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ISSN 1748-944X

Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football In Europe

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ABSTRACT

In many new or candidate Member States contracts for the performance of certain services are used between professional football clubs and their players in addition to, or even instead of, regular employment contracts. Under the rules and regulations of the national football associations, professional football players should be given employee status and players' unions should be based upon the membership of professional football players as employees.

KEYWORDS

European Union - Employment - Sport - Transfer Systems - Social Dialogue - Bulgaria

INTRODUCTION

In a study carried out by the T.M.C. Asser Institute on behalf of the European Commission in 2004 (Siekmann et al., 2004) it emerged that in many new or candidate Member States contracts for the performance of certain services are used between football clubs and their players in addition to, or even instead of, regular employment contracts. One of these candidate Member States is Bulgaria, whose entry into the European Union is anticipated for 2007. A seminar held in Sofia in November 2005, entitled 'Players' Contracts in Professional Football: EU Law and the Challenge for Bulgaria', confirmed that a complete shift had occurred from employment contracts back to performance of services contracts under Bulgarian civil law. This is a remarkable development as by this Bulgaria, a little over a year before it is set to accede to the EU, has drifted away from the 'EU sports acquis' towards which it should in fact be heading. 1

The main reason that countries prefer to use service contracts in professional football is the fact that in this situation, clubs do not need to contribute to the players' pensions or pay social security contributions. From a financial point of view these contracts are therefore net contracts and the player simply has to take care of insurance and the building up of a pension himself. Under these arrangements the player is regarded as an artist. Football is thus treated as a special branch of industry that simply cannot be compared with ordinary business. The illusion persists that if a contract is not *called* an employment contract, it cannot *be* an employment contract. The same applies to the contract's contents: if the contract says that the player performs services, then that is what the player does, according to this line of reasoning. But this is simply pulling the wool over one's own eyes to the detriment of the players. 2

FACT NOT FORM

It is not the format, but the facts which are decisive. To pursue the 'artist' analogy a player may give a brilliant acting performance or follow his instincts as if he were a ballet dancer, but the coach decides whether and in what position he plays. This is clearly a relationship of authority, which is a characteristic that the EC Treaty links with the free movement of workers, whereas the freedom to perform services is something completely different. Services are not performed on the basis of instructions of the client or under the authority of the client. Furthermore, there can be multiple clients at any one time or a succession of clients. This would imply that a player during one single season would first play for a particular club and then for another and then for a third, but this is never the case because there are too few transfer periods to make this possible. Put another way, transfer periods inherently conflict with the notion of service contracts: if they were service contracts, there would not be any transfer periods at all. 3

In any case, most football players work hard and follow the coach's instructions to the letter; and even most ballet dancers are not self-employed, but are employees of a ballet company. Typical service providers are tennis professionals who hire and fire their own trainers, organise their own team of supporting staff and are contracted per tournament by the tournaments' organisers. Service providers 4

can thus be found in individual sports like tennis, but not in team sports like football

There is a second aspect of this case. In Bulgaria a system of competition rights, also known as federation rights, operates. This involves the registration and admission of players and, more particularly, the granting of the player's pass, which establishes the right of a player to compete in a competition. The person who owns this pass or these rights *de facto* owns the player's transfer rights. Competition rights are the final element of using service contracts, for service contracts provide players with the absolute freedom to stay or go; but if the players no longer own these rights themselves they cannot go anywhere. In other words, they cannot join a different club. The rights are owned by their club, or by their agent, or even by a players' fund (investment fund). In Brazil, for example, agents literally carry players' passes in their pockets, or it may even be that several advisers have rights over the same individual. Players' funds, not an entirely unknown phenomenon in Europe, help clubs to attract players but the clubs hold on to the transfer rights themselves because they want to retrieve their investment or even see a return. The player, however, only has a contract with the club. The club has assigned the transfer rights to the fund or can only let the player transfer with the fund's permission. In this way, the player's freedom of movement is severely restricted, regardless of whether the restriction takes the form of a player's pass or a players' fund.

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In the case of the player's pass, the player has at some point assigned the pass to his agent(s). This is actually a void act, as the player's pass exclusively serves as the player's ID and entitles him to take part in competition. For this reason, the pass remains the property of the national football federation, just like an ordinary passport remains the property of the state. If it falls into the hands of a third party, that is illegal. Such parties are not then allowed to do business with it and dispose of the player's deployability. A person cannot be the property of another person; not even by his own consent, and not even when this consent was not forced. It goes against the Universal Declaration of Human Rights and all rights and instruments deriving from it. This involves a principle of *jus cogens* from which, under the rule of law, no-one can deviate.

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TOWARDS COLLECTIVE AGREEMENTS IN FOOTBALL?

A third aspect of this case concerns the feasibility of a social dialogue between management and labour, to exist for the purpose of (for example) drawing up a collective agreement on employment status. On the basis of service contracts a social dialogue is not possible because the player is legally a self-employed person who should in principle be able to give instructions in return to the other party (the club) and which have to be carried out as performance. In the case of an employment contract, the focus is on the employee as a person, whereas in a service contract the focus is on the service to be performed. The fact that both notions – employment contract on the one hand and service contracts on the other – are included in the EC Treaty separately obviously has a reason. It is a reflection of general international principles of labour law that this distinction is made. These principles do not permit employees to remain unprotected, as if they were their employer's plaything. In the first and the last instance, this is a question of a philosophy of norms and values surrounding labour in a civilised world.

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Should the parties wish to regulate matters differently through the introduction of a third option (in addition to or somewhere in between the employment contract and the service contract) then a collective agreement would be the most appropriate instrument for achieving this. A special "football contract" should in principle be possible provided this is not contrary to public policy, but it is difficult to imagine how this would work now that in the team sport of football there can *de facto* only be a relationship of authority between the club and the player. It is equally difficult to imagine how the handling of players' passes and transfer rights could be legalised by means of a collective agreement.

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In any event at the European level a Social Dialogue is still very much in its infancy because the employers have yet to organise themselves as such whereas on the employees' side there is the world players' union FIFPro. On the employers' side, self-appointed candidates are currently the "League of Leagues" (Association of European Union Premier Professional Football Leagues/EPFL) and the G-14 group of clubs.

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CONCLUSION

Under the rules and regulations of the national football associations in the new EU Member States, professional football players should be given employee status, that is employment contracts which would considerably strengthen their position with regard to their clubs by improving their legal position and affording better financial protection. Where this is not already the case, existing and/or future players' unions should be based upon the membership of professional football players as employees.

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* Presentation at FIFPRO Conference on "10 Years After Bosman: Should we have another *Bosman* case, or can we avoid another *Bosman* case?". Council of Europe, Palais de l'Europe, Strasbourg, 14 December 2005.

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Siekmann, Robert, "Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football In Europe", [Entertainment and Sports Law Journal](#), ISSN 1748-944X, April 2006, <<http://go.warwick.ac.uk/eslj/issues/volume4/number1/siekmann/>>