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Editorial

Professional sports constantly seek new ways to improve performances, break records and reach a certain form of perfection. While sports betting is growing to epic proportions, integrity is key. In this perspective, the recent rise of Big Data deeply changes the way we think about sports and football more specifically.

Football governing bodies, teams, players, broadcasters, betting companies and other private companies have become increasingly sophisticated in the data that they collect, use, control and monetise. This (r)evolution of data raises unprecedented legal challenges for every football stakeholder.

Furthermore, the "General Data Protection Regulation", adopted by the EU Commission, will be applicable from May 2018. Data compliance is becoming a crucial issue and all legal practitioners must, more than ever, be aware of the good practises to be adopted regarding data.

In light of this situation, Football Legal addresses the main legal issues related, amongst others, to data protection, football betting, the integrity of football competitions and footballers' rights to privacy.

Ronan David
Chief Editor

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Players entitled to a share of their transfer fee, Taxes of up to 75% levied on clubs: An Analysis

By Lennart VAN DE PEPPEL
De Kempenaer Advocaten
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→ ***Player transfer – Transfer fee – National law – Tax Law – Sport entities***

The Hague District Court, 30 March 2017, ECLI:NL:RBDHA:2017:3429; North Holland District Court, 24 April 2017, ECLI:NL:RBNHO:2017:3212

Football players are sometimes entitled to a share of the transfer fee paid for them and this compensation can legally be considered as severance compensation. A special employers tax on excessive severance compensation was introduced in the Netherlands in 2009. Since then, a tax of 30% of the excessive part of the severance compensation was levied on the employer. However, in the context of so-called crisis measures, the special employers tax increased to 75% in 2013. Two procedures have been settled at first instance in the past months concerning this special employers tax on excessive severance compensation in relation to the transfer of football players from Dutch clubs to foreign clubs.

On 30 March 2017, The Hague District Court decided on a tax related matter concerning the transfer of a football player.[1] After Player A had been transferred from Club B to Club C in July 2014, a special employers tax for an excessive severance compensation was levied on Club B.

In addition, on 24 April 2017, the North Holland District Court ruled on a similar matter.[2] Player X transferred from Club Y to Club Z in July 2012. Also, in this case, the player had negotiated a percentage of the transfer fee, for which a special employers tax for an excessive severance compensation was levied on Club Y.

The District Courts clarified whether in these cases the special employers tax must be applied to the player's right to a percentage of the transfer fee.

Legal Framework and Background

The Dutch Wage Tax Act 1964 prescribes that a special employers tax - the so-called pseudo final tax - applies to employers who pay employees excessive severance compensation after the employment relationship ends.[3]

It is important to note that such tax is only applicable in the event the annual wage of the respective employee in the year of comparison - in the cases here assessed this was the second year preceding the calendar year of transfer[4] - is higher than a certain threshold, namely EUR 531,000 in both 2012 and 2014,[5] and the total salary in the year of termination of the employment relationship (*i.e.* the year of transfer) including the severance compensation (*i.e.* the compensation based on the transfer fee) would exceed double

1 The Hague District Court, 30 March 2017, ECLI:NL:RBDHA:2017:3429. According to news articles, this decision concerns compensation paid to Graziano Pellè for his transfer from Feyenoord Rotterdam to Southampton (see for example *M. VAN DER KRAAN*, *"Zaak Pelle doorbraak in voetbal"*, De Telegraaf, 5 April 2017, www.telegraaf.nl).

2 North Holland District Court, 24 April 2017, ECLI:NL:RBNHO:2017:3212. According to news articles, this decision concerns compensation paid to *Jan VERTONGHEN* for his transfer from *Ajax Amsterdam* to *Tottenham Hotspur* (see for example *L. BERENTSEN*, *"Hoge belastingambtenaren kraken extra heffing op excessieve vertrekvergoedingen"*, FD, 23 August 2017, https://fd.nl/economie-politiek).

3 Article 32bb of the Wage Tax Act 1964. In accordance with Article 32bb, par. 4, Wage Tax Act 1964, a severance compensation in the sense of the relevant provision is defined as the sum of the amount an employee receives upon termination of the employment contract (such as an amount based on the transfer fee as agreed between the parties) and the relevant wage increases since the year of comparison.

4 If the player was not under contract with the transferring club during the second year preceding the transfer or earlier, the comparison year would be the year preceding the year of transfer in the event of a two-year contract period. In the event the player would already transfer after his first contract year, the comparison year would be the year of the starting date of the contract.

5 The *"test wage"* is in most cases the wages enjoyed in the second calendar year preceding the calendar year in which the employment relationship has ended. The threshold amount of the total annual wage for the comparison year is EUR 540,000 in 2017. If the player arrived at the selling club during the second (or first) year preceding the calendar year of transfer, *e.g.* on 1 July of the relevant calendar year, such test wage is to be calculated by converting the actual received amount in the comparison year (*e.g.* 6 months of salary) to an amount which the player would have received if he would have arrived at the arrived the club on 1 January of the relevant year. In the example given herein the factor would thus be two.

the salary in the year of comparison.[6] Moreover, the rule only applies to severance compensation payable after the entry into force of the provision on 1 January 2009.

Since its introduction in 2009, the pseudo final tax for excessive severance compensation was levied at a 30%-rate. Under the provision in place since 2013, tax at a rate of 75% is levied on the employer over the excessive part of the severance compensation. Next to the pseudo final tax levied on the employer, a 52% tax is levied on the employee over the excessive part of the severance compensation. Consequently, combining the tax of 75% levied on the employer with a tax at a rate of 52% levied on the relevant employee, a total tax of 127% is levied over the excessive part of the severance compensation under the current provision.[7]

A compensation paid to a player based on (a share of) the transfer fee by the old club is to be qualified as severance compensation.[8] The question whether such share of a transfer fee in combination with the annual salary of the player results in excessive severance compensation is to be assessed on a case-by-case basis.

Furthermore, the legitimacy of the application of the pseudo final tax was assessed in both cases here discussed on the basis of Article 1 of Protocol no. 1 to the European Convention on Human Rights (hereafter referred to as "*Protocol 1*"). This provision stipulates as follows:

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

For a provision interfering with the right to peaceful enjoyment of possession to have effect, it shall be lawful and not arbitrary,[9] for which it is required to be accessible, precise and foreseeable.[10] In addition, the interference with the right to peaceful enjoyment of possession must pursue a legitimate aim in the public interest.[11] The national legislator has a wide margin of appreciation regarding the question if a certain measure serves the public interest.[12] Furthermore, for every interference with the right to peaceful enjoyment of possession, the legislator is required to keep a "*fair balance*" between the means employed to serve the general interest of the community and the protection of the individual's fundamental rights.[13] This balance is absent if the relevant measure under the circumstances of the specific case leads to an "*individual and excessive burden*" for the interested party.[14]

In relation to taxation of excessive severance compensation on the basis of Article 32bb Wage Tax Act 1964, Article 1 Protocol 1 might be infringed dependent on the specific circumstances of the matter. However, there is only an infringement of Article 1 Protocol 1 if the effect of the circumstances of the case leads to the absence of a "*fair balance*" between the public interest and the right to peaceful enjoyment of possession of the taxable party.

Recent decisions on the employers tax on excessive severance compensation in relation to football transfers

An outline of the cases is necessary to explain the relevant regulations, their application in relation to football transfers and the consequences for the football industry.

Decision of The Hague District Court of 30 March 2017

Factual Background

Player A joined Club B on loan on 1 September 2012 and transferred on a definitive basis to Club B on 1 July 2013. In the employment contract, Player A and Club B agreed that in the event of a transfer of Player A, Player A would be entitled to 10% of the transfer fee

6 Parliamentary Papers I, 2008-2009, 31459-C, p. 23-24. It shall be noted that the increase(s) of salary since the year of comparison and the compensation on the basis of the transfer fee shall be taken into account for the for the calculation of the total amount of compensation of which the salary of the comparison year is then to be deducted, resulting in the excessive part of the compensation. Levy of the employers tax only takes place over the excessive part of the compensation, *i.e.* no employers tax is levied on the salary and the part of the compensation on the basis of the transfer fee that is not excessive.

7 It is noteworthy that a specific *"30%-regulation"* (not to be confused with the 30% tax rate from before 2013) could be applicable in such matters. This could be the case if a player lived abroad for at least 24 months (at least 150 kilometres from the borders of the Netherlands) before he arrived at the club. In such scenario, the club could possibly be allowed to provide 30% the wage of player free of tax. Only 70% of the excessive part (and of the non-excessive part) of the severance compensation would thus be taxed. Consequently, the total tax rate would be 111,4% (instead of 127%). It goes beyond the purpose of this article to deal any further with the *"30%-regulation"*.

8 In accordance with Article 32bb, par. 4, Wage Tax Act 1964.

9 Opinion of Advocate General to the Supreme Court Niessen to the decision of the Netherlands Supreme Court of 20 June 2014, no. 13/01431, ECLI:NL:HR:2014:1463, dated 24 September 2013, ECLI:NL:PHR:2013:979 (hereinafter: the Opinion of A-G Niessen), par. 6.11, with reference to the decision of the European Court of Human Rights of 25 March 1999, no. 31107/96 (Itaridis), JB 1999/163, par. 58.

10 Opinion of A-G Niessen, par. 6.12, with reference to the decision of the European Court of Human Rights of 5 January 2000, no. 33202/96 (*Beyeler* v. *Italy*), NJ 2000/571, par. 108-109.

11 Opinion of A-G Niessen, par. 6.17, with reference to the decision of the European Court of Human Rights of 5 January 2000, no. 33202/96 (*Beyeler* v. *Italy*), NJ 2000/571, par. 111.

12 Opinion of A-G Niessen, par. 6.18, with reference to the decision of the European Court of Human Rights of 21 February 1986, no. 8793/79 (*James and Others.* v. *United Kingdom*), Series A98, par. 45-46.

13 Opinion of A-G Niessen, par. 6.21, with reference to the decision of the European Court of Human Rights of 18 February 1991, no. 12/03386 (*Fredin* v. *Sweden*), Publication Series A, no. 192, par. 66.

14 Opinion of A-G Niessen, par. 6.22, with reference to the decision of the European Court of Human Rights of 8 July 1986, no. 9006/80, 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (*Lithgow and Others* v. *United Kingdom*), Publications Series A, no. 102, par. 120.

received by Club B.[15]

In July 2014, Player A transferred to Club C. In the agreement for termination of the employment contract between Player A and Club B, it was stipulated that Club B would pay to Player A his share of the transfer fee received from Club C, amounting to 10% of the net transfer sum Club B actually received from Club C.[16]

In November 2015, the Tax Administration levied a tax of an undisclosed amount on Club B as pseudo final tax for excessive severance compensation.[17] Although not mentioned in the published decision, Club B lodged a notice of objection with the Tax Administration, which, was apparently dismissed. Club B filed an appeal against the decision with The Hague District Court.

Points of Dispute

The dispute was whether the levy of the employers tax is contrary to Article 1 Protocol 1.[18] Club B was of the opinion that Article 32bb of the Wage Tax Act 1964 is contrary to Article 1 Protocol 1, because the provision has an arbitrary effect, there is no "*legitimate aim*" and the required "*fair balance*" has not been complied with. In that regard, Club B claimed that the payment of a transfer fee is common in European football and that this is an important part of the revenue model in the professional football sector. Revenue from transfer fees ensures the continuity of the company. Achieving the co-operation of players in transfers is, according Club B, achieved by envisaging a share in the transfer fee.[19]

Given the great economic interest of football clubs in realising transfer fees and the international arrangement of this earnings model, the behavioural change as proposed by the legislator would not be possible with employers in the football sector in relation to football transfers. Furthermore, according to Club B, the employers tax was also not introduced by the legislator with the aim of preventing Dutch professional football clubs from attempting to achieve higher transfer fees for the sale of players.[20] According to Club B, the levy is contrary to the purpose and meaning of the provision in this case.[21]

Finally, Club B claimed that in its case there is an "*individual excessive burden*". In that connection, Club B pointed out that, next to the 75% employers tax, it had already withheld 52% of the wage tax on the severance compensation. Thus, the wage is partially hit twice by a wage tax which leads to a tax of 127% on the excessive part of the compensation.[22]

The Decision

The court held that the "*legitimate aim*" and the required "*fair balance*" between the general interest and the individual interest can only be tested for reasonableness. This means that, only if legalisation works out evidently arbitrary or if legislation hits completely different categories than pursued by the legislator, there could be an infringement of the principle of proportionality.[23]

According to the court, it is certain that the relevant provision was not aimed at hitting professional football as such and it was accepted as part of the deal to also apply the regulation to football clubs.[24] It is also clear, according to the court, that the aimed behavioural change - no longer granting excessive severance compensations by employers - can foreseeably not be realised with this provision, since football clubs would miss out on transfer fees which contribute to the continuity of the company.[25]

> ***By the additional levy - which now amounts to 75% - Dutch professional football clubs may also experience a competitive disadvantage in respect of other European clubs***

The court further acknowledged that realising transfer fees is an important part of the revenue model in European professional football. By the additional levy - which now amounts to 75% - Dutch professional football clubs may also experience a competitive disadvantage in respect of other European clubs.[26]

On this basis, the court found that Article 32bb Wage Tax Act 1964 hits a category of taxpayers - professional football clubs - which evidently did not belong and could not belong to the target group, since this provision aims for a behavioural change to which the professional football clubs could foreseeably not comply. Besides, there is no possibility for exculpation.[27]

Consequently, the court held that Article 32bb Wage Tax Act 1964 does not comply with the principle of proportionality and already on that ground leads to a violation of Article 1 Protocol 1.[28] Consequently, it was not necessary to assess whether there was an "*individual and excessive burden*" in the present case.[29]

15 The Hague District Court, 30 March 2017, ECLI:NL:RBDHA:2017:3429, par. 2 and 4.
16 *Ibid.*, par. 5.
17 *Ibid.*, par. 9.
18 *Ibid.*, par. 10.
19 *Ibid.*, par. 11.
20 Creating a behavioural change concerns the so-called instrumental function of tax legislation. This function of the provision was confirmed in the legislative history to Article 32bb Wage Tax Act 1964 (Parliamentary Papers II, 2007-2008, 31459, no. 3, p. 1-4).
21 The Hague District Court, 30 March 2017, ECLI:NL:RBDHA:2017:3429, par. 11.
22 *Ibid.*, par. 11.
23 *Ibid.*, par. 15.
24 *Ibid.*, par. 17.
25 *Ibid.*, par. 17. It is important to note that since the compensations are already agreed in the employment agreement and clubs could thus not just decide to not grant the compensations on the basis of the relevant player's transfer fee anymore.
26 *Ibid.*, par. 17.
27 *Ibid.*, par. 18.
28 *Ibid.*, par. 19.
29 *Ibid.*, par. 20.

Decision of the North Holland District Court of 24 April 2017

Factual Background

Player X entered into an employment relationship with Club Y on 1 July 2005.[30] In a renewal of the employment contract starting on 1 July 2008, Player X and Club Y agreed that in the event of a transfer of Player X, Player X would be entitled to 15% of the transfer fee received by Club Y.[31]

In July 2012, Player X transferred to Club Z. In the agreement for termination of the employment contract between Player X and Club Y, it was stipulated that Club Y would pay to Player X his share of the transfer fee received from Club Z in three instalments of EUR 250,000, amounting to a total of EUR 750,000, plus 15% of the possible additional payments to be received from Club Z. These additional payments would be dependent on the results of Club Z in the next years.[32]

The Tax Administration levied a tax of EUR 454,757 on Club Y in December 2012 as pseudo final tax for excessive severance compensation. Club Y lodged a notice of objection with the Tax Administration, which was dismissed on 21 February 2012.[33]

After the notice of objection was dismissed, Club Y filed an appeal against the decision with the North Holland District Court.[34]

Points of Dispute

Club Y alleged that a general application of the rule - in the sense that it applies irrespective of the business sector - would have an effect on football clubs that is contrary to the purpose and meaning of Article 32bb of the Wage Tax Act 1964. Club Y purported that this applies specifically for the matter under scrutiny, since extra payments had been made to a specific footballers' pension fund, reason for which the pseudo final tax would be higher (due to a greater difference between the salary in the year of comparison and the year of termination of the employment relationship).[35]

In addition, Club Y alleged that the application of Article 32bb of the Wage Tax Act 1964 would be contrary to Article 1 Protocol 1.[36] Club Y argued that the levy is contrary to Article 1 Protocol 1 because of material retroactive effect, since the contract with the player had been concluded before the entry into force of Article 32bb of the Act, *i.e.* at a moment in time when the regulation was not foreseeable. In addition, Club Y claimed that since the agreement between the club and the player was fixed, avoidance would not have been possible. Furthermore, Club Y argued that the levy is disproportionate, as the amount is substantial both in absolute and relative terms. This is more important now that it is commercially impossible for Club Y to adjust its business if it wishes to continue competing in international football.[37]

Furthermore, Club Y was of the opinion that the regulation is contrary to the principle of equality of Article 26 International Covenant on Civil and Political Rights (ICCPR) and Article 14 European Convention on Human Rights (ECHR), for the reason that different situations are treated equally.[38]

The Decision

Regarding the purpose and meaning of Article 32bb of the Wage Tax Act 1964, the court ruled that application of the provision in a situation of a transfer of a football player was not in violation with the purpose and meaning of the provision. The court pointed at the legislative history, which explicitly stated that no exception is made for professional football clubs.[39]

The fact that Club Y had made extra payments in the pension fund for the player - which caused the "*test wage*" to drop and therefore the pseudo final tax to increase - was no reason to decide otherwise.[40]

Regarding the second argument, the court held that Article 1 Protocol 1 gives member states a wide discretionary power to set legal rules. Article 32bb Wage Tax Act 1964 pursues a legitimate aim in the public interest.[41] Concerning the alleged material retroactive effect of the regulation, it is to be noted that the application of the rule should be foreseeable for the interested party. Although the contract on which the severance compensation was based was agreed upon before Article 32bb Wage Tax Act 1964 entered into force, and also before the time that is was foreseeable that such regulation would enter into force, the severance compensation was - according to the court - foreseeable in the sense that it was co-dependent on an event occurring after the entry into force, namely the transfer.[42]

In this regard, the court noted that the legislator remained within its discretionary power when issuing a generic regulation on levying tax on the employer for excessive severance compensation. As such, the court ruled - referring to a decision of the Supreme Court of the Netherlands - that there is no reason to hold that the legislator had not pursued a legitimate aim with the relevant regulation, or failed to take into account the required "*fair balance*".[43]

30 North Holland District Court, 24 April 2017, ECLI:NL:RBNHO:2017:3212, par. 2.
31 *Ibid.*, par. 4.
32 *Ibid.*, par. 5.
33 *Ibid.*, outline proceedings.
34 *Ibid.*, outline proceedings.
35 *Ibid.*, par. 19.
36 *Ibid.*, par. 19.
37 *Ibid.*, par. 32.
38 *Ibid.*, par. 19.
39 *Ibid.*, par. 31.
40 *Ibid.*, par. 31.
41 *Ibid.*, par. 33. With reference to the decision of the Netherlands Supreme Court of 20 June 2014, no. 13/01431, ECLI:NL:HR:2014:1463, par. 3.4.6.
42 *Ibid.*, par. 33. With reference to the decision of the Netherlands Supreme Court of 20 June 2014, no. 13/01431, ECLI:NL:HR:2014:1463, par. 3.4.9.
43 *Ibid.*, par. 33. With reference to the decision of the Netherlands Supreme Court of 20 June 2014, no. 13/01431, ECLI:NL:HR:2014:1463, par. 3.4.10.

The court furthermore held that, although Club Y had no option to avoid application of the regulation due to the employment agreement with the player, this does not mean that the regulation is contrary to Article 1 Protocol 1 in this case, since the legislator deliberately chose a generic measure wherein escape options are limited as much as possible.[44]

Only in the event of an individual and excessive burden could this lead to disproportionality between the public interest and Club Y's interest. In assessing whether there is such an excessive burden, the deciding element is the extent to which Club Y, in the circumstances of the case, is affected by taxation.[45] In addition, it is important in that regard that in the case of a club, this burden should be felt stronger than in general. This can only be the case if special facts and circumstances, which are not applicable to all taxable entities, lead to an excessive burden for Club Y.[46]

The mere circumstance that a substantial amount in absolute and relative terms is to be paid, is insufficient to assume an individual and excessive burden. In view of Club Y's financial position, it was able to pay the amount of tax without the liquidity problem resulting in endangerment for the continuity of Club Y. The taxation only concerns 15% of a transfer fee. The remaining 85% of this transfer fee will benefit Club Y. Since there was a significant revenue for Club Y relative to the levy, the court ruled that the levy did in general not lead to an excessive burden for Club Y. Based on the foregoing, the court held that the taxation under Article 32b of the Wage Tax Act 1964 in the case of Club Y did not violate Article 1 Protocol 1.[47]

Moreover, there was no equal treatment of unequal matters, since the legislator had decided to include all withholding agents in the same way if they pay severance compensation to departing employees.[48]

Legal analysis

In the case of Club Y, it was argued that the application of Article 32bb Wage Tax Act 1964 in footballers' transfers related matters are contrary to the purpose and meaning of such regulation. The *rationale* of such allegation was explained. Namely, such final tax on excessive severance compensation was never initiated to hit football clubs in the situation of a transfer of a player, but rather intends to counteract exorbitant high severance compensations and therewith aims to achieve a change of behaviour for employers to no longer grant excessive severance compensation to their leaving employees. However, regarding the application of Article 32bb Wage Tax Act 1964 in relation to football clubs, the legislative history provides that such regulation is also applicable to compensation paid to players on the basis of transfer fees.[49] It can however still be discussed whether taxation of football clubs in matters as discussed herein matches with the underlying instrumental function of the regulation. In the author's opinion, such application of the regulation surely complies with the idea that no party should have the option to avoid taxation, yet it completely goes beyond an underlying instrumental *rationale*.

Whether the regulation on taxation of excessive severance compensation would in football transfer related matters be in violation of Article 1 Protocol 1 is a question that remains and which is food for even more discussion than the previously mentioned argument. It is very interesting to see whether, under the circumstances of a transfer, taxation of compensation to players on the employer is in principle not in contradiction with Article 1 Protocol 1. It is clear that the extra taxation is substantial in both absolute and relative terms in case an extra (!) tax of 75% is levied. However, the question remains if, and, if so, under what circumstances such a substantial taxation results in an "*individual and excessive burden*".

Firstly, a distinction must be made between both cases, as the 30% employers tax applies to the matter leading to the decision of 24 April 2017 - since the transfer of Player X dates back to July 2012 and tax was to be paid over the 2012 financial year - whereas the 75%-rate is applicable to the matter leading to the decision of 30 March 2017 - since the obligation to pay tax in relation to the transfer of Player A arose after the increased rate was introduced in 2013.[50]

Although the difference in the applicable tax rate - 30% *vis-à-vis* 75% - might appear to have led to a different outcome when reasoning that a 30%-rate might be found less of an "*excessive burden*" on the football club, the decision in the case of Club Y was more consistent with the wording of the rule laid down in Article 32bb Wage Tax Act 1964 and the legislative history thereto.

Furthermore, a change of behaviour, *i.e.* clubs not granting compensation to their players on the basis of future transfer fees, would cause for Dutch clubs not being able to hold on to their best players longer than they could have and would thus cause a change of behaviour which is harmful to Dutch professional football.

In addition hereto, clubs would foreseeably be hit again and again by this employers tax in the event of a transfer. It would take new player contracts and players who would settle for a contract without the prospect

44 *Ibid.*, par. 34.
45 *Ibid.*, par. 35. With reference to the decision of the Netherlands Supreme Court of 12 August 2011, no. 10/02949, ECLI:NL:HR:2011:BR4868.
46 *Ibid.*, par. 35. With reference to the decision of the Netherlands Supreme Court of 17 March 2017, no. 15/04187, ECLI:NL:HR:2017:441.
47 *Ibid.*, par. 35.
48 *Ibid.*, par. 36.
49 Legislative history to Article 32bb Wage Tax Act 1964 (Parliamentary Papers I, 2008-2009, 31459-C, p.23-24).
50 See in this regard also the annotation of *D. Molenaar* to the decision of the North Holland District Court, 24 April 2017, NLF 2017/1393.

of compensation upon transfer, which tends to a new generation of players before a behavioural change could take place. Besides, one of the arguments of Club B - with envisaging a compensation for the player upon his transfer clubs achieve the co-operation from a player for the transfer - has an underlying aspect. With granting players the prospect of compensation in the event a transfer fee being paid for their transfer, a player will co-operate more easily. If such prospect of a compensation would not be granted, chances are bigger that a player waits to transfer to a new club until his employment contract has lapsed and then sign an employment contract with a new club for a higher salary because the new club would not have to pay a transfer fee. These interrelated aspects of the football market should not be underestimated.

Further, taxation on the basis of Article 32bb Wage Tax Act 1964 is (somehow) foreseeable in the sense that it is co-dependent on an event occurring after the entry into force, *i.e.* the transfer of the player. However, the legislation does not provide for transitional law for employers to adjust their policy or behaviour.[51] Thus, since severance compensation in football transfers is based on the employment contract, the football clubs in the here discussed cases did not even have the possibility to adjust their policy in this sense, apart from the question whether football clubs can actually change their policy of granting players compensation on the basis of the transfer fee without damaging their revenue model.

Moreover, it is a serious question whether clubs are harmed in their competitive position with regard to other European clubs. This regulation may hit football clubs (more than once) in the heart of their modern revenue model, different from other companies in other markets in which the transfer of employees to other employers is not (one of) the main pillar(s) of a company's revenue model. As such, the regulation has an anti-competitive effect on football clubs.

The discussion on the legitimacy comes close to a discussion on feasibility in pecuniary sense in football transfer related compensations. On the one hand, the amount of tax that is to be paid is substantial in both relative and absolute terms, whereas on the other hand it is a tax levied on a compensation that is based on a transfer fee, and therefore a club must be able to pay these taxes.[52]

Yet, combining these opposing arguments, the higher the compensation payable in relation to the transfer fee, the more substantial the tax would be and the less easily the club will be coughing up the sum. Indeed, such higher compensation will cause for a heavier burden for the club and the bigger the possibility that taxation of the employer should be deemed an "*individual and excessive burden*."

In this regard, a club would not effectively profit from a player's transfer if the regulation is applicable and the player would be entitled to a compensation equal to or more than 57.124857% of the transfer fee. In such situation, the compensation payable to the player and the 75%-taxation of this amount would result in zero profit on the relevant transfer for the club.[53] In the event of wage increases since the "*year of comparison*", the percentage of 57.124857 drops, relative to the wage increases.

Of course, a compensation equal to (or more than) 57.124857% of the transfer fee is a rather high compensation but this shows what the effects of the employers tax could be; a football club could be discouraged to act in what should be their best interests to develop, namely it could be discouraged to transfer a player whilst knowing that it will not be able to attract a suitable replacement.

> ***"The compensation payable to the player and the 75%-taxation of this amount would result in zero profit on the relevant transfer for the club"***

It seems clear that an "*individual and excessive burden*" exists in case of a compensation equal to (or more than) 57.124857%. However, it is not easy to draw a line where the employers tax becomes an "*individual and excessive burden*".[54] All circumstances should be taken into consideration in the specific case, including the fact that a great part of the revenue model of Dutch professional football clubs is based on transferring their players. Not just the mere fact that a compensation is taxed twice - at the player and at the club - makes it an "*individual and excessive burden*."

Conclusion

For Dutch professional football clubs, a clause granting a player compensation relative to the transfer fee paid for his transfer allows the club to compete

51 Lack of transitional law is also one of the points discussed in the decision of the European Court of Human Rights of 14 May 2013, no. 66529/11 (*N.K.M.* v. *Hungary*), FED 2013/79, with annotation of *M.R.T. Pauwels*.

52 This was also pointed out by the court in the case of Club Y (North Holland District Court, 24 April 2017, ECLI:NL:RBNHO:2017:3212).

53 The following equation, whereby the player's share is X, applies: net transfer fee = 75% * X * net transfer fee + X * net transfer fee. If the amount awarded to the player as compensation accumulated with the amount of employers tax to be paid is equal to the net transfer fee, the club does not profit from the transfer. Example: a player is transferred for a net transfer fee of EUR 10,000,000. 75% * X * 10,000,000 + X * 10,000,000 should thus equal 10,000,000. Therefore, 17,500,000X + 10,000,000X = 10,000,000. Consequently, 17,500,000X = 10,000,000. Thus, 1,75X = 1. Thus, X = 0.57142857.

54 It is interesting to note that Advocate General to the Supreme Court Niessen already pointed at - in relation to matter not related to football - the possibility of an employers tax on a severance compensation becoming an *"individual and excessive burden"* in case the tax rate is very high. However, the tax rate is one of the aspects that is to be taken into consideration. A mere high tax rate does, as such, not lead to an individual and excessive burden. See in this regard the Opinion of A-G Niessen, with reference to the decision of the European Court of Human Rights of 14 May 2013, no. 66529/11 (*N.K.M.* v. *Hungary*), FED 2013/79, with annotation of *M.R.T. Pauwels*.

with clubs from other countries which are able to offer higher salaries whilst it enables the club to achieve co-operation of the player for a transfer in order to receive a transfer fee. Clubs are hit in their revenue model with the employers tax on severance compensation, *i.e.* the transfer of players whilst enabling themselves to hold on to their best players longer (and possibly even generating more transfer income from the more developed player).

Although for clubs a relatively low risk means providing the player with a compensation that will be based on his own performance (which could also be a driving force for realising a high transfer fee) instead of a high (fixed) annual fee or performance bonus, Article 32bb Wage Tax Act 1964 implies an additional expense on the basis of Dutch legislation.

That Article 32bb Wage Tax Act 1964 influences the competitiveness of Dutch clubs *vis-à-vis* foreign clubs, for which such a provision does (probably) not apply, is undeniable. Thus, the amount of tax to be paid "*extra*" cannot be invested in a new player, or otherwise benefit the club. The question remains whether such a disadvantage is disproportionate in relation to the general interest, whereby the aim of the provision is to be considered. It is the author's opinion that the higher the amount of compensation in relation to the transfer fee, the greater the individual burden for the club and the greater the chance that it is excessive. Article 32bb Wage Tax Act 1964 should, in such case, be deemed contrary to Article 1 Protocol 1 and thus not be applied in the specific case.

Not only could this regulation have dragged football clubs into extra taxation for which it was not specifically targeted, but it could and probably already is harmful to clubs in the sense that they have less funds to attract replacement for their sold players.

The Penalty Story between FC Lisse *and* HSV Hoek*: Justified or Unjustified Winners?*

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➔ ***Referee decisions – Royal Dutch Football Federations (KNVB) – International Football Association Board (IFAB) – National courts***

Mid-Holland District Court, 6 October 2017, ECLI:NL:RBMNE:2017:5226

A beautiful day for the players of amateur club *FC Lisse:* on 20 September 2017, they defeated another amateur club, *HSV Hoek*, after a penalty shoot-out. Or not…? Read below to find out what happened between *FC Lisse*, *HSV Hoek* and the Dutch Football Association (KNVB).

The facts and circumstances

On 20 September 2017, *FC Lisse* played in the first round of the KNVB Cup Tournament against *HSV Hoek*. The winner of this match would qualify for the second round of the Cup. After 90 minutes, the score was 1-1, following which the match went to extra time. Within this extra time both teams scored one goal, so after the extension the score was 2-2. Therefore, the referee proceeded to penalty shoot-outs in accordance with Article 9 of the Regulations of the Cup. However, the referee decided to let the players take the penalties according to the ABBA-system, instead of the default ABAB-system. The former system implies that club A takes the first penalty, club B takes the next two penalties, after which club A takes the next two penalties, etc. (comparable to the tie-break system in tennis), rather than both teams taking penalties alternately as was customary in football until recently.

FC Lisse took the first penalty in the *ABBA*-series. After taking ten penalty shots in total, both teams missed one penalty shot which resulted in a 4-4 score. The referee then decided that the next penalties were going to be taken alternately. *FC Lisse* took the first penalty and scored. *HSV Hoek* was next and missed. Therefore, *FC Lisse* won the match with the penalty shoot-out ending in a 5-4 score.

The ABBA-system was not used completely out of the blue by the referee, since FIFA is currently investigating through a pilot if taking penalty shoot-outs according to the ABBA-system is more desirable than the ABAB-system. Apparently, research has shown that when penalties are taken alternately, the club that takes the first penalty shot has a psychological advantage. The ABBA-system would make this advantage disappear (at least to a great extent).

After the match, the team manager of *HSV Hoek* lodged a complaint against the decision of the referee to use the ABBA-system, which *HSV Hoek* considered to be unjustified and in violation of the KNVB Regulations. The referee admitted one day later that he indeed wrongly decided to take the penalty shoot-out according to the ABBA-system. The KNVB carried out an investigation into the above-mentioned matter in order to answer the following question: was it necessary for the penalty shoot-out to be repeated?