

# Has football's transfer system been given the red card?

On 04.10.2024, the Court of Justice of the European Union issued a judgment that will probably be known as the Diarra judgment, and it will certainly change the current transfer system in football completely, while the consequences must be expected to be even more (financially) extensive than the Bosman judgment.

## November 2024

*By Lars Hovmand Mikkelsen, Abogado (Spanish lawyer), Cand.jur. & FIFA Football Agent*

Admittedly, I'm super passionate about the subject. In fact, so much that in due time I chose to write my legal thesis in sports law at the University of Copenhagen under the title *Football contracts' revocable irrevocability?* about the same problem that is now coming into focus after the Court of Justice of the European Union has delivered a judgment in which it has reached the same conclusion that I did in my thesis 24 years ago.

## Delimitation

In its judgment, the Court of Justice of the European Union, hereafter the Court, examines FIFA's transfer rules in relation to the EU rules which:

1. ensures the free movement of workers, and
2. prohibits all agreements between companies that have the purpose or effect of hindering, limiting or distorting competition for the internal market.

In this article, I deal only with the part of the Diarra judgment that relates to point 1 above.

## The facts of the Diarra judgment

The French, now former football player, Lassana Diarra, entered into a four year employment contract with

Lokomotiv Moscow in August 2013, but the club cancelled the contract in August 2014 due to the player's behaviour and brought the case to FIFA in September 2014, demanding a payment of 20 million euros due to the player's breach of contract without just cause.

In May 2015, FIFA partially upheld Lokomotiv Moscow's claim and ordered Diarra to pay 10.5 million euros in compensation to the club.

Meanwhile, in February 2015, Diarra had received an offer from Belgian football club Sporting Charleroi, conditional on him being registered as eligible for the club and the club receiving written and unconditional

## What will happen by January 2025?

The consequences of the judgment will appear by January 2025, when the transfer window opens, and the big question will be whether clubs will continue to accept having to pay large transfer sums in order to hire new footballers, when the current transfer system is tied together by rules that are not allowed by the EU.

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confirmation that it could not be kept jointly liable for payment of compensation to Lokomotiv Moscow.

After contacting the respective football associations and FIFA, Diarra could not deliver this, as registration as eligible to play according to FIFA's rules could only take place when Lokomotiv Moscow had issued an International Transfer Certificate.

Diarra then filed a lawsuit in December 2015 at the court in Charleroi, Belgium, claiming that FIFA and the Belgian Football Association should pay compensation for the loss he had suffered by not being able to enter into a player contract with Sporting Charleroi, as a result of the rules in the transfer system.

In January 2017, a judgment was given in favour of Diarra that FIFA appealed to the Court of Appeal in Mons, Belgium, which, before making its decision, has submitted the issue to the EU Court in October 2022, and it is these questions, which the EU Court has answered when delivering the Diarra judgment.

### FIFA's transfer rules

The FIFA transfer rules, which are dealt with in the Diarra judgment, consist of individual provisions which, in combination, constitute a transfer system which regulates the following:

- Calculation of the compensation to be paid by the player in the event of a unilateral breach of contract without just cause.
- Joint and several liability for a new club in relation to the payment of compensation from a player to a former club.
- Rule of presumption according to which the new club is presumed to have encouraged the player to break his contract with the former club and therefore a sporting sanction is imposed.
- Issuance of International Transfer Certificate.

The aforementioned rules are supplemented by further FIFA provisions that also form part of the transfer system, e.g. rules on transfer windows, but these provisions are not dealt with in the Diarra judgment.

### Restriction on the freedom of movement of workers

Art. 45 of the Treaty on the Functioning of the European Union, TFEU, ensures the free movement of workers, and it precludes any measure that hinders this.

Exceptions can be made in relation to rules that:

- *pursues a legitimate objective in the public interest, and*
- *observe the principle of proportionality.*

Such rules may well restrict the freedom of movement of workers, and therefore the understanding and compliance with the principle of proportionality is absolutely essential in order to be able to understand and thus solve the problem.

### Principle of proportionality

Measures (rules) complies with the principle of proportionality if they:

- Are suitable to ensure the achievement of a legitimate objective in the public interest, and*
- Do not go beyond what is necessary for that purpose.*

Both conditions must be met.

In recent judgments, including the Diarra judgment, the Court has clarified that:

- A provision is only considered suitable if it genuinely reflects a concern to attain the aim in a consistent and systematic manner.*

### Will the clubs claim compensation from FIFA for transfer payments?

Since FIFA has facilitated a transfer system in violation of EU law, and which has had the consequence that clubs have had to pay often large transfer amounts in order to employ a new footballer, the clubs must currently consider whether compensation may be claimed by FIFA / the football associations for these payments.

## Can transfer rules be justified by a legitimate objective?

In the Diarra judgment, the Court unsurprisingly concludes that FIFA's transfer rules constitute a restriction to the free movement of workers, and the question then becomes whether the rules pursue a legitimate objective in the public interest and, if this can be confirmed, whether the rules comply with the principle of proportionality or no.

### Legitimate objective in public interest

In the first instance, the Court examines whether the objective pursued by the transfer rules is legitimate and in the public interest, and which is stated by FIFA as:

- a) Maintain contractual stability and the stability of professional football club teams.
- b) In a broader sense, to preserve the integrity, regularity and proper conduct of interclub sporting competitions.
- c) Protect the workers that professional football players are.

Regarding the purpose of protecting of workers, the Court observes that this does not appear in FIFA's statutes, and that FIFA has not been entrusted with any particular mission in that area by public authorities!

As far as the purpose of ensuring equal conditions in sporting matches is concerned, the Court states that it *"is a legitimate objective in the public interest that may be pursued by a sporting association, e.g. by adopting rules setting transfer deadlines of players in order to avoid late transfers that might substantially change the sporting strength of one or other team in the course of a competition, and thereby call into question the comparability of results between the teams taking part in that competition and thus the proper conduct of that competition as a whole"*.

Regarding the same purpose, the Court continues that it is *"of particular importance in the case of football, in view of the essential role afforded to sporting merit in the conduct of competitions organised at both European and national level. That essential role can be guaranteed only if all the numerous teams taking part face*

*each other in homogeneous regulatory and technical conditions, thereby ensuring a certain level of equal opportunity"*.

Furthermore, the Court notes that *"since the composition of teams constitutes one of the essential parameters of the competitions in which clubs compete [...], that objective is capable of justifying the adoption [...] of rules intended to ensure the maintenance of a certain degree of stability in clubs' player rosters, which serves as a pool for the composition of the teams that are likely to be fielded by those clubs in interclub football competitions."*

Finally, the Court states that *"maintaining a certain degree of stability in those player rosters, and therefore a certain continuity in the related contracts, must thus be regarded [...] as one of the means capable of contributing to the pursuit of the legitimate objective in the public interest consisting in ensuring the regularity of interclub football competitions"*.

This means that it is a legitimate aim to ensure equal conditions for clubs, and that this, according to the Court, can be achieved by means such as transfer windows and rules that ensure, to a certain extent, stability in the player squad and continuity in player contracts.

Transfer rules may therefore hinder the free movement of workers if they pursue this aim, but it is a condition that they also comply with the principle of proportionality.

## Will the players claim compensation from FIFA for transfers that never materialized?

Since FIFA has facilitated a transfer system that conflicts with EU law, and which has had the consequence that the clubs have de facto had veto power if a player wanted to transfer to a new club, the question for the players is now, if they, as Diarra, will file a complaint against FIFA/ the national football associations?

## Does the transfer system comply with the principle of proportionality?

In its examination of this question, the Court finds the rules of the transfer system to be *"suitable for ensuring the achievement of the objective or ensuring the regularity of interclub football competitions, contributing, each in its own way, to maintaining a certain degree of stability in the player rosters of all the professional football clubs which are likely to participate in those competitions"*.

The Court then notes that these different rules, however, *"seem, in a number of aspects, to go beyond, indeed, in some cases, far beyond, what is necessary to achieve that objective"*.

This is the case with the transfer system rule, that sets the various criteria for the calculation of the compensation to be paid by the player to his club in the event of a unilateral breach of contract without just cause.

The Court notes in this regard that the expression "without just cause" is not precisely defined.

## Calculation of the compensation to be paid by the player in the event of a unilateral breach of contract without just cause

The criteria for calculating compensation in the transfer system consist of:

- Due consideration for the law of the country concerned.
- The specificity of the sport.
- Any other objective criterion, which shall include, in particular, the remuneration under the current and/or new contract, the time remaining of the current contract up to five years and the fees and expenses paid by the former club.

According to the Court the criterion of due consideration for the law of the country concerned does not guarantee actual observance of that law, as FIFA has virtually never applied it in practice in its own proceedings.

The Court further states that *"such a failure to actually take into account and therefore to actually comply with the law in force in the country concerned clearly goes beyond what may be necessary in order to maintain a certain degree of stability in clubs' player rosters with a view to ensuring the regularity of interclub football competitions"*.

In other words, this must mean that the applicable law in the country in question must be included as a criterion when calculating the compensation a player shall pay to a club for a unilateral breach of contract.

In relation to the specificity of sport, the Court considers that FIFA refers to *"a general concept, but without also providing a precise definition that would make it possible to understand on which basis and according to which detailed rules that criterion might be called upon to influence the calculation of the compensation payable by the player [and] although that criterion is presented as an 'objective criterion' it lends itself, in reality, to an application which is discretionary and therefore unpredictable and difficult to verify. The imposition of a criterion having such characteristics and giving rise to such consequences cannot be regarded as necessary in order to ensure the regularity of interclub football competitions"*.

As regards the criteria for calculating compensation, the Court notes that, *"while being prima facie more objective and more readily verifiable than the preceding criteria, nevertheless also appear to go very significantly beyond what is necessary for that purpose"*.

## How can clubs retain players in the future?

- ◇ What opportunity does national law provide?
- ◇ What do you do in other industries?
- ◇ Career planning?
- ◇ The composition of the right team?
- ◇ The player's status on the team?
- ◇ Sporting values and level?
- ◇ The club's natural 'power of attraction'?

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This concerns, among other things, remuneration, etc. contained in a new contract that the player may have entered into, as these elements must be held to be unrelated to the contract with the player's former club. Costs and expenses incurred by the former club in connection with the player's transfer to that club seems to be particularly excessive, since they make it possible to transfer potentially significant burdens that were initially negotiated solely by other persons and in their own interests, such as the clubs that are parties to the transfer or third parties that have participated.

The Court therefore states that *"such criteria for compensation seem to be intended to preserve the financial interests of the clubs in the economic context specific to transfers of players between them more than to ensure what is alleged to be the proper conduct of sporting competitions, as attested, moreover, by the way in which those criteria are interpreted and applied by the [FIFA] and the Court of Arbitration for Sport"*.

### Joint and several liability for new club

In relation to the rule in the transfer system according to which the player's new club is jointly and severally liable for the compensation that a player must pay to his former club in the event of a breach of contract without just cause, the Court states that, at first sight, the rule does not appear to comply with the principle of proportionality, in particular since the actual conduct of the new club is not taken into account and since the compensation is calculated on the basis of the criteria which, as described above, suffer from shortcomings.

### Presumption rule and sporting sanction

According to the Court, the same applies to the presumption rule contained in the transfer system, according to which the new club is presumed to have incited the player to breach the contract without just cause with his previous club and, as a result, risks a sporting sanction consisting of a general ban on registering new players for two full and consecutive registration periods.

In relation to the imposition of sporting sanctions in general, the Court states that FIFA is free to determine such sanctions, but they can only be permitted if they

are subject to criteria that are transparent and objective, non-discriminatory and proportionate.

### Prohibition on issuing international transfer certificates

Regarding the transfer rule concerning the prohibition of the issuance of an international transfer certificate, when the former club and the player are faced with a contractual dispute, the Court concludes that such a provision manifestly infringes the principle of proportionality and it cannot be justified by an alleged wish to ensure the proper conduct of sports competitions.

### The Court's conclusion

The Court concludes in the judgment that the transfer system constitutes a restriction to the free movement of workers and that FIFA must therefore demonstrate to the Belgian court, which has requested the Court's opinion in the case, that the transfer rules do not go beyond what is necessary to achieve the objective of ensuring regularity in football tournaments between clubs by maintaining a certain degree of stability in the professional football clubs' player squads.

### What will be the outcome of the Belgian judgment?

The Belgian court, which has asked the Court to answer its questions, must now conclude the case in the Belgian legal system and deliver its judgment, which, as noted in parentheses, must take into account the observations of the Court, and no one seems to doubt

### What will a new transfer system look like?

- ◇ Only one transfer window per year?
- ◇ Access to terminate employment contract?
- ◇ Redistribution system of income?
- ◇ Transfer payment calculated according to national law?
- ◇ What about those countries (e.g. Spain) that have special statutory provisions/criteria for calculating compensation that must now be assumed to conflict with the Diarra ruling?

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that the outcome of that decision will be in accordance with the observations and conclusions made by the Court in the Diarra judgment.

### Football contracts' revocable irrevocability?

In my thesis, *Football contracts' revocable irrevocability?*, which I wrote in the subject of sports law at the University of Copenhagen, I concluded 24 years ago that the transfer system at that time was in conflict with EU rules and Danish law, and that no exceptions could be made with reference to the otherwise recognized legitimate objectives such as ensuring the balance between the clubs by maintaining a certain level of competition and uncertainty about the results, as well as promoting the employment and further education of young players, as the rules (irrevocable fixed-term contracts) go beyond what is necessary to achieve these objectives and are only partly a suitable means to this end.

Today's transfer system is not much different than it was when I wrote my thesis, and the result of the Diarra ruling therefore does not come as a surprise to me.

### Risk-based business model

I am convinced that I am not the only one who has considered and concluded that the days of the transfer system have been numbered since the Bosman ruling was handed down in 1995, and it has therefore also been surprising and incomprehensible to me to see how almost all football clubs over the past 30 years have made it their core business to sell (their best) football players.

A business model that must be said to be uncertain and risky to that extent, since it is based on a transfer system built on provisions that have now been thrown out of the game by the Court.

I cannot help but think about how the need for the tax and accounting treatment of transfer sums in club accounts at the time made it necessary to find a common understanding of what the heck a football club actually buys and sells when a transfer sum is paid or received?

Today, few people talk about anything other than the purchase and sale of contract rights, and even though in reality it has been about the purchase and sale of football players, this somewhat sought-after / artificial adaptation of indefinable income and expenses in a regular set of accounting rules, with requirements for a balance sheet indicating assets and liabilities, depreciation rules, calculation of the year's profit, etc., has over time normalized and made trading of football players, disguised as contract rights, an acceptable business model.

It is my assumption that the business model of most football clubs is currently very much based on the sale of players and thus on a transfer system that has now been given the red card by the Court.

There is therefore a need to carefully consider the future business model by these football clubs' boards, as many questions will arise as the possible consequences of the Diarra ruling become clear to clubs, players, agents, associations and football fans.

### The future business model of a football club

In my opinion, the most important thing in a football club should be to try to win as many football matches as possible (in this respect, it is hardly optimal to sell your best players to your competitors) and on this basis to search for and optimize the income opportunities that good sporting results can bring.

#### Can the clubs survive without a drastic change to their business model?

If there is no transfer system that can ensure that clubs receive a transfer payment, these clubs will have to reinvent parts of their business model and seek and optimize other sources of income. If transfers are not received for the sale of players, then conversely, there is no need to pay for new players either ....

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It is arguably only the imagination that sets limits to these opportunities, as long as the business model simply stays within the limits of the law, and instead of seeing the Diarra ruling as a disaster, when you can no longer expect to receive significant income from player sales, the clubs could instead choose to seize the opportunity that has now arisen to reinvent parts of their business model.

In this context, it should be important that it should no longer be necessary for the club to have to pay a (large) transfer fee to a player's previous club.

### Alternative to the transfer system

In my thesis, *Football contracts' revocable irrevocability?*, which I submitted for examination in December 2000, I proposed an alternative to the transfer system, which included the use of transfer windows, as these had been approved by the Court even if they in principle constitute a measure which restricts the free movement of workers.

I therefore also remember when FIFA introduced transfer windows in football in September 2001, not because of my thesis, of course, but probably because they could also read between the lines that transfer windows could form part of a comprehensive set of rules on the transfer of players.

Transfer windows limit players' ability to switch to other clubs during a season in a good sporting way, and they meet the clubs' need for a certain stability in their player squads, which is why one transfer window per season seems better than the current two.

In addition to transfer windows, the alternative to the transfer system described in my thesis consisted of a right of termination for both club and player against payment of compensation measured according to national rules, and a redistribution system of part of the clubs' income.

Whether a new transfer system will include such mechanisms remains to be seen, but it is certain that the transfer system is facing a dramatic change.

### Prohibition of cartel formation

The Diarra judgment also deals with the prohibition of agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and the Court concludes that the transfer system is affected by the prohibition and can only be exempted, if it can be demonstrated by convincing arguments and evidence that all the conditions for this are met, which does not appear to be the case.

In this connection, it should be remembered that, according to the Court, it is legitimate to pursue an objective of ensuring balance between clubs, and that this can be achieved by means such as transfer windows and rules that to a certain extent ensure stability in the player squad and continuity in player contracts, but the rules must be **proportional**.

### What are the consequences of the Diarra ruling?

The next transfer window will probably provide some answers to several of the questions that have arisen in relation to the consequences of the Diarra ruling, but no one seems to know yet when the big questions will be answered.

It will be interesting to get answers to the following:

- Will the clubs claim compensation from FIFA and/or the national associations for transfer payments already made?
- Will the players, in the same way as Diarra, claim compensation from FIFA and/or the national associations for club transfers that never materialized?
- Can the clubs retain a player for a period longer than one season in the future?
- What will the transfer system look like?
- Can the clubs survive without a drastic change in their business model, and what will it look like?