Which Method to Use for the Valuation of Football Players’ Image Rights?

In this article, a series of decisions by the Spanish National Court concerning the allocation of image rights’ returns of certain football – FC Barcelona – players are critically examined. The exploitation of such image rights was conferred to entities owned by the very players; hence transfer pricing regulations were triggered. The cases touch upon several relevant transfer pricing topics, such as the choice of the most appropriate transfer pricing method to value the remuneration the players should obtain, the nature of the functions performed by the entities that exploited such image rights, or the consideration of the image rights as hard-to-value intangibles.

1. Introduction

This contribution critically analyses a series of Spanish National Court decisions concerning the transfer pricing attribution of the image rights’ returns of – former – Fútbol Club Barcelona (FC Barcelona or FCB) players Dani Alves, Iniesta, Puyol and Xavi, for income tax purposes. Specifically, these individuals transferred the right to exploit their image rights to entities they owned – tax resident in Spain – in exchange for an arm’s length remuneration that was questioned by the Spanish tax authorities.

In a sense, these are fairly exotic decisions in the transfer pricing realm, as they concern high-net-worth individuals and not multinational enterprises (MNEs), operating on a domestic basis – in Spain, the scope of transfer pricing regulations is applicable also to domestic transactions – interacting at an entity-individual shareholder level.

The taxpayers applied the transactional net margin method (TNMM) to calculate the remuneration that the entity should pay to the player on a yearly basis. The operating margin allocated to the players ranged between 48% and 41%, depending on the fiscal year. Contrary to this, the tax authorities considered that the returns generated through the exploitation of the image rights of these players should be distributed in line with the profit split method (PSM). Curiously enough, the allocation key employed to split the profits focused on the low-value character of the services rendered by the entities. Accordingly, the tax authorities allocated 5% of the net amount to the entities and 95% to the players. In addition, the applicability of a special rule on the valuation of image rights for personal income tax purposes – the so-called 85% rule – was discussed. The National Court reviewed the merits of the case and decided in favour of the taxpayers, following the arguments that will be reviewed in the upcoming sections.

The structure of the contribution is as follows. Section 2.1. addresses the relevant facts of the FCB cases, the assessment conducted by the tax authorities and the National Court decisions. Section 2.2. regards these cases as representative of entity-shareholder transaction issues and attribution of image rights’ returns issues. Section 3. contains a critical analysis of the assessment the tax authorities conducted on the valuation of the image rights’ remuneration, with regard to five issues, namely, the use of the TNMM (section 3.1.) and the misuse of the PSM (section 3.2.), the wrong assessment of the management of image rights as a low value-adding service (section 3.3.), the possible existence of a transactional adjustment (section 3.4.) and the issues that arise on the applicability of the 85% rule (section 3.5.).

2. The FC Barcelona Cases

2.1. Facts, assessment by the tax authorities, and the National Court decisions

The National Court decisions that will be reviewed concern transfer pricing aspects of the remuneration of the transfer of the right to exploit image rights by FC Barcelona football players – Dani Alves, Iniesta, Puyol and Xavi – to entities they own. These entities would obtain the resulting returns paid both by the club itself and from other enterprises – such as Coca-Cola, Nike, Panini, Adidas International, Kalise and others – mainly due to advertisement or endorsement agreements. In exchange,
the players would obtain an arm’s length remuneration from these entities, calculated in line with the TNMM.

Yet, the income paid by FC Barcelona was excluded from such computation, as the taxpayers considered that a special attribution of income rule, the so-called 85% rule, was applicable instead of transfer pricing regulations based on the arm’s length principle. Specifically, the 85% rule is a special income attribution rule envisaged in the personal income tax regulations. It’s scope is defined through three cumulative conditions:

- the taxpayer must have transferred the right to exploit their image rights, even if the transfer took place when the taxpayer was still a non-resident;
- the taxpayer is an employee; and
- the taxpayer’s employer – or any entity or individual related to the employer – was granted the right to exploit the image rights of the taxpayer.

This regime was applicable to the aforementioned FCB players as they transferred the right to exploit their image rights to entities they owned, and afterwards the entities conferred such exploitation rights to FCB on a non-exclusivity basis. The outcome of the 85% rule would entail the attribution of the income paid by the club directly to the player, after certain adjustments are made, albeit a carve-out might impede such attribution. Such carve-out rule states that if the player receives 85% or more of the total remuneration paid by the club, including the salary and the remuneration of the image rights, the described attribution rule will not apply. In the cases at hand, this carve-out was complied with – mainly due to the effect of the salary in the computation of the said base – and therefore the income was not attributed to the players but remained in the hands of the entities.

Notwithstanding, the tax authorities opened assessments referring to fiscal years ranging from 2009 to 2015, based on two arguments. On the one hand, they considered that the 85% rule does not imply excluding the income paid by the club to the entities from the scope of transfer pricing regulations. Therefore, they considered that the exclusion of this income from the calculation related to the arm’s length remuneration paid by the entities to the players was wrong. The taxpayers considered otherwise, namely that the 85% rule was lex specialis that excluded the enforcement of transfer pricing regulations if the rule was complied with, as happened in their case.

On the other hand, the tax authorities confronted the comparability analysis performed by the taxpayers. They questioned the benchmark employed in the context of the TNMM as they considered the chosen comparable references invalid. Specifically, the comparables consisted of entities that were indeed dedicated to the exploitation of image rights of individuals, yet these individuals owned the entities and thus were related for transfer pricing purposes. Therefore, the tax authorities considered that such related parties’ transactions could not be used as a benchmark in the comparability analysis. It was also pointed out that the average operating margin applied did not represent the margin of the selected companies because it does not disaggregate activities different from the management and exploitation of the image rights.

Yet, instead of adopting the reference of the comparables the tax authorities found as an alternative to those of the taxpayer to calculate the arm’s length remuneration under the TNMM, which included comparables concerning other top-notch FC Barcelona players, the tax authorities would allocate the returns to the players and the entities under functions performed, following the PSM. As a result, the tax authorities adopted as reference the revenue generated by the entities on the exploitation of the image rights vis-à-vis third parties. The split was based on the fact that the entities were considered to perform low value-adding services. As a result, the tax authorities considered that 5% of the image rights’ gross return should be attributed to the entity, and 95% to the player.

The National Court overturned the tax authorities’ assessments. The Court considered that complying with the 85% rule described above excludes the applicability of transfer pricing regulations based on the arm’s length principle to the amounts paid by FCB to the entities. Additionally, it regarded the PSM as inadequate because of two main reasons. First, because at the time of the facts of the case, the hierarchy of methods still applied in Spain, giving preference to the so-called traditional methods – the comparable uncontrolled price method, the cost-plus method, and the resale price method – over the profit-based ones – the TNMM and the PSM. The tax authorities did not provide arguments to justify the inappropriateness of using the traditional methods; hence the Court considered that the use of the PSM was not justified. Second, because the use of the PSM is sound only in cases in which both parties to the transaction make unique and valuable contributions, and according to the tax authorities, one of the parties – the entities – perform low value-adding functions, a result that entails an evident contradiction.

2.2. The FCB cases as representative of entity-shareholder transaction issues and attribution of image rights’ returns issues

Before analysing the specific arguments of the FCB cases under scrutiny, it is convenient to put these decisions in perspective as they are representative of two strings of related parties’ structures that have posed numerous issues in Spain. The first string refers to cases on the obtaining of income generated through the activities of liberal arts professionals, artists and sportspersons through entities owned by these very same individuals. In these cases, the generation of returns mostly depends on professionals that render services that cannot be detached from their persona, e.g. lawyers, TV or radio programme presenters, movie actors, and others. These individuals would inter-

3. ES: Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas Fisicas y de modificacion parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio, art. 92 [Personal Income Tax Act 2006].
4. See the specific fiscal years per player at supra n. 1.
pose a controlled – often wholly participated – entity that would render the service from a private law standpoint. The entity would be the party signing the contract and rendering the service, obtaining the resulting remuneration. 5

Although these structures may be justified due to the inherent benefits of operating through a limited liability entity from a private law standpoint, the tax outcome is also relevant. Specifically, the income obtained would not be taxed at personal income tax progressive rates but at corporate income tax proportional ones. Hence, the income could be “parked” to achieve a certain level of deferral until the profits were distributed to the shareholder. Besides, there are less restrictions on the deductibility of expenses at the level of the corporate income tax when compared to the personal income tax, e.g. on the use of vehicles in the course of a business. Moreover, entities are not liable for the comprehensive property tax, but individuals are. 6

The tax authorities have confronted these structures using two types of strategies. First, through the application of the sham transactions rule. 7 This is a fairly aggressive line, as it implies – for tax purposes – to deny the existence of the entity that signed the contracts and obtained the revenue in a sort of piercing the veil approach. Often, the argument to sustain such a hard stance is a substance one – or lack thereof – as many of these entities did not have employees, facilities, or relevant assets. As a result, the income would be attributed to the shareholder, namely the individual effectively rendering the service. Usually, such assessment was accompanied by harsh penalties, and some cases were taken to criminal courts when criminal tax fraud was considered to exist. The second strategy – a more moderate one – followed by the tax authorities consists in applying transfer pricing regulations at the entity-shareholder level. If, from a private law perspective, the service is provided by the entity, then from a transfer pricing perspective, this entity must remunerate the shareholder, namely the individual – lawyer, artist, sportsperson, or other – is providing a service to the entity in the form of the service ultimately rendered to the client. This way, the income would not be “parked” anymore, and most of it would be allocated to the individual, considering that often these interposed entities do not generate significant value compared to the service provided by the individual. The FCB cases are an example of this “transfer pricing” approach to entity-shareholder relations.

On the other hand, the FCB cases are the last in a saga of conflicts relating to the exploitation of image rights of football players. The grant of the right to use image rights of other football players, the entities they owned were tax residents in Spain, which is probably a favourable factor in this regard. Still, these cases pose relevant issues that will continue to be addressed in courts of law due to the significant number of assessments opened by the tax authorities on the described matters.

3. Critical Analysis of the Image Rights’ Remuneration Assessment

In this section, the specific transfer pricing issues raised in the FCB cases will be dealt with. These issues refer to the adequacy of the TNMM and the PSM to attribute the image rights’ returns either to the entities or to the players; the pretended low value-adding character of the functions performed by the entities; the possibility of assessing the cases from a transactional adjustments standpoint; and the special 85% attribution rule configuration.

3.1. The apparent suitability of the transactional net margin method

One of the most striking features of the FCB cases is the mix of valuation methods that the tax authorities leaned on to (allegedly) achieve an arm’s length outcome. In this respect, the authorities adopted two different approaches. The first, addressed in this section, consisted in adjust-

5. See a comprehensive analysis of these structures in O. Carreras Manero, La problemática tributaria de la interposición de sociedades en la realización de actividades profesionales (Reus 2019).

6. Spain is the only country in the European Union that comprehensively taxes the property of resident individuals. See ES: Ley 19/1991, de 6 de junio, del Impuesto sobre el Patrimonio.


ing the benchmark process within the TNMM, although this option was further discarded. The second consists in the (mis)application of the PSM and is addressed in section 3.2.

In the draft assessment notice, the tax authorities admitted the validity of the comparability method chosen by the taxpayer, namely the TNMM, albeit they considered that the comparables used were unsuitable for four reasons. First, the comparables were indeed companies dedicated to the management of image rights of high-profile sportspersons – such as Fernando Alonso, a Formula 1 driver, or Fernando Verdasco, a professional tennis player. Yet, in all cases the entity and the sportsperson were related. As these were not uncontrolled references, they were considered tainted by both the tax authorities and the National Court.11 Second, the tax authorities considered that these references were not sufficiently comparable to the circumstances of the FC Barcelona players as they referred to sportspersons practising different sports and thus did not reflect the features of the Spanish professional football league. Third, the tax authorities considered that the operating margin average prepared by the taxpayer in the benchmark study was not valid as it did not distinguish returns obtained from managing image rights and other operating returns. Fourth, the dispersion of the obtained operating margins was too wide, as it comprised companies with a relatively low operating margin (below 10%) coexisting in the set with companies with a significantly high operating margin (close to 100%). Even if averaging is allowed in the context of the comparability analysis,12 averaging such disparate results would not improve the reliability of the benchmark and, therefore, should have been discarded.13

Instead, the tax authorities searched for external comparables referred to entities dedicated to the representation, management and exploitation of the image rights of sportspersons not related – from a transfer pricing perspective – to the managing entities.14 Moreover, the comparables found were entities that managed and exploited the image rights of fellow top-notch FC Barcelona players with a salary level and a potential for generating income from the exploitation of their image similar to those of Dani Alves, Iniesta, Puyol and Xavi. Besides, the tax authorities selected these comparables because the activities of these entities – as well as the football players they represent or whose image rights they manage and exploit – were widely reported on the Internet, both on the websites of the entities themselves and in information and news in the sports press.

The examination of the contracts subscribed by these comparable entities shows that their remuneration consisted of a commission calculated as a percentage of the income they obtained both for the services related to the contractual negotiation with football clubs – including transfers – and the management and commercial and advertising exploitation of the players’ image rights (search, negotiation and development of advertising and/or sponsorship contracts, designated as commercial contracts). In doing so, the companies incurred their own expenses. According to the tax authorities, the average commission was 15% of the revenue derived from the exploitation of image rights, yet the numbers were somehow uneven. Out of the three contracts that were reviewed, the commission was 20% in the first one, 10% in the second and 10% in the third, but with the possibility of a reduction to 7%. Additionally, the tax authorities refer to a 25% commission concerning the revenues obtained in the exploitation through digital media and new technologies and 10% with respect to the revenues obtained in the exploitation through conventional media. However, they did not explain to which contract such commission structure applied.

Until this point, any transfer pricing expert would probably be satisfied with the terms of discussion raised by the tax authorities in the draft assessment, regardless of the merits of each party’s position. Notwithstanding, instead of adopting the aforementioned commission percentages as a reference to calculate the arm’s length remuneration on the image rights, the tax authorities decided, in the end, to apply the PSM, as will be shown in the next subsection.

3.2. The misuse of the profit split method

During the preparation of the definitive assessment notice, the tax authorities decided to radically change their valuation approach and applied the PSM. The PSM identifies the profits generated in the controlled transactions and then splits them between the related parties in a way that reflects the division of profits that would have been agreed upon at arm’s length.15

To justify the application of the PSM, the tax authorities would assert that the entities’ functions are negligible compared to those of the players themselves. Accordingly,
the generation of value in the exploitation of image rights is notoriously greater on the part of the players since they are rendering the activities themselves, and they assume the responsibility and the risks derived from the exploitation of their image rights. Hence, the services rendered by the entity can only be considered of low added value when compared to the functions and risks assumed by the player. The tax authorities leaned on the Joint Transfer Pricing Forum report on low value-adding services (JTPF Report) to come up with a 5% remuneration reference, as this is the most common remuneration percentage agreed upon in exchange for these types of services.6 Hence, the remuneration of the entity was set at a 5% of the returns generated from the exploitation of the image rights, while the remaining 95% was allocated to the players. Otherwise – the tax authorities stated in their assessment – independent parties would never have agreed to such a transfer of the right to exploit the image rights.

Such approach may be labelled as paradoxical when one acknowledges the scenarios in which the application of the PSM is appropriate. According to the OECD Guidelines, the method is thought to be used in two types of scenarios that are often intertwined. First, the PSM is appropriate in cases where both parties make unique and valuable contributions (e.g. contribute unique and valuable intangibles) to the transaction. Second, the method may be helpful when there is no reliable, comparable information which could be used to price the entirety of the transaction more reliably through the application of another method.

Accordingly, it seems clear that the PSM was not an appropriate method to value the transactions between the entities and the players in the FCB cases. The tax authorities adopted a contradictory position by claiming that the entities performed low value-adding services while supporting at the same time the use of the PSM (which requires both parties to make unique and valuable contributions). Moreover, they did so after having brought forward – in the draft assessment notice – comparable transactions referred to entities managing image rights of other FCB players resulting in a 15% gross commission and not a 5% one. Hence, there is clearly not a lack of comparable references that could justify the abandonment of the CUP in favour of the PSM.

Another wrongdoing referred to the fact that the hierarchy of methods was still applicable in Spain. Regulations did not allow for the best method to apply until 2015. Therefore, profit-based methods – the TNMM and the PSM – were applicable only if the traditional methods – the comparable uncontrolled price, cost-plus and resale minus methods – did not offer reliable results. No arguments were provided in this regard, especially on why the authorities changed their approach from using the TNMM in their draft assessment to the use of the PSM in the definitive assessment notice. Interestingly enough, the tax authorities could have achieved an identical outcome by resorting to the cost-plus method, taking the entity as the tested party. Although this approach does not address the issue of considering the functions performed by the entities as low value adding, a topic that will be addressed in the next subsection, it would have solved the “hierarchy of methods” issue, which was the main reproach expressed by the National Court when deciding to overturn the tax authorities’ assessments.

3.3. The wrong assessment of the management of image rights as a low value-adding service

As stated, the tax authorities considered that the entity performed low value-adding functions and decided that a 5% image rights’ return was the appropriate arm’s length remuneration, according to the remuneration percentage envisaged in the EU JTPF Report.6 The authorities did not provide arguments to support the label of these services as low value adding, aside from stating that the players themselves are generating a much higher value vis-à-vis the value resulting from the functions performed by the entities. Notwithstanding, this approach is clearly deceptive. The fact that the player adds significant value does not necessarily mean that the entities perform low value-adding services. Both can render significant functions simultaneously, as the relevance of the functions is not necessarily of an excluding nature. The focus should be on analysing which functions the entities perform, which assets they use and which risks they assume, a task the tax authorities did not undertake.

Despite the fact that the JTPF Report refers to low value-adding services, it does not provide a definition of such a concept. In the context of the BEPS Project, the OECD filled that gap with a specific report on the matter,21 which was then incorporated in the subsequent review of the OECD Guidelines.22 As a result, the OECD Guidelines list the following features of low value-adding intra-group services:23

(1) they are of a supportive nature;
(2) they are not part of the core business of the MNE group (i.e. not creating the profit-earning activities or contributing to economically significant activities of the MNE group);
(3) they do not require the use of unique and valuable intangibles and do not lead to the creation of unique and valuable intangibles; and

16. See para. 63 EU Joint Transfer Pricing Forum Report: Guidelines on Low Value-Adding Intra-Group Services (JTPF/020/REV3/2009/EN): “In cases where it is appropriate to use a mark-up, this will normally be modest and experience shows that typically agreed mark-ups fall within a range of 3-10%, often around 5%. However, that statement is subject to the facts and circumstances that may support a different mark-up”.
20. See supra n.16.
22. Paras. 7.43-7.65 OECD Guidelines (2017), the content of which is identical to the OECD Guidelines (2022) version.
they do not involve the assumption or control of substantial or significant risk by the service provider and do not give rise to the creation of significant risk for the service provider.

One could argue that the exploitation of image rights constitutes part of the core business of the “group”, namely – in this case – the entity and the player (shareholder). Additionally, the exploitation of image rights clearly entails the use of unique and valuable intangibles; hence the second and third requisites would not be met. Such a stance would be reinforced by acknowledging that the exploitation of the intangible is within the most relevant functions regarding these types of assets, hence the “E” in the widely used DEMPE acronym. 24 To seriously address this matter, the tax authorities could have questioned whether the entity exerts control over the risks in the exploitation of the intangible, as the attribution of returns would greatly depend on this factor. 25 If the players adopted the relevant decisions in this matter, perhaps the return that the entity could keep would be lower in that regard. Yet, this line of reasoning was not explored by the tax authorities.

Furthermore, in the FCB cases, there was precise quantitative data that upholds the non-low-value character of the functions performed by the image rights managing entities. As stated above, the very tax authorities found comparable references alternative to those proposed by the taxpayer that display an average remuneration of 15% of the revenue generated by the exploitation of the image rights. The last aspect that must be criticized in this context is that the tax authorities failed to notice that the 5% markup proposed in the JTFP Report and the post-BEPS guidance on low value-adding services is to be applied to the cost base, 26 not to the gross return, as they did. The confusion between these two bases obviously leads to very different outcomes.

### 3.4. A hidden transactional adjustment? Exploring the hard-to-value-intangibles approach

As described above, the assessment proposed by the tax authorities attributed 5% of the image rights’ returns to the entity and 95% to the player. According to the authorities, the entities did not deserve more than a modest return in exchange for such intangibles. This outcome would be similar to one in which the players retained their image rights while externalizing their management. If seen from such an angle, this would entail the disregard of the transfer of the image rights to the entities, and thus a transactional adjustment, i.e. the adjustment of the conditions of the transaction aside from the remuneration component. 27 In fact, the tax authorities asserted that under normal market conditions, the taxpayer would not have assigned his image rights to an independent third party in exchange for such a low consideration when he could collect the returns immediately and retain the whole amount, hence the transfer of the image rights to the entity was alien to any commercial or economic logic.

In this regard, the OECD Guidelines clearly state that every effort should be made to determine the actual nature of the transaction and ensure that non-recognition is not used simply because determining an arm’s length price is difficult. 28 Hence, the restructuring of legitimate business transactions would be a wholly arbitrary exercise, 29 a notion labelled as the “as-structured principle” in transfer pricing. 30 Only when it is not possible to arrive at determining a price that would be acceptable to both parties considering their respective perspectives and the options realistically available to each of them at the time of entering into the transaction, do the OECD Guidelines admit the disregard of the transaction. 31 In our case, it seems clear that such circumstance does not happen. As explained in section 3.1., the very tax authorities found suitable comparables to value the remuneration of image rights at market prices that would render any attempt to ignore such transaction as contrary to the arm’s length standard. In other words, when comparable references exist, the tax authorities cannot disregard the controlled transactions.

On the other hand, it must be recognized that the OECD does breach such an “as-structured” rationale in other sections of the OECD Guidelines. This happens for instance in the guidance on the so-called hard-to-value intangibles (HTVI), a by-product of the BEPS Project. 32 Specifically, the ex-post review of the remuneration formula of these intangibles would be allowed in certain circumstances, regardless of the remuneration clauses’ configuration that was agreed at the time of the transfer. 33 Still, in the FCB cases, such an issue does not arise because the agreed remuneration in exchange for the exploitation of the image rights was not a lump sum but one that depends on the yearly returns generated by such intangibles. Moreover, as stated, the tax authorities found unrelated parties’ comparables that adopt the same remuneration formula, hence a possible HTVI label would be unfounded.

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24. DEMPE designates the most relevant functions regarding the obtainment of intangible-related returns, namely development, enhancement, maintenance, protection and exploitation. See paras. 6.12 and 6.32-6.85 OECD Guidelines (2022). Such concept was adopted during the BEPS Project and has acquired a significant relevance ever since. For an in-depth analysis, see K. Dwarsinski, The DEMPE Concept and Intangibles: Definition, Practical Approach and Analysis in the Context of Licence Model (Kluwer Law International 2022).


27. See A. Navarro, Transactional Adjustments in Transfer Pricing, sec. 1.3. (IBFD 2018), Books IBFD.


30. The expression was coined in A. Bullen, Chapter 4 The As-Structured Principle: Introduction, in Arm’s Length Transaction Structures: Recognizing and Restructuring Controlled Transactions in Transfer Pricing (IBFD 2011), Books IBFD.


33. See a critical analysis in C.C. Rodríguez Peña, Compatibility between the OECD’s Hard-to-Value Intangibles Methodology and the Arm’s Length Standard: What is the Way Forward? 8 International Tax Studies 8 (2020), Journal Articles & Opinion Pieces IBFD. See also A. Navarro, supra n. 27, at sec. 5.3.
Therefore, in the FCB cases, an approach based on the HTVI guidance or the possibility to undertake transac-
tional adjustments in line with paragraphs 1.142-1.145 of the OECD Guidelines would be contrary to the arm’s
length standard.

3.5. The 85% attribution rule for image rights in the Spanish personal income tax and its incompatibility with the EU prohibition of State aid

Although alien to the arm’s length standard, the 85% attribution rule applicable in Spain for personal income tax purposes – described above in section 2. – was, in fact, at the core of the National Court decisions on the FCB cases. As stated, the National Court adopted the view of the taxpayers in its decisions: the image rights’ return paid by the club to the entities was covered by the 85% rule and therefore should be excluded from the revenue base that is used to calculate the arm’s length remuneration to the player. Hence, a significant portion of the remuneration of the players due to their image rights was left out from the reach of transfer pricing regulations.

It is important to note that such exclusion could lead to considering the 85% rule as infringing the prohibition of State aid envisaged in article 107 of the Treaty of the Functioning of the European Union (TFEU). Shortly stated, if within a framework of reference there is a derogation that provides an advantage to a specific group of taxpayers, the measure may be labelled as State aid and could be considered against the TFEU, unless justified.

If one takes transfer pricing regulations as the framework of reference, as it generally applies to the transactions of related parties, where a community of interests exist, it is not difficult to see that the 85% rule deviates from such a framework and applies to particular scenarios. More specifically, it applies when a taxpayer transfers the right to exploit their image rights to their employer. Besides, the rule would be deactivated when the carve out clause applies – as happened in the analysed cases – when the taxpayer receives 85% or more of the remuneration paid by the employer, preventing not only the special attribution rule from applying, but also transfer pricing regulations, as interpreted by the National Court in the FCB decisions. When the rule is complied with, the remuneration may stay in the hands of the company and be often taxed at lower rates when compared to the progressive rates of the personal income tax.

4. Conclusion

High-net-worth individuals may be subject to transfer pricing risks in certain jurisdictions, even in domestic scenarios. In this contribution, a string of decisions by the Spanish National Court concerning the allocation of image rights’ returns of certain FC Barcelona players were critically examined. The exploitation of such image rights was referred to entities owned by the players themselves; hence transfer pricing regulations were triggered. The decisions touched upon several relevant transfer pricing topics, including the choice of the most appropriate transfer pricing method to value the remuneration the players should obtain (the transactional net margin method or the profit split method), the regard of the functions performed by the entities that exploited such image rights (as low value adding or not), the possible existence of transactional adjustments, including hard-to-value-intangible issues, and the applicability of a special attribution rule (the 85% rule) that renders transfer pricing inapplicable and could as a result be contrary to the prohibition of State aid in the European Union.

34. Treaty of the Functioning of the European Union (TFEU), Primary Sources IBFD.
35. On the existence of an advantage and its link with the notion of selectivity in taxation matters, see H. López, General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters, 9 European State Aid Law Quarterly 4, p. 807 (2010). At a general level, see K. Bacon, European Union Law of State Aid, paras. 2.09-2.92 and 2.113-2.141 (Oxford University Press 2017).