

PLAYER TRANSFERS – A LEGAL CLASSIFICATION

Why was Neymar able to switch to Saint-Germain for € 222m last summer, against the will of FC Barcelona, and so get out of an ongoing employment contract? The clubs have very limited possibilities to prevent such excesses and the Financial Fair Play of the UEFA is so far pretty toothless.



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Gone through the ceiling

British TV money and foreign investor capital have now so inflated the player market in European professional football that transfer fees in the tens of millions are the order of the day and often justify little more than a side note. Last year's transfers of Brazilian superstar Neymar and French mega-talent Kylian Mbappé to Paris St. Germain for a total of more than 400 million euros have, however, even in the grotesque illusory world of European top-football blown apart the previous framework and ushered in a new era in the transfer market. It will therefore be interesting to see, after the World Cup, how deeply the top European clubs are willing to dig into their pockets to acquire the "discoveries of the tournament".

What is a transfer fee?

As a rule, professional footballers have a fixed-term contract with their current club. If a player with a current employment contract is to change to a new club, the new club must pay the current club a transfer fee. The transfer fee is therefore nothing more than compensation for premature termination of the employment contract with the old club, so that the player is free to enter into an employment relationship with his new club. The remaining duration of the contract generally has a significant influence on the amount of the transfer fee.

Since the Bosman ruling of the European Court of Justice in 1995, which stipulated that football professionals are allowed to change clubs after expiry of the employment contract, it has become customary for players to change clubs before the expiry of the fixed-term employment contract as this is the only way a club can demand a transfer fee and profit financially from a player's switch to another club. However, it can be very attractive for a player to wait until the end of the contract before changing clubs. This gives him the opportunity to collect at least part of the potential transfer fee as a signing bonus. This also explains why clubs extend the contracts of players who are willing to transfer, prematurely and at significantly better conditions, in order to collect at least a transfer fee.

Fixed transfer fees

Basically, the amount of the transfer fee is a matter of negotiation between the clubs. However, one can always read about fixed transfer fees for which a player can leave his club, as was the case a year ago when Neymar moved from FC Barcelona to Paris Saint-Germain. This is a fixed transfer fee negotiated between the club and the player when the contract is concluded. In this case, any other club is entitled to buy the player out of the current employment contract for the fixed transfer fee, provided that they can agree upon a new employment contract with the player. With the inclusion of a fixed transfer fee clause in a contract, a club therefore gives up its negotiating power and allows the transfer negotiations to take place exclusively between the player and the interested club. In this sense, the inclusion of a fixed transfer fee in the contract often represents a concession granted to the player within the framework of the contract negotiations, so that he can decide autonomously on his future and any possible change of club even if an employment contract is still in place.

Limitation of transfer fees?

Due to the steady increase in transfer fees over recent years, the voices demanding an end to, or at least a limitation of, the transfer madness have become louder. However, most European legal systems, including the Swiss one, do not offer any options. The associations can refer to the legal principle of contractual freedom and therefore the amount of the transfer fee remains a matter of negotiation, in which the legislator generally cannot interfere.

Only the football associations at national or continental level, as well as FIFA, have the possibility to include mechanisms in their regulations to limit transfer fees. So far only UEFA has tried to make use of its possibilities.

Financial Fair Play

UEFA tried to stop the excesses on the European transfer market by implementing Financial Fair Play (FFP) 2015. The FFP is a UEFA regulation on club licensing for European club competitions which, among other things, regulates the legal and financial criteria that clubs must meet in order to participate. In particular, UEFA wants to use the financial criteria in the FFP to prevent the increasing indebtedness of European football clubs.

Financial fair play works as follows: In the course of the last three years, the relevant balance sheet values of the clubs were reviewed. During this assessment period, the relevant revenue must at least have offset the relevant expenditure. If this is not the case, the previous year is also included in order to determine whether, at least, a positive development is discernible.

If the relevant expenditures exceed the relevant income, the difference (currently no more than €45 million) can be offset by private lenders or investors but if this does not happen, the association violates the FFP. If the deficit exceeds the maximum amount of €45 million, the association is also in violation of the FFP. The maximum amount of this deficit is to be renegotiated at the end of this year. The aim is to reduce it to zero.

The clubs have agreed with UEFA that if they violate the FFP they may be sanctioned. Sanctions include, but are not limited to, admonitions, referrals, fines, point deductions in UEFA competitions, transfer bans, expulsion from UEFA competitions and removal of titles.

In practice, the FFP has so far proved to be a rather toothless instrument, punishing smaller clubs in particular, while effective sanctions (such as the one-year exclusion from the Champions League) against the, mainly responsible, top clubs have so far failed to materialise.

Admissibility of non-competition clauses

Against this background, clubs may be willing to impose contractual non-competition bans on their players so that they do not switch to a competitor. However, this is not permitted under Swiss law: On the one hand, footballers have no insight into their employer's clientele or manufacturing and trade secrets and so already a basic prerequisite for a valid prohibition of competition according to Art. 340 CO does not exist. On the other hand, professional athletes (in contrast to other professional groups) have a fundamental right to be employed by their employer, as the market value of such employees would fall rapidly in the event of prolonged inactivity and their economic advancement would be at particular risk. This right to employment would be circumvented by a contractual prohibition of competition at the end of the contract term. For the same reason, garden leave of a professional footballer is also problematic.

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