

Stefan Szymanski is my friend and sometimes co-author, so our quibbling about this issue has been a source of enlightenment as well as help for my own research. I have no quarrel with his analysis of the FIFA transfer system's exploitation of the vast majority of FifPro's 18,000 top division players. I note that, in a reply, he acknowledges that FifPro does not necessarily want to end the entire transfer system (although that is the clear and logical result of the argument he sets forth here and in his paper). An American legal perspective suggests a more nuanced view than Szymanski's wholesale attack.

First, there is something to be said for a modified importation of the American antitrust labor exemption. Without getting too much in the weeds, the principal idea is that rules that primarily restrain trade in a labour market that are the result of collective bargaining with FifPro ought to be conclusively held NOT to distort competition in labour markets, and, providing no discrimination among member states, NOT considered an interference with the free movement of labour under the EU treaty. This would give FifPro considerable leverage to negotiate a system that benefits players. The problem with Szymanski's argument is that, if accepted, it could be challenged in private litigation even if FifPro were to agree with UEFA on changes that benefit almost all players.

Second, to understand my more nuanced critique of the transfer system, it is necessary to briefly summarize some basic principles of Anglo-American contract law. Most "victims" of contract breach can receive only cash reimbursement for out-of-pocket expenses or demonstrated lost profits. A court will issue an order – called "specific performance" – that prohibits a party from breaching (unless all parties voluntarily settle) only in special circumstances where the victim cannot obtain the same promised good or service elsewhere, and cash won't really make the victim whole. Consider the 1902 case of Hall of Fame baseball player Napoleon Lajoie, who breached a contract with the Philadelphia Phillies of the National League, to play for the then-rival American League Athletics. The Supreme Court of Pennsylvania issued an order barring Lajoie from playing for the A's (though they traded him to Cleveland and an Ohio judge refused the same order). The Court noted that his services "require special knowledge, skill and ability" and "the same service could not easily be obtained from others." (The trial judge had refused an injunction, and in 1901 Lajoie hit .422 with a .635 slugging percentage and 125 RBIs for the A's.)

FIFA regulations effectively apply this "special circumstances" principle to ANY player, no matter how ordinary, and no matter how easy it would be for the prior employer to replace the player. In many cases, of course, the employment contract has no special value to the club: the player is usually worth precisely what the club is paying him, so that if the player breaches, the club just hires someone else. Thus, in the general case, FIFA's rules are justly criticized.

That said, there are quite a few modern-day Nap Lajoies on the football pitches of Europe. These are either proven elite players, or young players with the potential to become elite players in a short time. For these players and the clubs that employ them, Szymanski is wrong to claim that we are "not haggling about contract terms." For under his view, clubs and players are precluded from voluntarily choosing to allocate the uncertainty over how well a player might perform in the coming four years.

In many ways, the contracts for these special players – elite stars or those with the potential to become stars at the highest level – are very similar to the sort of long-term contracts that characterize commodities markets. I presume that European sugar and baking markets are workably competitive. If so, refiners and bakers may voluntarily find it to be in their mutual interest to agree on a 3- or 4-year contract at a price or range of prices. If sugar prices escalate, the refiners lose an opportunity for higher profits, but they are willing to accept this in return for insurance of steady prices if sugar prices fall precipitously. Indeed, if a Member State passed a law allowing any bakery to voluntarily breach long-term sugar contracts without compensation, Brussels would consider such a law itself to be an interference with the free movement of goods, and require the State to justify the law in some manner.

Likewise, contracts between clubs and elite or potentially elite player offer the prospect of giving the club an extraordinary talent, and in return guarantee the player a significant salary, regardless of performance or injury. If the player's talent far exceeds his wage, the club gets the benefit, but many players may find this worthwhile to provide them with 3 or 4 years of guaranteed wages that could potentially assure their financial success for life. From this perspective, significantly revised FIFA rules – specifically enforcing bargains only with special players who are not easily replaceable -- would reflect the free choice of employees and employers; indeed, the automatic application of the rule of most European countries that employees cannot be held to promised terms of employment contracts is itself an interference with the free movement of labour.

Third, I'd like to turn to Szymanski's critique of the justifications for FIFA rules, assuming they are considered to be facially inconsistent with European law and must be justified. Here, I will focus on my own arguments to support the rules, not necessarily those that FIFA and UEFA officials have used and that Szymanski is keen to refute.

A foundational principle of FIFA rules is "contract stability." In my view, the point is not to stabilize European football clubs (I agree that this is not necessarily desirable and that contract rules do not meaningfully achieve this objective.) The point is to assure both parties to a contract will get the benefit of the bargain. Right now, the European labour market, at the highest level, is highly competitive, and clubs pay players large salaries for (a) their immediate services and (b) the club's option to either retain the player's services over the term of the contract or to sell the player's contract for millions of Euros. I defer to Szymanski's superior economic sophistication, but I do not understand how he can think that eliminating (b) will not result in lower annual wages, especially for the "potentially elite" players. (This may be why FifPro is not keen to eliminate the entire transfer system, but a FifPro agreement will not immunize UEFA from a competition law challenge that ought to prevail anyway if we accept Szymanski's arguments in full.)

A second justification is player development. Szymanski's critique echoes a brilliant 1964 judicial opinion by Lord Wilberforce involving a member of the 1966 England world champions, George Eastham. In a dispute with his then-club (Newcastle), Eastham was barred by FA rules that didn't allow players to sign with new clubs, even after the expiration of their employment contract. His Lordship found the rule to be an unlawful restraint of trade (equivalent in substance to the modern EU Article 101). Among the FA's unsuccessful arguments was that the rule protected a club's investment in

developing young players. Lord Wilberforce correctly observed, as did Szymanski, that it is unclear how much of an investment in a player needed to be recovered, and from whom. However, without any aspersions on the quality of education Szymanski received at Pelham Middle School or their claim for recoupment from the University of Michigan, the Norwich School-educated Lord Wilberforce has the better of the argument when he observed that clubs may need an opportunity to recoup investments in a player development program. He stated: "But if and so far as it is right that clubs should have some protection against the loss of that expenditure through transfer of those players to other clubs, the answer lies in a definite contract for a term with those players." Rote application of continental European employment law precludes this means of creating incentives for clubs to develop players.

Finally, Szymanski argues that if "players could move more freely and without the payment of large transfer fees, it would be open to more clubs to hire top players on short term contracts and thereby create more competition at the highest level." I agree that under certain specific contexts (most likely a sugar daddy seeking to emulate Sheikh Mansour or Roman Abramovich), an environment where European football players were free to leave their job at the end of each season, just as most workers can, would result in more competition at the highest level.

Comparisons with American sports leagues are difficult because of the many differences that exist (revenue sharing, salary caps, etc). However, a common way for non-dominant clubs to take on dominant clubs is to sign talented younger players and then retain their services as the team improves each year until it can indeed challenge the top teams. This is facilitated by strict "anti-tampering" rules that prevent other clubs from signing players under contract, and prevent dissension by strict penalties on club officials who even suggest that they might be interested in hiring a player under contract to another team. Most European players want to play in the Champions League, and the best way, in my judgment, to "create more competition at the highest level" would be to allow near-dominant teams just below the Champions League level to sign players to long-term contracts, and then effectively preclude breach of contracts.

I see no real response to Szymanski's critique when applied to the vast majority of the 18,000 first division football players in Europe. For small category of elite or potentially elite players, though (perhaps, to ensure that enforceable long-term contracts have real value, a bright-line rule might limit its applicability to under-21 players earning €60,000 or other players earning €90,000), a better rule would be one requiring the player and the club to explicitly agree on one of three contract provisions: (A) the player can terminate contract by buyout (either negotiated amount or to be determined based solely on damages to club by an arbitrator, with effective and speedier resolution than now exists); (B) an explicit acknowledgement that the player provides the club with unique skills and agrees not to sign with any other club during the contract, absent just cause due to misconduct by the club; (C) explicit, individually-tailored terms based on whatever foreseeable conditions parties can agree on.

The solution is to mend, not end, the transfer system.