

COMMENTS

Offside! CJEU Judgment that Finds FIFA Transfer Rules Anti-competitive Set to have Major Implications for the Football Transfer Market

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🔗 Competition law; EU law; Football; Freedom of movement; Proportionality; Sportspersons; Transfer

On 4 October 2024, FIFA suffered its second major EU law setback in less than a year (following the *European Superleague* judgment of 21 December 2023¹) when the Court of Justice of the European Union (CJEU) held in

*Diarra*² that FIFA's rules underpinning the current multi-billion euro transfer market contravene EU rules on free movement and competition.

The CJEU's judgment is unusual in the strength of its wording. As a result, it is likely to require substantial changes to the world football governing body's rules and, like the *Bosman* case,³ tip the balance of power further away from clubs and towards players. More freedom to exit contracts and greater uncertainty over transfer fees seem likely to follow, with clubs' control over a player's career development lessening as a result. This has potentially major implications for football in Europe, where many clubs rely on transfer fees to generate revenue.

The judgment is also likely to have significant direct implications for FIFA. In addition to re-writing its transfer rules, FIFA may face sizeable damages claims from players whose careers have been affected by the existing rules. A range of further challenges to its rules in other areas also seem likely, with at least one unrelated complaint, also based on EU competition law, already having been submitted to the European Commission.⁴

Background

The case arose from a dispute between the French footballer, and France international, Lassana Diarra and his former club Lokomotiv Moscow. In 2013, Diarra signed a four-year contract with Lokomotiv and quickly became a key player for the team.⁵ However, by the end of the 2013/2014 season relations between Diarra and the club had soured. Diarra had fallen out with the club's manager, the club was reportedly seeking to reduce his salary, and he was allegedly refusing to train with the team.⁶ In August 2014, Lokomotiv terminated Diarra's contract and subsequently applied to the FIFA Dispute Resolution Chamber (DRC) for an order that Diarra pay the club compensation.⁷

Diarra subsequently sought employment at a new football club, but encountered difficulty in doing so. In February 2015, he received an offer from the Belgian club Sporting du Pays de Charleroi, but that offer was conditional on: (1) Diarra being registered with the Belgian Football Association (URBSFA) so as to be eligible to play for the club in Belgian and FIFA competitions; and (2) Charleroi not being held jointly or severally liable for any compensation Diarra might have to pay Lokomotiv.⁸ Given the ongoing dispute between Diarra

¹ *European Superleague Co SL v Federation internationale de football association (FIFA)* (C-333/21) EU:C:2023:1011; [2024] 4 C.M.L.R. 16. See also, S. Smith et al, "CJEU Judgment in European Superleague Case has Significant Implications That Go Beyond Football" (2024) 35(3) Ent. L.R. 124–128.

² *Federation internationale de football association (FIFA) v BZ* (C-650/22) EU:C:2024:824 (*Diarra*). At the time of writing, the judgment is available only in French or Polish, accordingly English-language quotes, where given, are the authors' own translations.

³ *Union Royale Belge des Sociétés de Football Association (ASBL) v Bosman* (C-415/93) EU:C:1995:463; [1996] 1 C.M.L.R. 645.

⁴ Press Release, "Player unions and leagues file complaint to European Commission over FIFA's imposition of international match calendar" (FIFPRO, 14 October 2024), <https://www.fifpro.org/en/who-we-are/what-we-do/foundations-of-work/player-unions-and-leagues-file-complaint-to-european-commission-over-fifa-s-imposition-of-international-match-calendar>.

⁵ "The Never Ending Story About Lokomotiv and Lassana Diarra" *Russian Football News*, 31 May 2016, <https://russianfootballnews.com/the-never-ending-story-about-lokomotiv-and-lassana-diarra/>.

⁶ "Lass Diarra ordered to pay €10M Lokomotiv fine" *theScore.com*, 26 May 2016, <https://www.thescore.com/news/1034605>; "Lassana Diarra ordered to pay Lokomotiv Moscow £6.8 million after breaching his contract" *Daily Mail Online*, 28 May 2016, <https://www.dailymail.co.uk/sport/football/article-3614300/Lassana-Diarra-ordered-pay-Lokomotiv-Moscow-10-million-breaching-contract.html>.

⁷ *Diarra* (C-650/22) EU:C:2024:824 at [23].

⁸ *Diarra* (C-650/22) EU:C:2024:824 at [25].

and Lokomotiv, FIFA rules prevented these conditions from being fulfilled and, as a result, Diarra failed to sign with Charleroi. Diarra was ultimately able to sign for the French side Marseille, but not until July 2015.

In 2015, Diarra brought proceedings against FIFA and the URBSFA in the Commercial Court in Hainaut (Charleroi division) seeking damages for loss of earnings on the basis that the rules applied by the two bodies were contrary to EU law. The Commercial Court upheld Diarra's claim and FIFA appealed to the Belgian Court of Appeal. The Court of Appeal in turn applied to the CJEU for a preliminary ruling on whether the relevant FIFA rules infringed the provision of the Treaty on the Functioning of the European Union (TFEU) on free movement of workers (art.45) and anti-competitive agreements (art.101).

In 2016, the DRC found Diarra guilty of breach of contract without just cause, and ordered him to pay compensation of €10.5 million to Lokomotiv. This decision was ultimately upheld by the Court of Arbitration for Sport (Lausanne, Switzerland) in May 2016.⁹

The relevant FIFA rules

The relevant FIFA rules are contained in its Regulations on the Status and Transfer of Players (RSTP) (the version at issue was adopted in March 2014).¹⁰ These provide that a contract between a professional player and a club can only come to an end by expiration of the term, by mutual agreement, or by termination for "just cause". No contract may be terminated unilaterally during the playing season. The term "just cause" is not defined.¹¹

According to the rules set out in the RSTP, a player that terminates a contract without just cause must pay their former club compensation and face sporting sanctions, entailing a restriction on playing in official matches for four (or six) months.¹² Absent contractual provisions to the contrary, the amount of compensation owed by the player will be calculated on the basis of "the law of the country concerned, the specificity of sport, and any other objective criteria"¹³ including the remuneration and other benefits due to the player under the existing contract and/or any new contract, the time remaining on the existing contract (up to a maximum of five years), and the fees and expenses paid or incurred by the former club.¹⁴

Any new club signing the player will be jointly and severally liable for any compensation payable by the player to their former club. In addition, the new club will

be presumed (subject to proving the contrary) to have induced the player's breach of contract and may, as a result, be subject to additional sporting sanctions, including a restriction on registering *any* new players for two entire registration periods.¹⁵

Finally, the RSTP provides that a player must be registered with an association in order to play for a club or participate in organised football. A player wishing to transfer between clubs belonging to different national associations must obtain an International Transfer Certificate (ITC) from the national association of their former club in order to register with the association of their new club. FIFA rules prohibit a national association issuing an ITC if the former club and the player are involved in an ongoing dispute regarding termination of the player's contract.¹⁶

The CJEU judgment

The CJEU confirmed, consistent with the position it took in *European Superleague*, that where the exercise of sport constitutes an economic activity, it is subject to EU law.¹⁷ Only those rules adopted by a sporting association exclusively for non-economic reasons and relating to uniquely sporting issues may be considered to fall outside any economic activity.

As regards the specific FIFA rules at issue, the CJEU found that, given that team composition is an essential element of competition between professional football clubs and that such competitions constitute an economic activity, FIFA rules relating to player contracts and transfers have a direct impact on an economic activity and on competition. As a result, such rules fall within the scope of TFEU arts 45 and 101.¹⁸

Free movement rules

TFEU art.45 precludes any measure which is liable to place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of a Member State other than their Member State of origin, by preventing or discouraging them from leaving their Member State of origin.

The CJEU found that, taken together, the relevant FIFA rules were liable to disadvantage players who lived or worked in their Member State of origin but wished to work for a club established in another EU Member State. The rules subjected clubs signing such players to significant and unpredictable legal risks as well as potentially very high financial risks (in addition to major

⁹ *Diarra* (C-650/22) EU:C:2024:824 at [28].

¹⁰ "Regulations on the Status and Transfer of Players (RSTP)" (FIFA, June 2024), <https://digitalhub.fifa.com/m/69b5c4c7121b58d2/original/Regulations-on-the-Status-and-Transfer-of-Players-June-2024-edition.pdf>.

¹¹ RSTP arts 13 and 14.

¹² RSTP art.17(3).

¹³ RSTP art.17(1).

¹⁴ RSTP art.17(1).

¹⁵ RSTP art.17(4).

¹⁶ *Diarra* (C-650/22) EU:C:2024:824 at [20].

¹⁷ *European Superleague* (C-333/21) EU:C:2023:1011 at [83].

¹⁸ *Diarra* (C-650/22) EU:C:2024:824 at [80]–[82].

sporting risks), which, taken together, operated to dissuade them from hiring such players.¹⁹ In the case of international transfers, they also automatically prohibited, subject to exceptional circumstances, the issuing of the ITC necessary for registration at the new club for as long as litigation existed between the player and their former club in relation to the absence of a mutually agreed early termination of their contract. As a result, the rules restricted the free movement of workers.²⁰

The CJEU recognised that the relevant FIFA rules might nonetheless be lawful if they could be shown to be pursuing a legitimate non-economic objective in a proportionate manner. Whilst stating that this issue would ultimately have to be decided by the referring Belgian court, the CJEU recognised that maintaining contractual stability and the stability of football teams, as a means to preserve, more broadly, the integrity, regularity and smooth running of interclub football competitions was potentially such an objective.²¹

However, the CJEU found that the FIFA rules went far beyond what was proportionate or necessary to achieve those objectives for a number of reasons.²² First, the criteria for calculating compensation were imprecise and unpredictable. The criterion allowing account to be taken of applicable national law did not guarantee that law would be respected and, as FIFA itself acknowledged, was almost never applied in practice.²³ The criterion relating to the “specificities of the sport” was imprecise and gave no guidance as to how it should be applied in calculating compensation. Indeed, it lent itself to discretionary implementation. The other specified criteria went well beyond what was necessary to protect the goal of achieving stability in teams or contracts.

Secondly, the automatic joint and several liability for compensation imposed on any new club signing the player took no account of that club’s conduct or the circumstances of the case.

Thirdly, the imposition of sporting sanctions on the new club based on a presumption that it had incited the player’s breach of contract was manifestly lacking in any relationship with proportionality (“manifestement dépourvue de tout rapport de proportionnalité”).²⁴ It automatically precluded a case-by-case assessment. To

be even potentially justifiable, sanctions would have to be based on transparent, objective, non-discriminatory and proportionate criteria.²⁵

Fourthly, the automatic prohibition on issuing the necessary ITC in the event that an ongoing dispute existed between the player and the club in relation to the breach of contract similarly manifestly disregarded the principle of proportionality (“méconnaît de façon manifeste le principe de proportionnalité”).²⁶

Overall, the relevant provisions could not be justified by an alleged desire to ensure the smooth running of sporting competition.²⁷ Indeed, the apparent purpose of the rules was to preserve the financial interests of clubs in the context of player transfers.²⁸

Competition rules

TFEU art.101(1) prohibits all agreements between undertakings (which includes sports organisations such as FIFA), all decisions by associations of undertakings (such as FIFA) and all concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU.

The CJEU found that the relevant FIFA rules form a unified whole and must be read together.²⁹ Taken together, they represent a generalised and drastic (“généralisée et drastique”) restriction of an essential parameter of competition in professional club football, i.e. the cross-border recruitment of active professional footballers.³⁰ Furthermore, that restriction was effectively permanent since it covered the entire duration of all successive contracts between club and player.³¹ In effect, the FIFA rules operated as a non-poaching agreement between clubs that resulted in an artificial partitioning of the market to the benefit of the clubs themselves.³² In the circumstances, those rules had to be considered an automatic “by object” restriction of competition and, as such, it was not necessary to examine their effects in order to find that they infringed art.101(1).³³

Echoing its reasoning in relation to free movement, the CJEU drew attention, first, to the fact that the criteria by which compensation was calculated included extremely general and imprecise terms which lent themselves to discretionary implementation and

¹⁹ *Diarra* (C-650/22) EU:C:2024:824 at [92].

²⁰ *Diarra* (C-650/22) EU:C:2024:824 at [91]–[94].

²¹ *Diarra* (C-650/22) EU:C:2024:824 at [95], [98].

²² *Diarra* (C-650/22) EU:C:2024:824 at [104]–[111].

²³ *Diarra* (C-650/22) EU:C:2024:824 at [106].

²⁴ *Diarra* (C-650/22) EU:C:2024:824 at [110].

²⁵ *Diarra* (C-650/22) EU:C:2024:824 at [111]. Citing *European Superleague* (C-333/21) EU:C:2023:1011 at [257].

²⁶ *Diarra* (C-650/22) EU:C:2024:824 at [112].

²⁷ *Diarra* (C-650/22) EU:C:2024:824 at [113].

²⁸ *Diarra* (C-650/22) EU:C:2024:824 at [107].

²⁹ *Diarra* (C-650/22) EU:C:2024:824 at [134].

³⁰ *Diarra* (C-650/22) EU:C:2024:824 at [138].

³¹ *Diarra* (C-650/22) EU:C:2024:824 at [140].

³² *Diarra* (C-650/22) EU:C:2024:824 at [145].

³³ *Diarra* (C-650/22) EU:C:2024:824 at [148].

extremely high and dissuasive (“extrêmement élevé et dissuasif”) levels of compensation.³⁴ Secondly, it noted that merely as a result of having a claim brought against them by their former club on the basis of alleged improper termination of contract, players were deprived of any possibility of obtaining an ITC or, therefore, participating in organised football.³⁵ Thirdly, any new club the player joined would be jointly and severally liable for any compensation awarded and potentially subject to sporting sanctions on the basis of a presumption that it had incited the breach of contract.³⁶ In effect, player recruitment could only take place by means of a negotiated transfer between the old and new clubs.³⁷

While, in certain circumstances, restrictions of competition could fall outside the scope of the art.101(1) prohibition, that could not be the case here as it did not apply to “by object” restrictions.³⁸

As regards the application of the art.101(3) criteria, the CJEU acknowledged that this was ultimately an issue for the Belgian courts. However, it noted that those criteria included a requirement that any restrictions be indispensable to the realisation of the relevant pro-competitive benefits. In this case, both the discretionary and disproportionate elements of the relevant rules and the generalised, drastic and permanent restriction on inter-state competition to which they gave rise would (alone) be sufficient to preclude a finding of indispensability.³⁹

It is notable that in several passages, the CJEU compared the FIFA rules unfavourably with national law. When discussing the requirement to take account of applicable national law when calculating compensation payments, the CJEU noted that this obligation does not effectively “guarantee” the respect of national law.⁴⁰ When discussing the potential quantum of compensation, it noted that, according to submissions by Diarra’s counsel, in a comparable situation under Belgian law, the amount of compensation corresponds solely to the remuneration remaining due under the outstanding term of the employment contract.⁴¹ Finally, when discussing potential sporting justifications, the CJEU stated that it was important to underline that the standard mechanisms of contract law were sufficient to ensure an appropriate balance between a player’s continuing presence at a club and the normal play of market rules (“il importe de souligner que les mécanismes classiques du droit des

contrats ... suffisent à assurer, d’une part, la présence durable de ce joueur dans le premier club ... et, d’autre part, le jeu normales règles du marché”).⁴²

Comment

In principle, the final decision on the compatibility of FIFA’s rules with EU law lies with the Belgian courts. However, the CJEU’s language is unusually strong and its reasoning unusually definitive. It refers to rules being “manifestly devoid of any relationship of proportionality” and the purpose of the rules being, in effect, a “no poaching agreement” for the benefit of the clubs themselves. In the circumstances, the final outcome appears to be in little doubt.

Following the CJEU’s decision, FIFA issued a statement indicating that it had reached the same conclusion, stating that it “looks forward to developing its regulatory framework further” in line with its strategic objective to improve the transfer system, and has indicated that it will initiate a global dialogue with key stakeholders to this effect.⁴³ This perhaps underplays the likely challenges. The CJEU judgment suggests that major surgery will be required in relation to the transfer rules. The repeated references to national law suggest that rules creating rights or liabilities going significantly beyond those available under standard contract law risk being considered unlawful. At a minimum, any sporting sanctions will need to be based on “transparent, objective, non-discriminatory and proportionate criteria”.

Given the importance of transfer fees as a source of club revenues—in the UK alone, Premier League clubs made a total of €1.62 billion from players sales in summer 2024⁴⁴—the judgment is likely to have major commercial implications for European football. Amongst others, it will create challenges for the business model of multi-club ownership groups, which rely on the ability to control the career paths of players.

Nor is this case likely to be the end of FIFA’s EU law problems. Damages claims from other footballers historically affected by FIFA’s RSTP seem likely to follow. Diarra’s lawyer in the case, Jean-Louis Dupont, has already issued a written statement in this respect:

“All professional players have been affected by these illegal rules (in force since 2001!) and can therefore now seek compensation for their losses.”⁴⁵

³⁴ *Diarra* (C-650/22) EU:C:2024:824 at [135].

³⁵ *Diarra* (C-650/22) EU:C:2024:824 at [136].

³⁶ *Diarra* (C-650/22) EU:C:2024:824 at [137].

³⁷ *Diarra* (C-650/22) EU:C:2024:824 at [147].

³⁸ *Diarra* (C-650/22) EU:C:2024:824 at [149]–[150].

³⁹ *Diarra* (C-650/22) EU:C:2024:824 at [157].

⁴⁰ *Diarra* (C-650/22) EU:C:2024:824 at [106].

⁴¹ *Diarra* (C-650/22) EU:C:2024:824 at [135].

⁴² *Diarra* (C-650/22) EU:C:2024:824 at [145].

⁴³ Press Release, “FIFA to open global dialogue on article 17 of the Regulations on the Status and Transfer of Players following Diarra ruling” (FIFA, 14 October 2024), <https://inside.fifa.com/legal/football-regulatory/news/fifa-to-open-global-dialogue-on-article-17-of-the-regulations-on-the-status-and-transfer-of-players>.

⁴⁴ “1.62bn in player sales—Premier League break transfer income record” *Transfermarkt.com*, 4 September 2024, <https://www.transfermarkt.com/euro-1-62bn-in-player-sales-premier-league-breaks-transfer-income-record/view/news/443392>.

⁴⁵ J.-L. Dupont, statement, https://www.linkedin.com/posts/jean-louis-dupont-269a7316b_judgement-of-the-cjeu-in-the-case-of-lassana-activity-7247954005467828224-P7Rz?utm_source=combined_share_message&utm_medium=member_desktop_web.

Finally, this latest judgment is likely to encourage further challenges to FIFA's rules. Indeed, on 14 October 2024, it was announced that the top European national leagues and the player's union, FIFPRO, had filed a formal complaint with the European Commission in relation to FIFA's management of the international fixture calendar, on the basis that FIFA's conduct amounts to an abuse of dominance.⁴⁶

Court of Appeal Considers Relevance of a Crowded Market and Earlier Coexistence Agreements in Determining Likelihood of Confusion Between "Polo Club" Brands

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📄 Clothing; Co-existence agreements; Confusion; Distinctiveness; Infringement; Similarity; Trade marks

The Court of Appeal has handed down its judgment on Lifestyle Equities' appeal from a decision of Mellor J that the Royal County of Berkshire Polo Club's use of a polo-themed clothing brands featuring a polo-player-on-horseback logo did not infringe Lifestyle Equities' Beverly Hills Polo Club trade marks.¹

Arnold LJ, delivering the lead judgment, with which Nugee and Baker LJ agreed, dismissed both grounds of appeal. The Court of Appeal upheld the findings that a crowded market reduced the distinctive character of the earlier trade mark and highlighted the significance of existing coexistence agreements, when assessing the likelihood of confusion between the marks.

In view of this decision, trade marks owners in a crowded market are in a less good place when enforcing their rights and strong evidence of actual confusion is likely to be necessary for such claims to succeed. This decision may also force businesses to reconsider their decisions to enter into coexistence agreements when similar marks operate in the same market, as these may weaken their position in future conflicts.

Background

The claimants, "Lifestyle Equities", were, respectively, the owner and exclusive licensee of the Beverly Hills Polo Club trade marks, depicted below and registered in various jurisdictions including the UK, primarily for clothing.



They issued proceedings against the Royal County of Berkshire Polo Club (one of the UK's premier polo clubs) and various related parties, alleging trade mark infringement and passing off through the use in particular of the sign set out below (the "allegedly infringing sign") in connection with leisure clothing.



The first instance judgment, extending to over 352 paras and 77 pages, included a thorough analysis of the parties' arguments and evidence, noting the existence of numerous polo-themed brands coexisting in the marketplace. Dismissing the claim, Mellor J concluded that the crowded nature of the market meant consumers were less likely to assume a connection between two brands merely because both included the term "POLO CLUB" and depicted a polo player on horseback. The judge also held that the existence of coexistence agreements which the parties had separately entered into with Ralph Lauren, owner of the Polo Ralph Lauren brand, indicated that the parties were willing to accept the use of similar marks.

Grounds of appeal

Lifestyle Equities appealed Mellor J's decision on two grounds. The first ground was that the judge erred by considering factors extrinsic to the trade marks under comparison when assessing trade mark infringement. Specifically, Lifestyle Equities argued that the judge was

⁴⁶ "Legal complaint filed against Fifa's 'abuse of dominance'" *BBC Sport*, 14 October 2024, <https://www.bbc.com/sport/football/articles/c981203e61qo>.

¹ *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2024] EWCA Civ 814; [2024] E.C.C. 20.