ Therefore, it is evident that the best 20 clubs are responsible for 75% of overall growth in this area as mostly only the top clubs can attract global sponsors. In general, all of the top 20 leagues except in Sweden and France saw an increase in sponsorship revenues in 2017. Interestingly, the Russian league had the highest sponsorship revenue percentage in respect to the total club's revenue, accounting for 61% of

¹⁵⁶ Supra note 152, p. 27

¹⁵⁷ Supra note 145, p. 27

¹⁵⁸ Ibid., p. 28

¹⁵⁹ Supra note 152, p. 66

¹⁶⁰ Ibid., p. 29

its total revenue, while other leagues, on average, made up for around 30% of their total revenue. However, for smaller leagues sponsorship deals and commercial revenues play a relatively bigger role as revenues from broadcasting deals are usually very low and often close to zero. In many cases, smaller clubs have to also rely on donations and other types of income in order to survive and be relevant in their league.

When taking into account the previously mentioned key economic drivers behind the rapidly growing transfer market, it is clear that without some kind of limitations, the top clubs would continue to thrive even faster by putting in more and more money into players, paying high transfer fees, which the smaller clubs cannot match financially, and with their major broadcasting and sponsorship deals would eventually destroy any attention to smaller clubs. Therefore, to try and even things out, the UEFA established the UEFA Financial Fair Play Regulations (FFP).

3.5 Financial Fair Play Regulations

Financial Fair Play was introduced by the UEFA in 2010, with the aim of improving the financial situation of European football clubs. Since 2013 it also established the 'break-even assessment', which aims to tackle football club financial stability by making clubs balance the spending on transfers, wages, and other football-related expenditures with their broadcasting, commercial and other revenues, furthermore, also limiting the amount of accumulated debt. This is done by imposing a certain limit of how much money clubs are allowed to have in losses over a three-year assessment period. Now clubs during this three-year assessment period can only spend up to EUR 5 million more than they earn, and if there is a violation of this rule, then disciplinary measures ranging from a warning to disqualification from ongoing and future competitions may be imposed.¹⁶¹

Furthermore, the UEFA updated the FFP regulations on June 2015 to promote more stable investment while maintaining overspending control for clubs that require business restructuring, are facing sudden economic shocks or are operating with serious market structural deficiencies.¹⁶² Gianni Infantino, who was the general secretary of UEFA at that time, stated that: "*these new rules will encourage investors to invest in European football,*"¹⁶³ furthermore adding that, the changes will, hopefully, contribute to increased competition

¹⁶¹ The Official Website for European Football – UEFA.com, Financial fair play: all you need to know, available on: <https://www.uefa.com/community/news/newsid=2064391.html> Accessed on: 12 May 2019

¹⁶² Ibid.

¹⁶³ Association, Press. "Uefa Says Financial Fair Play Has Changed to Attract New Investors." The Guardian, available on: <https://www.theguardian.com/football/2015/jun/29/uefa-financial-fair-play-investors> Accessed on: 12 May 2019

while at the same time protecting European football's financial stability.¹⁶⁴ Article 2 of the UEFA Club Licensing and Financial Fair Play Regulations sets out the objectives and aims of these regulations. Firstly, it aims to improve all aspects of football in Europe, especially regarding the training and care of young football players.¹⁶⁵ In this matter, the UEFA has been very incentivizing by excluding all costs related to training facilities, youth development and investment in stadiums from their break-even calculations.¹⁶⁶

However, despite the UEFA's efforts to increase competition and safeguard financial stability, the studies have shown that FFP regulations have actually generated a larger gap between the top and bottom teams by setting too high barriers for investors that would be willing to sponsor smaller clubs.¹⁶⁷ Likewise, even Bruce Buck and Nicola Cortese who are the chairmen of the Premier League's top clubs Chelsea and Southampton have condemned this policy for negating the chance for smaller clubs to compete with the elite clubs.¹⁶⁸ At the same time, the UEFA has stated that:

*"The aim of financial fair play is not to make all clubs equal in size and wealth, but to encourage clubs to build for success rather than continually seeking a 'quick fix'."*¹⁶⁹

To my point of view, this statement and the idea behind it makes no sense, because if this policy in practice has proved to polarize the European football clubs and leagues even more, then about what kind of success can we talk about for the smaller clubs? Nevertheless, even though the FFP regulations have not really tackled the issue of improving the competitive balance between clubs, the UEFA's recent efforts in assisting clubs that have financial difficulties have been seen as a positive step forward,¹⁷⁰ and with few adjustments could eventually prove to be effective in the long run.

¹⁶⁴ Ibid.

¹⁶⁵ UEFA Club Licensing and Financial Fair Play Regulations, Article 2

¹⁶⁶ Supra note 161

¹⁶⁷ "Financial Fair Play Regulations Limit Investments in Smaller Clubs - Study." ESPN, available on: <http://www.espn.com/soccer/uefa-champions-league/story/2946083/financial-fair-play-regulations-limit-investments-in-smaller-clubs-study> Accessed on: 12 May 2019

¹⁶⁸ Glenn Moore "Financial Fair Play Policy Unfair on Smaller Clubs," The Independent, available on: <https://www.independent.co.uk/sport/football/news-and-comment/financial-fair-play-policy-unfair-on-smaller-clubs-claim-chairmen-of-chelsea-and-southampton-8872161.html> Accessed on: 13 May 2019.

¹⁶⁹ Supra note 161.

¹⁷⁰ Supra note 167.

4. CONCLUSIONS

Taking into account the analysis throughout this paper, it is clear that the current transfer system still hinders the freedom of movement guaranteed under Article 45 TFEU. And it seems that this will not change as the restriction of movement can be justified under sports specificity in order to protect and maintain fair competition in football. Undoubtedly, from the EU perspective, football is seen and treated as special, thus allowing it to deviate from the European Union standards and rules that are applicable in other industries. The relationship between sports and EU is very tangled and complicated and will probably continue to be like that as there is no evidence that the Commission is willing to challenge the current transfer system. Adding to this point is the fact that the Commission's previous intervention has failed miserably. Moreover, because of the regulations and the CAS's considerable discretion to interpret disputes on a case by case basis, the players cannot make financially informed decisions regarding the risk of unilaterally breaching contracts. And even though the recently adapted regulations have made things a bit clearer, there is still a long way to go to achieve the Commission's initial aims. Therefore, players actually choose to stick to the traditional transfer system of transfer fee payments, which, as previously mentioned, have peaked at record-high numbers. Additionally, the results have actually indicated that the payment of transfer fees has negatively affected the competitive balance of clubs. Furthermore, this system has not even proved to be very beneficial for youth development, which was one of the key aims of it. It is very unfortunate that even though this system in practice has proved that the transfer fees hinder players' movement between the Member States as well as makes it almost impossible for smaller clubs to compete with the larger ones, the players still elect to choose this route because of the ambiguity of regulations and their interpretation by courts.

Furthermore, the current transfer system can still be seen as a violation of competition law, thus could be contested under Articles 101 and 102 TFEU. The former, as well as today's system, limits the choice of players that clubs can employ, thus intervening with the market's supply and demand. Moreover, as clubs do not have unlimited resources, it only strengthens the position of wealthier clubs than can afford to spend more money on transfer fees and wages. Even though, the UEFA and FIFA have made a fair effort to improve clubs' financial situation by implementing regulations that limit spending and accumulating debt for clubs, these safeguarding measures, in the meantime, have turned out to have an adverse impact, especially for smaller clubs that wish to have a chance of reaching the success of top clubs. The FFP regulations limit the investment in smaller clubs, therefore, investors are reluctant to

invest in them. Additionally, as the private and foreign investment is becoming more popular, mostly for already top-level clubs, which can easily generate a huge return on investment, the barrier and the financial distribution between clubs have risen. Other dividing aspects of the football market are the revenues stemming from broadcasting rights, sponsorships and other commercial activities. These are the key economic drivers for clubs, and it is only inevitable that the most popular clubs will receive much higher revenues than smaller clubs, but the rate at which they further part away is alarming. This is an issue, but, essentially, football clubs are businesses and should operate mostly on their own. Thereby, if sports governing bodies would intervene in this matter even more by implementing new regulations, then they would most likely be challenged under competition law.

In my point of view, to improve the current system, firstly, there needs to be a reform, which should be discussed and adapted by all involved stakeholders. The key issues that should be addressed are distinctly regarding the transfer of players as well as the very highly polarized financial situation in-between leagues. The latter could be done through a better solidarity mechanism system, that is, by increasing the percentage of it and ensuring its effective enforcement. Additionally, the creation of some form of a higher tax on transfer fees that are above a certain amount, which could then be distributed between smaller clubs. In the end, it is necessary to improve the overall transparency of the football market in order to further protect youth development and prevent malpractice from clubs. As the Commission is not very likely to challenge these issues, it seems that the FIFPro is football players' best chance of improving the current system, and hopefully, it will do just that and make the football world a better place for players.

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