

## ARTICLE 17 OF FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS AND CIVIL RESPONSIBILITY OF PLAYERS

Article 17 of FIFA Regulations on the Status and Transfer of Players (“**FIFA Regulations**”) is a unique instrument aimed to protect the principle of ‘contractual stability’ in employment relations between players and clubs.

After Bosman ruling<sup>1</sup> FIFA was compelled to modify the regulations of its transfer system and to find the balance and compromise between the principle of ‘contractual stability’ and ‘freedom of movement’, protecting the first and not violating the second one. In my opinion, the system existing nowadays has managed to combine both: from one side the player may unilaterally and prematurely terminate the contract even without just cause, exercising his fundamental right of freedom of movement, though simultaneously violating Article 13 of FIFA Regulations and principle of *pacta sunt servanda*, but from another side he will be subject to severe consequences for such termination (compensation and sporting sanctions) available under Article 17.

### Civil responsibility of Players under Article 17

Besides sporting sanctions that can be imposed when breach was occurred during protected period, Player bears responsibility to compensate the aggrieved party, *i.e.* Club, all damages caused by Player’s violation of *pacta sunt servanda* principle and his premature termination of the contract.

The main and most arguable and ambiguous question is how to evaluate such responsibility, notably how to define the amount of compensation.

As provided by Article 17.1, in all cases party in breach shall pay compensation, although there are some exceptions to this rule<sup>2</sup>. The amount of compensation can be agreed by the parties in contract or, absence of later<sup>3</sup>, established by FIFA DRC or CAS according to the provisions and criteria provided by Article 17.1.

### Amount of the compensation agreed under the contract

The easiest way to evaluate Player’s responsibility is to refer to the contract itself, where parties previously agreed on the lump sum (*liquidated damages* clause) or calculation mechanism of the

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<sup>1</sup> [Case 415/93 Union royale Belge des Sociétés de Football Association ASBL V Jean Marc Bosman, Royal club liégeois SA v Jean Marc Bosman and others and Union des Associations Européennes de Football \(UEFA\) v Jean Marc Bosman](#) (1995).

<sup>2</sup> See, *e.g.*, [CAS 2009/A/1856 & 1857 Fenerbahçe Spor Kulübü v Stephen Appiah](#) (“**Appiah case**”).

<sup>3</sup> As was confirmed by CAS jurisprudence, FIFA RSTP provides for the primacy of a contract regarding the calculation mode for compensation for breach of contract, and that the various criteria listed in Article 17.1 regarding calculation of compensation apply only subsidiarily. See, *e.g.* CAS 2012/A/2910 *Club Eskisehirspor v. Kris Boyd*, par. 73; [CAS 2009/A/1880 & 1881 FC Sion v. FIFA & Al-Ahly Sporting Club](#), par. 73; [CAS 2008/A/1519 & 1520 FC Shakhtar Donetsk v Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA](#) (“**Matuzalem case**”), par. 66.

compensation (*indemnity* clause). Although in some jurisdictions such clauses are prohibited, well drafted clause with reference to FIFA Regulations and explaining that such clause is not of a punitive nature, but rather predetermination of damages, can be efficient instrument for both clubs and players to avoid uncertainty of Article 17.1 and be aware of the “price” for premature termination of the contract.

Obviously, when negotiating compensation amount, Club should bear in mind the proportionality: by inserting low amount the Player and his new Club may be interested in terminating contract rather than negotiating Player’s transfer, while by inserting high compensation, there is a risk it would be decreased due to its disproportionality<sup>4</sup>.

Importantly, as was established in *Matuzalem case*<sup>5</sup>, the so called “buy-out clauses”, in particular as drafted therein, could not be deemed as clause, defining the amount of compensation within the meaning of Article 17.1. Moreover, it is irrelevant how the clause is called in the contract: buy-out, liquidated damages, indemnity, penalty, etc<sup>6</sup>. What really matters is what such clause implies. It is difficult not to agree with such approach, given that clauses, stipulating the amount or way of calculation of damages for premature termination of the contract, and clauses, defining the amount after receipt of which the club is obliged to terminate the contract and arrange the Player’s transfer, are of a different legal nature, purpose and consequences. Furthermore, usually amounts stipulated in “buy-out” clauses are higher than damages incurred by the clubs due to Player’s premature breach, and therefore could not reflect the actual “price” of Player’s services on the market.

Anyway, it is up to the parties to decide whether they prefer to be aware of a “price” for Player’s unilateral termination or maintain contractual stability by uncertainty of compensation amount, which is to be determined under criteria of Article 17.1. However, determination of compensation amount in the contract would deprive the Club to seek actual damages caused by Player’s premature breach, which depending on the circumstances of the case can vary substantially and cannot be assessed when negotiating the contract (for instance, when Player left the club before very important matches and his substitution cost a lot for club, or when Player’s “price” on transfer market drastically increased).

### **Amount of the compensation determined under criteria of Article 17**

Article 17.1 does not contain uniform “formula” to evaluate Player’s responsibility for premature termination of the contract in every single case. Compensation is based on the circumstances in every particular case, which could have different weight and impact on the final amount; the so called “case-by-case” basis. Nobody knows beforehand what criteria would be determining in each particular case (which also depends on whether party proved damages or not), and therefore the amount of compensation is uncertain.

It can be argued that uniform formula should exist and parties are entitled to have some clarity on consequences of premature contract termination. However, and I totally agree with opinion presented in *Matuzalem case*<sup>7</sup>, uncertainty of compensation amount is powerful and efficient instrument for maintaining ‘contractual stability’, which prevents Players to unilaterally and prematurely terminate contracts without just cause, risking to pay significant compensation. Moreover, such approach

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<sup>4</sup> See, e.g., [DRC decision no. 08133453](#) of 30.08.2013, par. 27.

<sup>5</sup> *Matuzalem case*, par. 68-75.

<sup>6</sup> *Matuzalem case*, par. 68.

<sup>7</sup> *Matuzalem case*, par. 89.

completely fits to the purpose of Article 17.1: Player should not pay determined and preliminary known amount for contract termination, which looks more like sanction or penalty, but rather compensate damages to the Club for such termination, which are unique in every particular case and can be assessed when deciding body has broad discretion on applying different criteria.

However, since 2001 Article 17.1 and criteria presented therein were applied differently and its scope was interpreted differently, which caused certain ambiguity and inconsistency in FIFA DRC and CAS jurisprudence.

#### Before *Matuzalem case*

Before implementing the principle of “positive interest” for estimating compensation in CAS jurisprudence, CAS, and particularly FIFA DRC were defining compensation amount based on general analyses of objective criteria under Article 17.1 and their application to the circumstances of particular case, although applying “case-by-case” analyses, but still evaluating and applying objective criteria from subjective perception of arbitrators or members of DRC, possibly trying to seek just and fair amount of compensation<sup>8</sup>.

For instance, in *Ortega case*<sup>9</sup> the amount (which was defined in general, absence of any particular calculations) was based mostly on the expenses the Club paid to previous clubs, football association and image promotion company for having player in its team. In *Mexès case*<sup>10</sup> such “other objective criteria” was taken into account as transfer offer from the player’s new club (which was rejected by previous aggrieved club) and money paid by previous club for contract extension. In *Tareq Eltaib case*<sup>11</sup>, CAS, although not deciding on the amount of compensation and sending case back to DRC, paid attention on Swiss law regarding compensation of loss suffered by the employer due to employee’s unilateral termination. Finally in *Webster case* CAS deemed appropriate to apply only the criteria of remaining salary under the contract, causing long discussions in the world of international sports law about the future of football transfer system.

#### *Matuzalem case* and principle of positive interest

However, *Matuzalem case* and further recognition of “positive interest” principle in other cases<sup>12</sup> made some kind of order and consistency in evaluation of compensation, shifting the analyses and application of objective criteria under Article 17.1 from subjective perception of decision makers to analyses of certain possible damages and losses incurred by the club and whether such damages and losses were proven or not.

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<sup>8</sup> Bearing in mind Club’s attitude to the player after rejection to extend the contract and other circumstances, the idea of “fair” compensation amount can in particular be assumed in [CAS 2007/A/1298, 1299 & 1300](#) *Webster & Wigan Athletic FC v Heart of Midlothian* (“**Webster case**”).

<sup>9</sup> [CAS 2003/O/482](#) *Ariel Ortega v. Fenerbahçe and FIFA*.

<sup>10</sup> [CAS 2005/A/902-903](#) *P. Mexès and AS Roma v. AJ Auxerre and AJ Auxerre v. P. Mexès and AS Roma*.

<sup>11</sup> [CAS 2006/A/1100](#) *Tareq Eltaib v. Club Gaziantepspor*.

<sup>12</sup> *De Sanctis case* ([CAS 2010/A/2145-2147](#), *Sevillia FC SAD, Udinese Calcio S.p.A., Morgan de Sanctis*); *El Hadary case* ([CAS 2009/A/1880 & 1881](#)); *Appiah case*. However, in [CAS 2013/A/3091-3093](#) *FC Nantes v. FIFA & Al Nasr Sports Club* the Panel confirmed decision of FIFA DRC, which based compensation on the offers made by third parties, showing “potential market value of the player” (par. 261), without referring to “positive interest” (the approach like in *Mexès case*).

Application of “positive interest”, although having a lot of criticism due to the assumptions on which “expected” losses of the club are based, in my opinion, is the exact reflection of how Article 17 should work. Keeping the amount of possible compensation uncertain (and strengthening the ‘contractual stability’), decision makers are flexible in having wide discretion on choosing and applying different criteria available under Article 17.1 depending on the circumstances and having the third element (which was missing before) – “positive interest” principle – some sort of guideline, using which decision makers know how these criteria should be applied (analysing what would be, if Player had not breached the contract).

### FIFA DRC’s approach

Interestingly, but even after the “positive interest” principle was applied in *Matuzalem case* and afterwards confirmed and accepted by other CAS awards, FIFA DRC, when calculating compensation, still does not directly recognize it. Probably DRC has own understanding and interpretation of Article 17, and is reluctant to go beyond what is written in Article 17.1 itself, by applying the principle derived from Swiss law<sup>13</sup>. Whether FIFA DRC and CAS should have certain level of consistency in applying the same provisions of FIFA Regulations? Probably yes, but as far as cases like *Matuzalem* or *De Sanctis* are relatively rare, particularly now, and uncertainty of compensation amount works effectively to maintain ‘contractual stability’, necessity of reforming Article 17.1 or clarifying on how it should be working precisely is rather absent.

Anyway, in many cases FIFA DRC based compensation on the difference between average remuneration due under previous and new contracts<sup>14</sup>. Sometimes, quite surprisingly, FIFA DRC simply granted “a fair and adequate amount of compensation”<sup>15</sup>.

### **Limitation of Player’s civil responsibility**

Going back to the issue of civil responsibility of Players, it is important to remember that Article 17.2 provides that Player’s new club shall be also jointly and severally liable for compensation, in parts stipulated in the contract or agreed between the parties.

But whether compensation system under Article 17 is fair and proportionate from Player’s prospective, where Player’s liability for premature contract termination can be higher than all amounts he was expected to earn under the contract or even within his career? One can argue, that specificity of sport industry requires such severe responsibility for ‘contractual stability’ imposed on Players comparing to ordinary employees, or that Players should understand, consent and accept such responsibility when signing the contract with a club. Moreover, Article 17.2 clearly imposes obligation to repay compensation also by the new club, which assumingly has induced Player to breach previous contract.

But whether all criteria reflected in Article 17 or derived from application of “positive interest” are directly concern Player as such? For instance, transfer amount is due to be paid by one club to another; Players do not directly benefit from transfer fees. However, one of the “objective criteria” can be the “*fees and expenses paid or incurred by the former club (amortised over the term of the contract)*”. Who benefits from

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<sup>13</sup> See, e.g., Articles 337b, 337c and 337d of [Swiss Code of Obligations](#) (of 30 March 1911).

<sup>14</sup> See, e.g., [DRC decision no. 129641](#) in *De Sanctis case* of 10.12.2009; [DRC decision no. 0113531](#) of 23.01.2013, par. 40; [DRC decision no. 08133453](#) of 30.08.2013.

<sup>15</sup> See [DRC decision no. 0812930](#) of 17.08.2012, par. 35; [DRC decision no. 1012716](#) of 25.10.2012, par. 32.

having a Player's services "for free": Player itself or his new Club? Logically, such part of compensation should be borne by new Club only. The same relates to the damages caused by the former Club due to the loss of Player's services: new Club as beneficiary of Player's services shall be liable to compensate former Club damages caused by loss of such services or damages regarding the replacement of Player's services.

Moreover, the degree of Player's responsibility can be also analysed from different prospective: what compensation should be paid by the Club in the case of unjustified premature termination of the contract? As CAS<sup>16</sup> and DRC<sup>17</sup> jurisprudence shows, the amount is usually based on the remuneration remained under the contract excluding the amounts mitigated by Player (remuneration within the same period under the new contract, if any).

After consideration of such issues it may become clear why FIFA DRC tends to base compensation on the difference between average remuneration under previous and new contracts.

In my opinion, Article 17, although nowadays together with "positive interest" is working effectively as such, could differentiate the compensation due by Player and by Player's new club. Player's responsibility under Article 17 could be limited to certain amount, while another part of compensation could be paid solely by the beneficiary of Player's services – new Club. Although it could be not vitally necessary, such differentiation could substantially facilitate the repayment on enforcement stage: former club and FIFA Disciplinary Committee would be aware which part of overall compensation due by Player only and which – by the Club. Thus Players could not argue the absence of assets and/or blaming new Clubs for inducing the breach, trying to allocate all responsibility on Clubs. On the other hand, amounts due only by Players would not be extremely substantial but rather possible to be repaid.

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<sup>16</sup> See, e.g., CAS 2009/A/1934 & 1946 *Georgi Chilikov v/ Dalian Shide FC*; CAS 2010/A/2289 *S.C. Sporting club S.A. Vashui v Marco Ljubimkovic*; CAS 2010/A/2344 *Ruslan Aleksyeyevich Ajinjal v. PFC Krylia Sovetov & Russian Football Union*; CAS 2011/O/2521 *Matteo Ferrari v Besiktas*. However, in CAS 2012/A/2874 *Grzegorz Rasiak v. AEL Limassol* CAS Panel recognised that "positive interest" is applicable also to the cases when unilateral breach occurred by the Club. Still, damages occurred by Clubs are relatively bigger than damages that Player may incur, and such amounts are disproportionate.

<sup>17</sup> See, e.g., [DRC decision no. 08132467](#) of 30.08.2013; [DRC decision no. 07132577](#) of 31.07.2013; [DRC decision no. 06131988](#) of 28.06.2013.