

TV rights in Spanish football and the controversial new law

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Introduction

Several years ago, two of Spain's leading sports law authorities published an article entitled (in translation) 'TV Rights in Professional Sports: An Interminable History of Conflict?' Indeed, for many years now, although Spain's existing system of individual (club-by-club) sale of broadcast rights has been increasingly criticised and its imminent demise predicted, it has proven stubbornly resistant to change and a frequent source of controversy.

The Spanish government very recently adopted fast-track legislation imposing from the upcoming 2016-2017 season a system of collective sale of broadcast rights for the Spanish La Liga (first and second divisions) and the national Copa del Rey and Supercopa de España competitions. Providing for a

centralised, rational and equitable distribution of proceeds among clubs and other football stakeholders along the lines of the systems in place in the leading European footballing jurisdictions, the new system might have been expected to meet with satisfaction from all relevant quarters.

But the reality, alas, is quite different and more complex: questions of politics, interests and personality have resulted in the new legislation being greeted with a maelstrom of criticism, including the threat of a player's strike which could bring the current editions of La Liga and the Copa del Rey to a screeching and premature end in the coming days. Far from making peace, the new legislation seems only to have fanned the flames of war in the world of Spanish football.

Background

The collective sale of broadcast rights for sporting events has gained considerable transaction globally in recent years. The eye-popping prices generated by the sales of rights by the English Premier League (not to mention those of the American mass market professional leagues such as the NBA, NFL and MLB) has left the Spanish individual, club-by-club sale system as increasingly anomalous compared to its peers.

Legally, competition law authorities have tended to find valid, rule-of-reason/proportionality justifications for collective sales notwithstanding their constituting presumptive horizontal restraints of trade among competitors. Spain's Comisión Nacional de Competencia (National Commission on Competition and Markets) indeed issued a 2009 report in which it indicated that the question of whether sales were individual or collective had little or

no bearing in and of itself on the question of anti-competitive effects. Echoing the Spanish government's approach to the issue, the report encouraged the clubs, as private enterprises, to develop and implement an appropriate system consistent with competition law.

But this has not been possible, and the government (as in the case of Italy several years ago) has now stepped into the breach and legislated.

Self regulation was jettisoned in favour of regulation due to the perception that Spanish football had become frozen into a bipolar world of 'haves' and 'have nots.' This trend, it was feared, would only be exacerbated over time: the two richest and most powerful teams (Real Madrid and Barça) would, especially in a world where financial fair play restrictions require budgetary prudence for rich and poor alike, become ever richer and more powerful, and the gap (both financial and competitive) between the 'best' and the 'rest' would continue to grow. La Liga would become more and more predictable and less and less competitive; over time, the ability to acquire and retain the talent necessary to maintain and increase public interest and audience viewership would increasingly lag behind that of competing leagues.

A quick look at the numbers shows the reasons for concern. On the one hand, the allocation of the 'pie' of TV rights under the current system favours the two powerhouse clubs, who together reap more than one third of the TV revenues generated by the 20 clubs in La Liga. At the other extreme, the bottom-of-the-table Spanish clubs receive barely one seventh as much as each of the two giants. This 7:1 ratio compares very unfavourably to the much flatter distribution ratios prevailing under

the principal European collective sales schemes, or comparable American collectively bargained revenue sharing schemes (which, together with salary caps, player drafts and similar devices, aim to level competition and competitors, making the American professional sporting world paradoxically more 'socialistic' than the more 'laissez faire' European model). The relatively extreme disparities produced by the Spanish individual sale scheme inevitably freeze the competitive status quo, making it a near miracle (as in the 2013-2014 season) when any club other than Real Madrid or Barça wins, or even competes seriously for, the La Liga title.

On the other hand, and notwithstanding the undeniable on-pitch prowess in the recent decade of Spanish football exemplified by the national team's World Cup and European Cup successes and Real Madrid and Barça being considered the best two clubs in the world, the revenues obtained overall from the sale of La Liga TV rights in recent years have been eclipsed by competitor leagues and more than doubled in the case of the Premier League.

In the absence of agreement among the interested parties, the government stepped into the breach on 30 April 2015, promulgating as a Royal Decree Law - a legislative procedure designed for urgent matters and which provides for subsequent up-or-down Parliamentary approval - legislation imposing collective sales as from the 2016-2017 season.

Content of the legislation

In typical Spanish legislative practice, the new law (of some 12 pages) is preceded by nearly six pages of 'exposition of motives,' i.e. explanation of the whys, wherefores and contents of the law.

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Referring to the professional sporting world as a 'complex ecosystem,' this prologue indicates that the 'structural weakness' of the system of individual sales has given rise both to sales proceeds far below those which properly correspond to Spanish football and to income gaps between rich and poor clubs which far exceed those of other European leagues. The solution contained in the law involves (i) the obligation for clubs to assign their audiovisual sale rights to La Liga (and, for the Copa del Rey and Supercopa, to the Real Federacion Española del Fútbol (the Royal Spanish Football Federation) ('RFEF')) for collective sales, (ii) the creation of a system of distribution of income from collective sales which provides for a much more balanced allocation than has been the case under the prevailing individual sales systems, and (iii) obligations for distribution of certain amounts for various other football stakeholders, activities and organisms.

Acknowledging that self regulation (as in England or Germany) would have been 'desirable,' the exposition of motives says that the impossibility of agreement among the stakeholders, the 'enormous accumulated tension' of the last decade, the 'indisputable social relevance' of football in Spain, the 'reiterated and unanimous request for governmental regulation' and the 'need to promote competition in the pay TV market' all made necessary governmental regulation by means of the fast-track, urgent Royal Decree Law.

Thus, from 2016 forward, Spanish football TV rights will be pooled and sold collectively to achieve the triple target of helping the finances of the smaller clubs, restoring competitive balance to the competitions and increasing overall revenues from the sale of

TV rights. According to the new law, 90% of the proceeds from the sale of rights will be allocated to First Division clubs, half of which being shared equally among all 20 clubs, and half to be divided up according to individual clubs' performance and profile (including ticket sales and the club's role in generating broadcast revenues). The remaining 10% of proceeds is destined for Second Division clubs, with up to 70% to be shared equally and the remainder to be allocated according to performance and profile.

The law also establishes a series of obligations on the clubs. Specifically, each club is obliged to provide to the RFEF and La Liga 1% of the club's receipts from the proceeds of the collective sale of rights for purposes of financing the development of amateur football and promoting professional football, respectively. In addition, up to 3.5% of receipts are to be allocated to assist clubs which are demoted in division. The clubs are also obliged to allocate 1% of their receipts to fund social security payments for athletes, as well as up to 0.5% to the Consejo Superior de Deporte (the arm of the Ministry responsible for sports oversight and regulation) for various purposes, including funding women's football, subsidising the lower divisions and financing the associations of football players and of other football stakeholders.

Interestingly, the Royal Decree Law states that the satisfaction of overdue payables involving social security and tax shall have priority over the foregoing allocation obligations. As it happens, Spanish first division clubs owe the Spanish fisc more than €500 million, a mind-boggling figure which in fact has been substantially reduced over recent years. From this perspective, the Royal Decree Law could be seen principally as a means of

financing the clubs' satisfaction of their debts owed to the state.

According to some analysts, the new system may increase the likely proceeds from the current figure of €755 million to some €1/1.1 billion in the first season, a very substantial increase indeed (although still a far cry from the £5.14 billion landed by the Premier League last year in its multi-year deal).

Obviously, the enormous imbalance in the structure of Spanish football that has been created in the past decades will not be undone overnight. Real Madrid and Barça will still earn more than the rest. Indeed the new regulation actually guarantees, as a transitional measure, that clubs will receive for the coming six seasons not less than what they received in the 2014-2015 season from the sale of TV rights.

But the law signals the beginning of a new era. As stated by the La Liga president, "This is a new chapter in the history of Spanish professional football. This decision taken by the Spanish government is a historic step forward for Spanish football that will allow us to be more competitive both nationally and internationally."

The immediate aftermath

The interminable controversy about Spanish football TV rights has not been resolved by the new legislation; any euphoria arising from the promulgation of the Royal Decree Law has been very short-lived. The government's action has not sat well with the players, who feel they have been short changed by the allocation rules, or with the RFEF, which alleges that it was excluded from the discussions. The players' position is particularly interesting and of particularly high visibility: they (via the Asociación de Futbolistas Españolas (Spanish

Footballers Association) ('AFE')) actually threatened on 5 May a strike which would shut down La Liga and the Copa del Rey in the final weeks of both campaigns.

The AFE asserts that its objection to the Royal Decree Law is based on its aim to obtain up to 3% of the proceeds of the new collective system whereas, as noted above, the players' participation has been finally limited to a portion of the 0.5% to be allocated to the Consejo Superior de Deporte for varying purposes (and ranked in third position of preference at that, behind women's football and the lower divisions).

Many observers assert that, in reality, the RFEF is simply using the AFE to pursue its own agenda, and the AFE is simply using the Royal Decree Law as an excuse to exert pressure on the government for entirely unrelated grievances. Specifically, it is suggested, the players are seeking to push the Spanish fisc back on both (i) their highly publicised efforts to closely scrutinise individual players' tax structures before continuing to grant a long-standing treatment as low tax paying image rights (rather than high tax paying ordinary income) on up to 15% of overall salary and (ii) their new insistence that agents' commissions be paid by players rather than, as per long-standing practice, directly by clubs without being considered income to the players. Viewed from this angle, the threatened strike would be a merely opportunistic - and possibly illegal - action with little or no relation to the Royal Decree Law itself.

The RFEF has endorsed the AFE's posture, declaring its intention to suspend Spanish professional football as from 16 May and converting the threatened action into a simultaneous strike and lockout. The long-standing president of the RFEF stated that

the present situation is a consequence of "the Spanish government's disrespectful attitude towards the RFEF with regard to this Royal Decree Law and its failure to resolve other questions involved." Coaches, referees and the regional federations, all dependent on the RFEF, have now endorsed the strike as well.

La Liga has brought a legal action seeking a declaration that the threatened strike is unlawful and an award of damages. Oral argument on La Liga's request for interim measures blocking the strike was heard on 13 May. The following day, on Thursday 14 May, the Court issued a decision granting the interim measure. Provided that La Liga posts a bond in the amount of €5 million, there will be football in Spain on the weekend starting the 16 May.

Needless to say, behind the brinkmanship, extremist positions and probably exaggerated threats of the various parties, there lies a struggle for power in Spanish football. The war between La Liga and the government, on one hand, and the RFEF and the AFE on the other, has been a long running soap opera. The 'interminable conflict' seems far from terminated as of this writing. Stay tuned...



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