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Insights

LASSANA DIARRA FOILS FIFA'S TRANSFER RULES

FROM MADRID, TO MOSCOW, TO LUXEMBOURG

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SUMMARY

It is pretty rare for judgments of the European Court of Justice ("**ECJ**") regarding the freedom of movement for workers and competition rules to grab news headlines. However, the ECJ's ruling in C-650/22 ("***Diarra***") has certainly *kick*-started global debate on the restrictions inherent in football's transfer system, and whether they are compliant with wider legal requirements.

The ECJ on 4 October 2024 clarified that certain of FIFA's transfer rules which (in effect) disincentivised unilateral termination of a player's contract (by club or player) without "just cause" are incompatible with Article 45 and 101 of the Treaty on the Functioning of the European Union ("**TFEU**"), that is, the rules on the freedom of movement for workers and the prohibition on anti-competitive no-poach agreements within the EU. Subject to the Belgian Court of Appeal ruling that these rules are capable of objective justification (which is unlikely in light of the ECJ's judgment), these rules are **void** in law across the EU.

The effects of the *Diarra* judgment could be profound, seemingly opening the door for players to unilaterally terminate their contracts and sign for competing clubs. However, the ECJ does hold open the prospect for clubs to receive protection from traditional mechanisms of contract law, for instance the right to receive compensation in the event of breach of contract by one of its players.

The case also serves as a reminder that the competition aspects of labour markets, and in particular no-poach agreements, are increasingly on the radar of courts and competition authorities around the world (particularly in the UK and the US), and may encourage those authorities yet to kick off investigations to do so. See our recent assessment of the application of competition law to no-poach agreements.

FIFA'S TRANSFER RULES

Anyone lucky enough to have studied law at university (or alternatively any die hard football fanatic) will likely recall the landmark *Bosman* (C-415/93) judgment from the ECJ back in 1995, which applied the EU's freedom of movement provisions to allow football players to transfer to another club once their contract had expired, without the approval of the player's former club. The *Bosman* judgment opened up the lucrative transfer market in football.

Post *Bosman* in order partly to protect football's pyramid structure (in effect to protect smaller clubs), FIFA introduced rules to govern the transfer of players between clubs, including rules to restrict players under contract from moving to another club without the consent of their current club. In particular, in 2014 FIFA adopted the current "Regulations on the Status and Transfer of Players" rules ("RSTP"). The following rules within the RSTP were of particular significance in the ECJ's ruling:

a. a party (e.g. a player or a club) who terminates a contract "without just cause" is required to pay compensation. The level of compensation to be paid, unless set out in the player's employment contract, is calculated by reference to objective criteria including "*the specificities of the sport".* A player who terminates their contract "without just cause" and the new club that employs that player (the "**new club**"), are jointly and severally liable for the payment of compensation to the former club (the **"Compensation Rule**")*;*

b. in addition to the obligation to pay compensation, the new club which signs a player who has terminated the employment contract "without just cause" is presumed (unless proven otherwise) to have induced the player to breach the contract and risks a ban on registering any new players at a national or international level for two complete and consecutive registration periods; and

c. where there is a dispute relating to a breach of contract "without just cause", the RSTP prevents the player's former national football association from issuing an International Transfer Certificate ("**ITC**") to the new association which is required for the player to participate in football competitions on behalf of the new club (the **"ITC Prohibition Rule"**).

(together the "**Rules**").

In parallel to the implementation of the Rules, a knotty legal problem was brewing. Lassana Diarra, the French central defensive midfielder moved between two prestigious premier league clubs (Chelsea and Portsmouth), and of course, separately, Arsenal. Diarra left Portsmouth in the midst of their financial concerns in 2009 to Real Madrid, before being forced out of the club to Anzhi Makhachkala then eventually transferring to Lokomotiv Moscow in 2013.

Despite a strong first season with Lokomotiv, Diarra fell out with the club and subsequently (in the midst of a pay dispute) refused to attend training. Lokomotiv terminated Diarra's contract on this basis, and brought a claim in FIFA's Dispute Resolution Chamber for €20m for Diarra's breach of contract "without just cause" under the RSTP. Diarra in the meantime sought to join a new club. The Belgian club Sporting du Pays de Charleroi SA ("Charleroi") offered to recruit Diarra, provided that

he was registered to participate in any competition organised by FIFA, UEFA and the Belgian football association, and that he obtained written and unconditional confirmation that Charleroi would not be jointly and severally liable for the payment of any compensation owed to Lokomotiv Moscow (in light of the Compensation Rule dispute).

Diarra wrote to both FIFA and the Belgian football association to gain comfort on these conditions. However, FIFA in response outlined that only its enforcement (rather than its administrative) body had the power to apply the Rules, and the Belgian football association refused to issue an ITC whilst Diarra's dispute with Lokomotiv Moscow was on-going. Diarra's deal with Charleroi ultimately fell through.

Diara commenced proceedings against FIFA and the Belgian football association for €6m in lost earnings on the basis that the Rules were contrary to EU law. The Belgian Court upheld Diarra's claim which was subsequently appealed by FIFA and the Belgian football association to the Belgian Court of Appeal. That court requested a preliminary ruling from the ECJ on whether the Rules were contrary to: (i) the right to freedom of movement of workers within the EU under Article 45 TFEU and (ii) the prohibition on anti-competitive agreements under Article 101 TFEU.

BACK TO THE TACTICS BOARD - THE ECJ'S JUDGMENT

Sports continues to be seen as an economic activity in EU law

In our article earlier this year regarding the Court's judgments in *Superleague, ISU* and *Royal Antwer*p, we noted that the ECJ in those cases re-affirmed that the practice of sport, insofar as it constitutes an economic activity, is subject to EU law. The ECJ in *Diarra* again repeats this and notes that there are undeniably specific characteristics of sporting activity that relate to amateur sport (which alone would not amount to an economic activity) may also be found in the pursuit of sport as an economic activity. While these characteristics should be taken into account when assessing the compatibility of the (applicable sporting) rules with EU law and should not be seen as justification for disapplying the EU rules to sport altogether.

Article 45 TFEU – players are workers too!

The ECJ considered that the RSTP Rules hindered the freedom of movement of workers as they: (i) dissuaded clubs from seeking to hire players in other Member States and (ii) prevented players in a dispute with a former club over termination of an employment contract from engaging in sports as an economic activity in another Member State.

Article 45 TFEU concerns the free movement of workers and precludes any measure which places workers at a disadvantage when wishing to pursue an economic activity (such as sport) in the territory of another EU member state. The ECJ ruled that the Rules were likely to place players, who wish to play for a new club in another Member State by unilaterally terminating their employment contract with their former club, at a disadvantage as that former club could claim that such

termination was without just cause. The ECJ noted in particular that clubs in other Member States were dissuaded from seeking to hire players in other countries under contract with another club, as the Rules, including the sporting ban on registering new players, raised "*significant legal risks, unpredictable and potentially very high financial risks as well as major sporting risks".* The ECJ also noted that the ITC Prohibition Rule prevents players from pursuing their economic activity (i.e playing football for a club) in another Member State.

While noting that it would be for the Belgian Court of Appeal to determine whether the restrictions on the freedom of movement could be justified as proportionately pursuing a legitimate objective, the ECJ made a number of observations, indicating that any such arguments brought by FIFA are unlikely to be successful including:

a. the Compensation Rule was imprecise and lacked clarity such that it risked discretionary implementation and was difficult to control. The ECJ considered that the Compensation Rule could not be considered necessary to protect the integrity of interclub competitions.

b. In our earlier article regarding the *Superleague* ruling, we noted that the ECJ stated that authorisation rules which were not subject to objective, non-discriminatory, transparent and precise criteria, were liable to be found as infringing Articles 101 and/or 102 TFEU. The ECJ noted in *Diarra* that these criteria must also be considered when assessing whether the Rules (and the penalties provided for breach of the Rules) are proportionate in light of a potential infringement of Article 45 TFEU. The ECJ highlighted that the Rule which presumes that the new club induced the breach, resulting in a sporting sanction does not allow for consideration of the relevant circumstances of a particular case, nor asks the former club to provide evidence that the new club induced the player to break their contract. It therefore appears unlikely that this would be considered to be proportionate by a court.

Article 101 – no-poach agreements are prohibited – goal hangers now onside?

The ECJ in *Diarra* also repeated the findings of the Court in *Superleague* that FIFA, as an association whose members are national football associations or affiliates such as football clubs (themselves considered to be 'undertakings' for the purposes of the competition rules), are an association of undertakings and therefore subject to the prohibition on anti-competitive agreements in Article 101(1) TFEU.

The ECJ reiterated its position in *Royal Antwerp* that an essential parameter of competition between clubs (which is in itself an economic activity) is the ability to compete to recruit players. In light of the content, objectives and legal and economic context of the Rules, which act to prevent players unilaterally terminating their contracts and joining clubs in other member states, the Rules were judged to amount to an restriction of competition by object "*in a generalised and drastic manner, from a material point of view"*.

The ECJ considered that, absent those Rules, clubs would be able to compete to recruit players already contracted with another club in another Member State. The ECJ recognised that while it may be legitimate for FIFA to ensure the stability of the squad of players during a season, and the prevention of aggressive recruitment tactics from clubs with deep pockets, the Rules amounted to no-poach agreements between clubs which resulted in the artificial partitioning of national and local markets, and froze the distribution of players (a parameter of competition) between clubs where transfers had not been negotiated between them. Once the ECJ identified the Rules to comprise a no-poach agreement, it was unsurprising that the ECJ judged the Rules to restrict competition by object.

The ECJ noted that FIFA's legitimate objective of maintaining stability of squads was sufficiently protected through contract law (i.e. a claim for breach of contract against a player) which ensured the long-term presence of a player at a club. Similarly with its consideration of Article 45 TFEU, while the ECJ noted that the possibility of an exemption under Article 101(3) would be a matter for the Belgian Court of Appeal to determine, it observed that the Rules did not appear indispensable to achieving FIFA's legitimate aims, and that this on its face suggested that FIFA would not benefit from exemption.

THE NEXT TRANSFER WINDOW

The *Diarra* judgment has captured global attention of the sports world and has both journalists and fans excited and concerned at the prospect of more regular transfers, including unilateral transfers from players perhaps seeking pastures (and pitches) new. Concern exists that larger clubs may be emboldened to negotiate bilaterally with players and induce contract termination without the risks entailed within the Rules. Whether this has a detrimental impact on smaller clubs with less leveraging power remains to be seen.

However, such fears may well be overblown. As we have noted, the ECJ was careful to reiterate that its conclusions do not preclude or prevent the application of contract law, which at first sight could reasonably include clauses deterring players from unilaterally terminating their contracts (including as the ECJ outlines, compensation). As a result, it is possible that players and their agents will become more resistant to the inclusion of these provisions within contracts. It remains to be seen how effective this will be, given some competitions have standard form employment contracts.

Whether *Diarra* will have a similar impact on the sector as *Bosman* did in 1995 is up in the air. FIFA's response to the judgment, including whether it will adjust the rules (for example, to include objective, non-discriminatory, transparent and precise criteria) to bring them in compliance with Article 45 and 101 TFEU, will be closely monitored.

In any case, as predicted in our last article, 2024 has continued to be a bumper year for sports and competition law aficionados and the impact of the *Diarra* judgment will require careful consideration from the likes of FIFA, clubs, players and fans. It remains to be seen whether the

Belgian Court of Appeal will consider the objective justification defence for Articles 45 and 101 (101(3)) TFEU to apply (though given the wording in the ECJ's judgment, the likelihood of this is somewhat limited). In parallel, competition lawyers will also be keenly looking out for the ECJ's judgments on no-poach agreements between Portuguese clubs (Case C-133/24) and the FIFA Football Agent Regulations (C-209/23), and the European Commission's response to the complaint from the European Leagues and FIFPRO against FIFA for the international match calendar

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