

# Are transfer payments in football ruled off-side by the ban on cartel formation?

The Diarra judgment, handed down by the Court of Justice of the EU on 04.10.2024, concerns not only the free movement of players, but equally, if not even more, whether clubs' access to their most important "resources" (the players) can be restricted by a requirement for a large transfer fee.

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**In my article *Has football's transfer system been given the red card?* I described the part of the Diarra judgment that deals with the free movement of workers, and this article can therefore be read as a continuation, where I focus on the EU competition law aspects that seem to constitute a more worrying and almost insurmountable obstacle to the survival of the football transfer system, given the serious sanctions that participants in a cartel can face.**

## 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 object 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 2 above.

## The facts of the Diarra judgment

Since this present article is a continuation of my previous article *Has football's transfer system been given the red card?*, I refer to my review of the facts in the Diarra judgment in the aforementioned article, which should therefore be read before this article.

## FIFA's transfer rules

The transfer rules dealt with in the Diarra judgment, consist of individual provisions which, in combination, constitute a transfer system regulating 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 club regarding 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.

## What is a resource ?

Most people have probably heard of an HR department, Human Resources, in a company, but resources can also consist of, among other things, financial or physical resources, such as capital or machinery, of material or intangible resources such as raw materials, goodwill, reputation, etc. Human resources, or Human Capital if you will, are typically defined as the skills, abilities, knowledge and talent that people use in the production of a good or a service.

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.

## The ban on cartel formation

The competition law rules are complex, but as with most other rules, they consist of a main rule and some exceptions to it.

Article 101(1) of the TFEU contains the main rule on the prohibition of agreements restricting competition, or cartels, and thus prohibits all agreements between undertakings, all decisions by associations of undertakings and all forms of 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 internal market.

It is therefore necessary to demonstrate either that the conduct in question has as its **object** the prevention, restriction or distortion of competition, or that the conduct has such an **effect**.

If it is found that a conduct proves to have an anti-competitive object, it is not necessary to examine its effect on competition. It is therefore only if the conduct cannot be considered to have such an object that it is necessary to examine its effect in the second instance.

In order to determine whether an agreement / decision / practice (a conduct) can be considered to have as its object the prevention, restriction or distortion of competition, it is necessary to examine the following:

- The content of the agreement, decision or practice in question.
- The economic and legal context of which it forms a part.
- Its objectives.

Exceptions to the prohibition can be found in:

- Case-law of the EU Court.
- Article 101(3) of the TFEU.

## The exception in case law

It follows from the case law of the Court that it is possible to make an exception to the ban on cartel formation and thus consider certain specific types of conduct not to be covered by the prohibition.

This applies to agreements or resolutions that may be exempted if they:

- pursues one or more legitimate objectives in the public interest which are not per se anticompetitive in nature, and

- the specific means used to pursue those objectives are genuinely necessary for that purpose, and
- that the inherent *effect* does not go beyond what is necessary.

The exemption therefore does not apply if the effect can justify a presumption that the agreement or decision has as its object the prevention, restriction or distortion of competition, since such can only be exempted by Art. 101(3).

## The exception in article 101 (3)

Article 101(3) of the TFEU contains four cumulative conditions, all of which must be met in order to exempt an agreement or decision from the ban.

The four conditions:

- It must be demonstrated with a sufficient degree of probability that efficiency gains can be achieved.
- It must be demonstrated that an equitable part of the profit of these efficiency gains is reserved for the users.
- It must not impose on the participating undertakings restrictions which are not indispensable for achieving such efficiency gains.**
- The participating undertakings must not be given the opportunity to eliminate all effective competition for a substantial part of the services concerned.

## The ban applies to FIFA

In the Diarra judgment, the Court, referring to two recent EU judgments, Case C-333/21 European Superleague Company and Case C-680/21 Royal Antwerp Football Club, initially states that the EU rules apply to FIFA in its capacity as an association whose members are national football associations, which themselves can be classified as “undertakings”.

### Are footballers a resource or a commodity for a football club ?

In the Diarra judgment, the Court consistently refers to footballers as a resource for football clubs. In fact, the Court states that footballers constitute an essential resource for a football club and that it is therefore absolutely crucial for the football clubs' ability to 'produce their product' that they are guaranteed equal and best possible access to this resource.

The Court then refers to the fact that the composition of a team is one of the essential parameters of the football tournaments and states that those of FIFA's decisions which consist in adopting and implementing rules concerning employment contracts and the transfer of players therefore come within the scope of the ban.

The Court further notes that the transfer rules clearly effect trade between Member States, since they have a global geographical scope, and the question then becomes whether the transfer rules have as its object or effect the restriction of competition.

### **Do the transfer rules have as its object or effect the restriction of competition?**

The Court's analysis of the question of the object of the transfer rules is comprehensive, and the Court reiterates at the outset that the conduct (the transfer rules) may consist in limiting or controlling the essential parameter of competition such as the employment of players who have already been trained as professionals.

In order to actually answer the question of the object of the transfer rules, the Court divide its examination into the previously outlined points, which are:

- a) The content of the transfer rules.
- b) The economic and legal context surrounding the transfer rules.
- c) The objective aim, which the transfer rules seek to attain.
- d) Conclusion of the study.

It is in this analysis that one can find the Court's inputs to the elements that a transfer system can consist of without being in conflict with EU competition law rules, and the analysis is therefore extremely relevant and interesting.

#### **A) The content of the transfer rules**

In its description of the content of the transfer rules, the Court first states that the transfer rules consist of various rules which present as an indivisible whole and must therefore be construed as such.

I would like to remark that this is an important consideration, as it shows that it is not just one of the provisions in the transfer system that is being assessed, but all of those mentioned in the judgment, and that it is as a whole.

The Court then describes that the transfer rules stipulate that any football player who terminates an employment contract with a former club without just cause is obliged to pay compensation to the former club, which, in the absence of contractual terms on the matter, is to be cal-

culated taking into account a number of criteria.

#### **The criteria for calculating compensation**

Having regard to what the Court has already held on these criteria elsewhere in the Diarra judgment, the Court further states that the criterion of 'the law of the country concerned' has in practice virtually been ignored, and that the criterion relating to 'the specificity of sport' is couched in extremely general and imprecise terms, that lend themselves to being implemented in a manner that is discretionary and therefore unpredictable and difficult to verify.

As regards the other calculation criteria, the Court considers that they appear, at first sight, to allow compensation to be fixed at an extremely high and deterrent amount, whereas the compensation calculated under national (Belgian) law would correspond solely to the remuneration remaining due until the end of the employment contract, and is not therefore to involve aspects unrelated to the employment relationship.

#### **International Transfer Certificate**

The transfer rules also contain provisions on the issue of an International Transfer Certificate. This certificate is necessary for a player to be registered as eligible to play for a new club.

The Court states in this regard that this provision automatically deprives the player of any possibility of obtaining the issue of an International Transfer Certificate, only by the former club alleging that the player has terminated his contract without just cause, and this therefore leads to a situation in which that player is deprived of any possibility of participating in organised football.

#### **Joint and several liability for new club, presumption rule and sporting sanction**

Regarding the other content of the transfer rules, the Court describes that any new club employing such a player would, first, be held jointly and severally liable for the payment of the compensation which that player

### **Can a company own and sell a specific human resource ?**

In this context, it must be mentioned that the serfdom was abolished in Denmark in 1788, and no, of course it does not make sense if a company today can own and sell a specific employee. This is possibly why a different description of what is transferred in return for payment of a transfer has been found over time, but that does not change the fact that behind the disguise there is a trade with human resources being purchased and sold.

might be ordered to pay; and second, be presumed to have induced that player to breach the employment contract; and, third, the new club is subject to a general ban on registering any new player in two entire and consecutive transfer windows, if the contract with the previous club has been terminated by the player during the protected period of the contract.

### The Court's summary of the content of the transfer rules

In its concluding observations on the content of the transfer rules, the Court refers to the Opinion of Advocate General M. Szpunar, who observes that the transfer rules "constitute a generalised and drastic restriction [...] of the competition, which, in their absence, could pit any professional football club [...], as regards the recruitment of players already employed by a given club, its being noted that such players constitute, in numerical terms, the essential part of the population of players who are already trained or undergoing training, who might be the subject of such [...] recruitment at a given time, even though there are also, at any time, a certain number of players who are no longer under contract for one reason or another".

Regarding the content of the transfer rules, the Court then concludes in summary that they "thus ensures, in practice, that each club is certain, or virtually certain, that it will be able to keep its own players for as long as the contract [...] concluded with them has not reached its term [...] as long as it does not decide to part with them in the context of a [...] transfer of the player to another club, in return for payment of a transfer fee".

### B) The economic and legal context surrounding the transfer rules

In its examination of the economic and legal context surrounding the transfer rules, the Court begins by noting that FIFA, in general, are able to adopt, implement and ensure compliance with rules relating, inter alia, to the organisation of tournaments.

When it comes to annual or seasonal competitions, the Court accepts that these are "essentially based on sporting merit, which can be guaranteed only if all the participating teams face each other in homogeneous regulatory and technical conditions, thereby ensuring a certain level of equal opportunity [...] it may be legitimate for [...] FIFA to seek to ensure, to a certain extent, the stability of the composition of the players rosters that serve as a pool for the teams [...] for example by proscribing, as [the transfer rules already do], the unilateral termination of employment contracts during the season [...] or during the year".

On the other hand, the Court does not accept that the specificity of football and the actual conditions of the

functioning of the market should lead to an acceptance of a generally, drastically and permanently restricted or even prevented possibility of the clubs to compete for the recruitment of players. Under the guise of preventing aggressive recruitment practices, those rules correspond, in fact, to no-poaching agreements between clubs which, in essence, lead to the artificial partitioning of the market to the advantage of all the clubs.

The Court therefore concludes, first of all, that "even if [the transfer rules] are presented as being intended to prevent player-poaching practices by clubs with greater financial means, [they] can be treated as being equivalent to a general, absolute and permanent ban on the unilateral recruitment of players who are already employed, imposed by decision of an association of undertakings on all the undertakings, consisting of the professional football clubs, and borne by all [...] players.

In relation to the economic and legal context surrounding the transfer rules, the Court finally concludes that the transfer rules constitute "a manifest restriction of the competition in which those clubs would be able to engage in their absence, resulting in the partitioning of the market to the advantage of those same clubs as a whole".

### C) The objective aim, which the transfer rules seek to attain

The Court's analysis of the objective aim, which the transfer rules seek to attain, is less comprehensive than the previous points, and the Court almost ruthlessly states that "irrespective of the subjective intention or the legitimate objectives, that may have inspired or have been pursued by [FIFA], those [transfer] rules must be considered to be intended to ensure that [...] it becomes extremely difficult [...] for the professional football clubs to compete for access to the essential resources which players already under contract are [...], as such recruitment can take place only through a transfer negotiated between the former club and the new club".

## Are transfer payments a simulation ?

Over time, there have been many and varied proposals for what is bought and sold in a transfer payment in football. The right to enter into a contract with the player, payment of a release clause, and transfer of transfer rights, to name just a few. Reading between the lines in the Diarra judgment, it seems to be a simulation made possible, among other things, by the veto power that follows from the rule on the (inter-)national transfer certificate.

## D) Conclusion of the study

Having thus examined the three points indicated, the Court concludes in summary that the transfer rules *“present, by their very nature, a high degree of harm to the competition in which professional football clubs could engage by unilaterally recruiting players, who are already employed by a club or players whose employment contract is alleged to have been terminated without just cause, therefore by seeking to have access to the resources essential for their success that those highly trained players are”*.

In other words, according to the Court, it is almost impossible for a club to meet the need of having essential resources available to the club when the essential resource consists of the best possible footballers.

This is because such footballers will in most cases already be under contract with another club, which means that access to employing them will be limited or even prevented as it is necessary to pay an (unaffordable) transfer fee to that club.

It is therefore not surprising when the Court then definitively states that the *“[transfer] rules must be considered to have as their object the restriction, indeed the prevention, of that competition [...]. There is accordingly no need to examine their effects”*.

## Can the transfer rules be exempted from the ban according to case law?

After the Court has concluded that the transfer rules have as their *object* the prevention, restriction or distortion of competition, the answer to this question is self-evident, since such rules can only be exempted by Article 101(3).

Therefore, there is no possibility in case-law to exempt transfer rules from the ban, and it is therefore only Article 101(3) that can potentially provide for this.

## Can the transfer rules be exempted from the ban under Article 101 (3)?

The Court recalls that if only one of the four conditions mentioned in Article 101(3) is not met, an exemption from the ban cannot be considered, whereas it makes observations only in relation to the third condition.

### 3. It must not impose on the participating undertakings restrictions which are not indispensable for achieving such efficiency gains.

In that regard, the Court notes that this condition involves an assessment and comparison of the respective impact of that conduct and of the alternative measures which might genuinely be envisaged, in order to determine

whether the efficiency gains expected from that conduct may be attained by measures which are less restrictive of competition.

Since that question is to be determined by the Belgian court, which has referred to the Court the question of the possible conflict of the transfer rules with the EU competition rules, the Court addresses the former in the following:

*“In order to determine whether that third condition is observed [...], the [Belgian court] will have to take into consideration, first, the fact, [...] that [the transfer rules] are characterised by a combination of factors, a significant number of which are discretionary and/or disproportionate.*

*In addition, it will have to take account to the fact [...] that those rules provide for a generalised, drastic and permanent restriction of the [...] competition in which professional football clubs could engage by unilaterally recruiting highly trained players. Each of those two circumstances, taken on its own, prima facie precludes those rules from being considered indispensable or necessary to enable efficiency gains to be made, if such gains were proven to exist”*.

## The Court’s conclusion

In its conclusion in Diarra, the Court rules that the transfer rules constitute a decision by an association of undertakings which is prohibited by Article 101(1) and which cannot be exempted under Article 101(3).

This means that the Court considers the transfer system to be the result of an association of undertakings, understood as a cartel, having adopted anti-competitive rules, understood as the transfer rules, in conflict with the ban in the TFEU.

This is serious reading, especially considering the important sanctions associated with a violating of the ban.

## Is cartel formation not punishable?

At least in Denmark, cartel agreements are considered serious economic crimes. A cartel agreement that is entered into intentionally and is of a serious nature can be punished with imprisonment. Companies, board members and senior employees can be punished with a fine or, in serious cases, imprisonment, for participating in a cartel. Following the Court’s conclusion in the Diarra case, the question seems to be what consequences this will have for the participants in FIFA’s transfer system?

## Are the transfer rules then ruled off-side by the ban on cartel formation?

I guess the Belgian court will come to the same conclusion as the Court and answer yes to this question.

This seems also to be the prevailing view of most stakeholders in the football industry, including FIFA itself suspending all pending cases before FIFA's own disciplinary bodies dealing with the Diarra transfer rules.

These transfer rules must therefore be considered to have been ruled off-side by the ban on cartel formation, which in itself is a very serious situation for the participants in this cartel formation.

The immediate consequences seem almost incomprehensible to the a football world that, over a period of several decades, has become accustomed to adventurous transfer payments being a completely central and normal part of the business model of football business.

The Diarra ruling must, however, be taken as an expression of the fact that the EU Court has a completely different perception of reality, and it is this new reality that all parties in football must adapt to as soon as possible, starting with FIFA and a proposal for a completely new transfer system.

In this context, it seems very difficult to imagine a transfer system allowing clubs to demand large transfer payments for the sale of players and by doing so a business model based on the purchase and sale of football players, but what will a new transfer system then look like?

## What will a new transfer system look like?

In my article *Has football's transfer system been given the red card?* from November 2024 and in my thesis *Football contracts' revocable irrevocability?* from December 2000, I have tried to identify some of the elements that a new transfer system could consist of.

There could thus be one transfer window per season/year instead of the current two, termination rights for both club and player against payment of compensation measured according to national rules, and a redistribution system of part of the clubs' income.

In the Diarra judgment, the Court of Justice of the European Union has provided its inputs on what a new transfer system could look like.

### Diarra judgment part 1: Free movement of workers

From part 1 of the Diarra judgment, which I have discussed in my article *Has football's transfer system been*

*given the red card?*, it must be concluded that on the one hand the EU Court of Justice will allow a transfer system that ensures sporting balance between the clubs, but at the same time it is a central element that the players must be given the opportunity to terminate their contracts.

Termination of the contract by the player must therefore be possible, but only in such a way that it cannot influence the sporting results in an unsportsmanlike manner.

It must therefore be taken into account that holding a tournament is about deciding which of several teams is the best in terms of sport, and since this will generally be the team that has collected the most points in the meeting with the other teams during the tournament, this only makes sense if the composition of the teams' players does not change during the entire tournament.

This must therefore mean that it would be acceptable, for example, for a player during a tournament not to have the opportunity to play the first few matches for club 1, and then to play a few matches for club 2, a few matches for club 3 and so on.

On the other hand, in connection with a right of termination, it seems absolutely crucial that the criteria for determining the compensation that a player must pay to the club for breaking/terminating the contract must be done taking into account the applicable law in the country in question and according to a formula that calculates this compensation in a predictable and proportional manner.

### Diarra judgment part 2: Ban on cartel formation

From part 2 of the Diarra ruling, which I have described in this article, it must be concluded that the starting point for a new transfer system shall necessarily be that clubs must be guaranteed equal access to their most

## A new transfer system ...

- ⇒ Must ensure that clubs have equal access to their most important resource, the players.
- ⇒ Must respect the player's right to change club against payment of a predictable and proportionate compensation.
- ⇒ Can prohibit the termination of player contracts during the season.
- ⇒ Can limit players's employment as football player to one club per season.

important resource, the players.

In this context, it should be recalled that the Court, in its examination of the economic and legal context of which the transfer rules form part, highlights that **the classic mechanisms of contract law, such as the right for the club to receive compensation in the event of a breach of contract by one of its players, at the instigation of another club where that is the case, in breach of terms of that contract, are sufficient to ensure, on the one hand, the ongoing presence of that player in the first club mentioned, and, on the other hand, the normal application between clubs of market rules, which allow them, on expiry of normal term of the contract, or earlier if a financial agreement is concluded between clubs, to recruit the player in question.**

Combined with the Court's acceptance that **it is possible to proscribe the unilateral termination of employment contracts during the season or a given year, as is the case with the transfer rules**, this must be seen as an important contribution from the Court in relation to the model for a new transfer system.

So, it may be legitimate for player contracts to be made non-terminable during the season.

However, this must then conversely mean that there must be a possibility of termination outside the season.

In such a scenario, it must be assumed that the consequence is that the clubs will no longer be forced to pay a large transfer fee for a player, as they will instead be able to agree to employ the player for the next season, of course provided that the player first terminates his existing contract at the end of the current season.

As the Court indicates, this does not mean, however, that two clubs cannot enter into a financial agreement to terminate a player's contract before expiry, since the contractual mechanisms will ensure that such an agreement does not get out of proportion and will thus be a result of normal market forces.

## Speculation in the trade of human resources

The world-famous Danish author Hans Christian Andersen describes in his fairy tale, *The Emperor's New Clothes*, how the naked reality can appear, as long as everyone agrees that this is how reality looks.

For the most naive, however, reality cannot be hidden, and when this becomes clear to the people, everyone is left embarrassed, except for the most naive.

They say reality is hard to hear, but is the story of trans-

## The Emperor's New Clothes

"But he has nothing on," said a little child. "Lord God, hear the voice of the innocent!" said the father, and one whispered to the other what the child said. "He has nothing on, there is a little child who says he has nothing on!" "He has nothing on!" finally shouted the whole people. And the emperor was overcome with fear, for he thought they were right, but he thought to himself: "Now I must endure the procession." And then he held himself even more proudly, and the chamberlains walked and carried the train, which was not there at all.

fer fees in football that much different from the fairy tale?

When I wrote my thesis *Football contracts' revocable irrevocability?* it was probably also a consequence of my sense of justice.

I have always had difficulty accepting that player X is not allowed to pursue the possibility of an adventure with, for example, a club S in the warm Spanish 2nd league, when the player's own club D is speculating on getting club E, from the rainy but more financially strong English 2nd division, on the pitch, after which the offer from club S in Spain disappears, while club E in England ends up signing another player.

I am sure that this speculation on the part of the clubs has cost many players not only a possible adventure, but also a better career both sportingly and financially, and I do not think that is fair.

In Spain we say that *el tiempo pone a todos en su sitio*, which means that time puts everyone in their place.

Hopefully the time has now come when the transfer system will be designed in a way that puts the sport in focus for the benefit of football fans and other parties in football.

May the answers to the questions below be an inspiration for the creators of the new transfer system.

- What is a resource?
- Are footballers a resource or a commodity for a football club?
- Can a company own and sell a specific human resource?
- Are transfer payments a simulation?
- Is cartel formation not punishable?