

From *Bosman* to *Diarra*: the eternal battle for a transfer system in professional football

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I. Introduction

On 4 October 2024, the *Diarra* ruling¹ sent shockwaves through the world of professional football. Echoing Advocate-General Szpunar's rather damning opinion of FIFA's existing regulatory framework underpinning the transfer system,² the ruling itself was more or less expected. *Diarra* seems the latest episode in a judicial and political tug-of-war that has been going on for almost three decades, ever since the CJEU's

Bosman ruling in December 1995.

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At stake is the survival of the transfer system in professional football and, in a nutshell, the question of whether an individual player's mobility can be subordinate to a greater common good. This contribution summarises the *status quaestionis* of the matter. Rather than dwelling too much on the facts and specifics of *Bosman* and *Diarra*, this article will consider the dialectics between the regulations of sport governing bodies ('SGBs') and EU law when it comes to the transfer system, the future of the transfer system and potential alternatives.

II. The *Bosman* case and its aftermath

1. The *Bosman* case

As is well known, in 1995, the *Bosman* ruling put an end to transfer fees for out-of-contract players. In *Bosman*, the CJEU made it clear that EU free movement rights apply horizontally to transnational private regulations of SGBs, and so a football player seeing out the term of his contract was from then on free to sign with a new club of his choice without the new club having to pay any compensation to the former club.³

2. Aftermath and revised regulations

In 1997, in the wake of the *Bosman* ruling, both FIFA and UEFA adapted their regulations but held on to a rather minimalist interpretation of *Bosman*.

This quickly triggered additional scrutiny from the EU Commission, this time from a competition law perspective.⁴ In the *Balog* case⁵ the European Commission indicated that the transfer regulations in force at the time infringed EU competition law.⁶ The CJEU's

Advocate General Stix-Hackle, in her (unpublished) opinion, also considered that the FIFA regulations violated EU competition law.⁷ Thus, under the threat of an EU competition law, FIFA and UEFA negotiated further changes to their regulations. As expertly described in great detail by R. Blanpain,⁸ successful lobbying by the football associations led to a dropping of the *Balog* case⁹ and the EU Commission caving-in to pressure from prominent European government leaders¹⁰ to agree to a new transfer system in a 2001 informal agreement with FIFA and UEFA. Following this agreement, the EU Commission withdrew its infringement proceedings against FIFA and UEFA and shelved other pending proceedings against the transfer system. FIFPro, initially critical of the new agreement, ultimately accepted the 2001 agreement.¹¹

The 2001 agreement heralded the principle of "*pacta sunt servanda*" and insisted on the need for contractual stability, with the rules aimed at avoiding the possibility of an early, unilateral contract termination. After the 2001 agreement and ensuing 2001 FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"), moreover, initially-agreed safeguards for players were gradually eroded in subsequent versions of the FIFA RSTP.¹² Essentially, the new rules led to longer player contracts and unilateral extension clauses, to avoid players leaving for free, and the transfer system thriving further.¹³ Both the 2001 agreement and ensuing FIFA transfer regulations, whilst being criticised to no small extent,¹⁴ have essentially survived ever since.¹⁵

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III. The *Diarra* case and its aftermath

1. The *Diarra* case

As a logical *sequitur* of *Bosman*, in *Diarra*, the CJEU looked at the EU law compatibility of FIFA's regulatory framework, making unilateral contract terminations very difficult. Indeed, the football transfer system immediately prior to *Diarra* was built on the principle of contractual stability, centred around three cornerstones contained in Article 17 of the FIFA RSTP, refraining

a player from unilaterally terminating his player contract (during the protected period) and then join another club: (1) the (uncertainty concerning the) calculation of compensation for breach of contract; (2) the presumption that the player's new club has contributed to the breach of the player's contract with his previous club, which makes the new club jointly and severally liable for the compensation payment; and (3) the risk of sporting sanctions being imposed on both the player and his new club.

Diarra, a professional football player, had fallen out with his club, Lokomotiv Moskau, with the latter terminating the player's contract for just cause and suing the player under the FIFA RSTP. Subsequently, Diarra had trouble finding new employment and blamed the stringent provisions of the FIFA RSTP for this.

In *Diarra*, the CJEU found that certain aspects of FIFA's transfer regulations at that time and, more specifically, rules regarding the calculation of financial compensation and the sporting sanctions imposed on both the club and player for early contract termination without "just cause" to be incompatible with EU public policy law. The CJEU considered the regulatory framework imposed by FIFA as being grossly deficient and infringing both EU competition law¹⁶ and the free movement rights of players.¹⁷ The CJEU, in unusually harsh language, criticised the 'club-friendly' way in which the financial compensation owed by a player for a breach of contract without just cause was calculated. Also, the CJEU held that the presumption of joint liability of the new club for the breach of contract merely served to discourage clubs from recruiting players who unilaterally breached their contracts, driving the new club instead towards negotiating an agreement with the player's current club before recruiting the player.

The CJEU, in spite of FIFA's official communication downplaying the ruling,¹⁸ effectively struck down the transfer system as it existed at the time and led authors to speculate on the end of the 'commoditisation' of football players.¹⁹

2. Aftermath and (once more) revised regulations

In *Diarra*, the CJEU had made it abundantly clear that FIFA's regulatory framework needed to be made less restrictive.

Over the last decades, football's SGBs suffered repeated 'slaps on the wrist' before the CJEU. As recent as 2023, SGBs learned the hard way that they were not immune to European public policy rules.²⁰ But the stakes are high and professional football is known to be rather resilient when it comes to (imposed) regulatory changes,

as the aftermath of *Bosman* had demonstrated earlier. All eyes were therefore once more on FIFA and their reaction to *Diarra*.

FIFA used its (legitimate) regulatory power²¹ to fairly quickly adopt new regulations in the wake of *Diarra*. In December 2024, FIFA adopted an Interim Regulatory Framework, to provide – in its own words – 'clarity and stability' to all participants in the global transfer system for the registration periods that would be opening in 2025. In spite of FIFA's claim that (1) the new regulations were only temporary and did not impact the on-going consultation and discussion regarding possible long-term amendments to the regulations and that (2) they were the result of a fruitful consultation with key football stakeholders, FIFA was criticized. One of the main criticisms was that one of the main stakeholders – player's representatives – was hardly involved in the adoption of the new regulations.²²

Fearing the CJEU's wrath and potential tort claims,²³ FIFA had of course no choice but to accept a number of changes to its regulations as a result of *Diarra*. A number of those changes certainly constitute improvements for players' mobility. The reversal of the burden of proof concerning the joint and several liability of a player's new club and its inducement to breach a contract is probably the most significant change. Other changes,²⁴ such as the codification of the notion of just cause²⁵ and changes to the mechanism surrounding the delivery of an ITC,²⁶ constitute welcome changes too, although these are a mere codification of existing practices.

The new framework may remain vulnerable to future legal challenges. First, there is the fact that the "positive interest" principle²⁷ remains for FIFA the way to determine the compensation in the event of an early contract termination. Applying the "positive interest" principle means that one has to return the injured party to the position that the party would have been in if the contract had been performed properly without the contractual breach. While this principle is widely accepted in contract law and the CJEU does not exclude the payment of damages for an unjustified breach of contract *per se*, the question will be whether a general contract law principle can be translated to a specific labour law context. In most countries, labour law is positioned as a "*lex specialis*" to general contract law. Few national labour laws allow that the breach of a fixed-term contract leads to the award of damages unrelated to the remaining salary owed to the individual and/or the reasonable costs incurred to find a replacement for the player.²⁸ In Belgium, for instance, the positive interest principle

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is not accepted in a labour law context, with the breaching party at most being liable to pay a lump sum compensation amount in lieu of notice, capped at the remaining value of the contract.²⁹ FIFA seems aware of this sensitivity, referring in its explanatory note to the new regulations, to the additional potential application of national (labour) laws.³⁰ Second, sporting sanctions going beyond what is needed to protect the integrity of a specific sporting competition seem questionable. Whereas it could be argued that FIFA can impose restrictions on players terminating their contract to join another club during the same season of a given competition, rules aimed at dissuading players from unilaterally terminating their contract altogether may 'cross the line' from a (lawful) scheme designed to protect the integrity of sporting competition to an (unlawful) attempt to use regulatory power to extract advantage at the players' expense.³¹

Further changes loom around the corner. In this respect, it should be noted that European Leagues, ECA, FIFPro Europe and UEFA have written to the European Commission asking to open a European social dialogue³² to re-regulate the European labour market in professional football.³³

3. Implosion, erosion or status quo of the transfer system?

When the *Bosman* ruling was delivered in 1995, observers noted that this could mean the end of football's transfer system. Whereas *Bosman* undeniably liberated any player who was coming to the end of their contract, the ruling in practice merely led to a new transfer system, with the full force of the existing regulatory framework aimed at ensuring clubs to transfer their players during the term of the player's contract. *Bosman* did not kill the transfer system.

It is too early to tell whether *Diarra*, by imposing boundaries on FIFA and putting forward clear guidelines in the event of unilateral contract terminations, has now delivered the 'coup de grace' to the transfer system.

Yes, the transfer system that enmeshed *Diarra* and that led to the litigation was labelled by the CJEU as grossly deficient and incompatible with EU law.³⁴ Yes, the former RSTP and the resulting transfer system were considered as being clearly illegal. That being said, with FIFA's adoption of a new interim regulatory framework, the imminent death of the transfer system seems, once again, greatly exaggerated. At the very least, FIFA's new regulatory framework offers some *prima facie* legitimacy to a new transfer system. Also, the first post-*Diarra* transfer window – notably, a mid-season transfer window – has seen its fair share of regular transfers. Although it is probably too early to tell whether this trend will continue at the end of

season and whether *Diarra* will erode the transfer fees that clubs are willing to pay for players that they target, it is fair to say that the last transfer window has still seen clubs paying hefty transfer fees in spite of the *Diarra* ruling. A full implosion of the transfer system therefore seems unlikely. SGBs and clubs are moreover likely to argue that the current regulations are also beneficial for the vast majority of players. Indeed, under the existing regulatory framework, players enjoy a one-stop, cost-effective 'shop' to claim salary arrears or severance compensation from clubs. Similar guarantees are not always easy to come by in every country.

In my experience, professional football is an extremely conservative sector. Change will take time. Players and their agents still consider a unilateral contract termination to be only a last resort solution. The reason is often not legal in nature at all. A lot of psychological and, for lack of a better word, 'political' elements are at play as well. Players and agents – the latter either way often wishing to maintain a good relationship with clubs and/or even standing to gain from the transfer system³⁵ – often fear reputational damage as a result of a unilateral contract termination. Some players even consider their high price tag as a token of their actual value compared to other players and so a 'badge of honour', in spite of the fact that the transfer fee comes from the global recruitment budget of the player's new club and therefore seems to the detriment of the player's own bargaining power regarding salary. On their side, clubs remain reluctant to hire a player who has terminated his contract unilaterally. For a large number of clubs, the transfer system is their main source of income. Hiring a player as a free agent following a unilateral contract termination might set a bad example to their own players wanting to leave 'on the cheap'. Moreover, it is no secret that clubs are looking, both formally and informally, to enter into no-poaching agreements between themselves.³⁶ Instead, *Diarra* is therefore more likely to be used by players as leverage, to negotiate down the transfer fee (and increase the player's salary with his new club) and/or force a transfer where the existing club is not willing to cooperate.

The stakes are high, not in the least for clubs counting on transfer income to fund their daily operations, including funding needed for the training of youth players. An 'overnight' implosion of the transfer system could wreak havoc in the market. The knee-jerk reflex from FIFA and clubs to try and restore the transfer system through the Interim Regulatory Framework is therefore understandable. But stakeholders best take heed that the present changes will likely not be sufficient and may lead to new litigation.

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4. Towards an alternative solidarity mechanism?

Solidarity with smaller clubs and smaller leagues is needed, but the transfer system may not be the way to achieve such solidarity. Stakeholders in professional football wishing to preserve the 'social fabric' of professional football, including but not limited to safeguarding incentives for the local training of young football players, have every interest in engaging in a proper consultation of all relevant stakeholders to set up an alternative solidarity mechanism. The specifics of the transfer system in most cases do not encourage the recruitment and training of young players, nor is it an adequate means of financing such activities.³⁷ The transfer system, with its opaque pricing mechanism, is

even criminogenic and responsible for a lot of what is wrong in today's professional game.³⁸

Coupling financial solidarity throughout the football pyramid with a player's individual mobility seems to have passed its expiry date.

Ideas for an alternative solidarity mechanism have been floating around, such as a luxury tax calculated on a club's turnover to pay compensation to their players' previous clubs in return for the training efforts that the latter had previously undertaken.³⁹

It will either way be key to involve all relevant stakeholders in the process, i.e. the regulators (FIFA and its member associations), the players (and their

representatives), the clubs (and their representatives) and the leagues. If FIFA insists on adopting regulations accommodating the specificity of professional football, collective bargaining may also be considered. Under the *Albany* exception, collective bargaining agreements may escape competition law scrutiny⁴⁰ (although CBA's will still have to abide with the free movement rules and applicable labour laws⁴¹).

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- 1 CJEU, 4 October 2024, *Diarra*, ECLI:EU:C:2024:824.
- 2 M. SZPUNAR, opinion delivered on 30 April 2024 in C-650/22, *FIFA v. BZ*, ECLI:EU:C:2024:375.
- 3 The Bosman ruling also prohibited domestic football leagues in EU member states and UEFA from imposing quotas on foreign players to the extent that they discriminated against nationals of EU member states.
- 4 In Bosman, the CJEU made its ruling on the basis of EU free movement rights. In the Balog case (CJEU, C-264/98), the Hungarian player Tibor Balog could – at the time – not invoke EU free movement rights but instead turned to EU competi-

- tion law to argue that he was free to join another club at the end of his contract (Bosman had also invoked EU competition law but won the case on the basis of internal market arguments alone as the court did not consider it necessary to examine the competition law aspects).
- 5 Case C-264/98, *Tibor Balog v. Royal Charleroi Sporting Club ASBL (RCSC)*.
- 6 European Commission, written observations to the CJEU dated 8 December 1998.
- 7 R. Siekmann and J. Soek, *The European Union and Sport: Legal and Policy Documents*, TMC Asser Press 2004, pp. 701-723.

- 8 R. Blanpain, *The legal status of sportsmen and sportswomen under international, European and Belgian national and regional law*, Kluwer Law International, 2003, pp. 29 et seq.
- 9 This agreement was concluded on the very day that the Advocate General was to deliver his opinion.
- 10 See, in this respect, the Joint Statement by Tony Blair and Gerhard Schröder regarding the Transfer System of 9 September 2000 as described in B. Garcia, "The 2001 informal agreement on the international transfer system", *European Sports Law and Policy Bulletin* 2011, pp. 13 et seq.

- 11 Following alleged threats by FIFA to replace FIFPro with ETUC as its negotiation partner, R. Blanpain also points to the fact that, at the time, the English Professional Footballers' Association ("PFA") received 5% of transfer fees and so was not necessarily opposed to a transfer system.
- 12 The initial agreement between the EU Commission and FIFA/UEFA seemingly considered that, to preserve the regularity and proper functioning of sporting competitions, unilateral breaches of contract were (only) possible at the end of a season and sanctions had to be proportionate (see ec.europa.eu/commission/presscorner/detail/en/ip_01_314). Also, the jurisprudence of both FIFA and the CAS gradually evolved to increasingly accommodate clubs being faced with unilateral contract terminations (compare Webster CAS 2007/A/1298, CAS 2007/A/1299 & CAS 2007/A/1300 – remaining contract value – to later CAS rulings such as Matuzalem CAS 2008/A/1519 – positive interest principle).
- 13 S. Bastianon and M. Colucci, "The evolution of FIFA transfer system regulations: challenges, opportunities, and innovative approaches in the wake of the Diarra judgment", *Rivista di Diritto ed Economia dello Sport*, 2024, p. 4.
- 14 See R. Blanpain, o.c., pp. 29 et seq; G. Pearson, "Sporting justifications under EU free movement and competition law: the case of the football 'transfer system'", *European Law Journal*, 7 October 2014 and N. Verborgh, "Economische ongelijkheid in het voetbal: rode kaart voor het transfersysteem?", Master's Thesis, VUB, 2017.
- 15 Subject to changes over the last decades.
- 16 The CJEU even considered a restriction of competition by object was present.
- 17 For a detailed breakdown of the case, see M. James, "The Diarra case", *International Sports Law Journal* 2024, <https://doi.org/10.1007/s40318-024-00286-5>.
- 18 <https://digitalhub.fifa.com/m/3ed083bc1084a958/original/FIFA-s-position-on-the-Las-sana-Diarra-case.pdf>.
- 19 A. Duval, Football at a crossroads. Why the Diarra Ruling Marks a Crucial Turning Point for Football, *Verfassungsblog* 25 October 2024, <https://verfassungsblog.de/football-at-a-crossroads>.
- 20 CJEU 21 December 2023, 21 December 2023. European Superleague Company v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA), ECLI:EU:C:2023:1011; CJEU, Case C-124/21, International Skating Union v European Commission, 21 December 2023, ECLI:EU:C:2023:1012; CJEU, Case C-680/21, Royal Antwerp Football Club v Union royale belge des sociétés de football association, 21 December 2023, ECLI:EU:C:2023:1010.
- 21 If there is one 'victory' that FIFA can claim from the Diarra ruling, it is that the CJEU acknowledged that FIFA has a legitimate role as a regulator. Legitimate objectives that may be pursued are, in terms of free movement, ensuring the regularity of club football competitions and contributing to maintaining a certain degree of stability in the membership of the football clubs likely to participate in those competitions and, in terms of competition law, ensuring the conditions under which professional football clubs may compose the teams participating in its competitions and those in which the players themselves may take part in them and aiming to ensure the stability of the composition of the squads of players during a given season.
- 22 <https://www.unfp.org/2024/12/si-loin-du-compte/>. It should be noted that FIFA and (some of) football's stakeholders often have joint (commercial) interests in other domains, such as the organisation of the FIFA World Cup, which may of course add 'politics' to the mix.
- 23 <https://www.kicker.de/schadenersatz-fuer-koeln-nach-diarra-urteil-wo-die-probleme-liegen-1057881/artikel>.
- 24 For an overview, see <https://footballbenchmark.com/w/fifa-s-interim-regulations-on-the-status-and-transfer-of-players-and-their-practical-implications>.
- 25 Codification of existing CAS case law.
- 26 Codification of existing practice, not allowing an association to impede a player's international transfer by withholding the ITC.
- 27 This is the equivalent of the concept of restoration to the previous condition (restitutio in integrum) found in some legal systems.
- 28 A. Duval, Football at a crossroads. Why the Diarra Ruling Marks a Crucial Turning Point for Football, *Verfassungsblog* 25 October 2024, <https://verfassungsblog.de/football-at-a-crossroads>.
- 29 The CJEU is ambiguous in terms of the value of local (labour) law. On the one hand, the CJEU seems to assume that clubs can be adequately protected from the harm flowing from a breach of contract through the application of contract and employment law. On the other hand, the CJEU seems to acknowledge the fact that sport needs common rules, operating independently of local contract and labour law, which are designed to protect the sport's functioning and which may have an impact on a player who commits a unilateral breach of contract. The CJEU's position in an EU internal market and competition law context should however be read in conjunction with other provisions of applicable – European and local – law (see G. Ernes, "Le contrat de travail à durée déterminée spécifique dans le sport professionnel, à l'épreuve du droit communautaire", <https://www.droitdusport.com>, 26 July 2017).
- 30 The application of national law is conditional to the party invoking national law "demonstrating the relevance of a particular national law, its exact content and to what precise effect it should be considered" (Explanatory notes on the regulatory framework, §34). In the existing sports law practice, local employment laws are often expressly disregarded, to give priority to rules on contractual stability as promoted under the respective lex sportiva for the sake of ensuring a level playing field. It remains to be seen whether, this time around, the reference to national laws will not merely be theoretical

and whether FIFA and CAS will effectively take on board national labour laws.

- 31 S. Weatherill, "Is this the end of football's transfer system? An immediate reaction to the Court's ruling in Diarra (C-650/22)", <https://eulawanalysis.blogspot.com/2024/10/is-this-end-of-footballs-transfer.html>.
- 32 Disputes are expected with stakeholders, currently not a member of the social dialogue committee for professional football, to have a seat at the table as well.
- 33 J-L. Dupont, "The price of football", podcast, 17 January 2025.
- 34 S. Weatherill, "Is this the end of football's transfer system? An immediate reaction to the Court's ruling in Diarra (C-650/22)", <https://eulawanalysis.blogspot.com/2024/10/is-this-end-of-footballs-transfer.html>.
- 35 Reference can be made to the ubiquitous practice of sell-on agreements, with agents gaining from the outgoing transfer of their player, in spite of FIFA's ban on third-party ownership.
- 36 See Case C-133/24, CD Tondela and Others, currently pending before the CJEU. In Belgium, in the De Beule case, a similar non-poaching agreement was declared unlawful by the competent federal public service, a predecessor of the Belgian competition authority.
- 37 O. Lenz, opinion delivered on 20 September 1995 in C-415/93, Bosman, ECLI:EU:C:1995:293, §237 and following; C. Stix-Hackle, opinion delivered on 29 March 2001, The European Union and Sport: Legal and Policy Documents, TMC Asser Press 2004, §111.
- 38 L. Vandercruysse, "Legal and regulatory vulnerability of the football sector to match-fixing, money laundering and human trafficking in the context of football transfers", PhD dissertation, publicly defended on 5 February 2025.
- 39 R. Houben, O. Budzinskil and M. Wathelet, "The transfer system in football: Diarra and what's next", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871477.
- 40 See, in this respect, M. Szpunar, opinion delivered on 30 April 2024 in C-650/22, FIFA v. BZ, ECLI:EU:C:2024:375, §46.
- 41 In Belgium, for instance, CBA's may not deviate from applicable rules on unilateral contract termination prescribed by law (art. 51 of the 1968 law on collective agreements and joint committees).