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THE EVOLUTION OF FIFA TRANSFER FOOTBALL REGULATIONS: CHALLENGES, OPPORTUNITIES, AND INNOVATIVE APPROACHES IN THE WAKE OF THE DIARRA JUDGMENT

by *Stefano Bastianon*[*] and *Michele Colucci*[**]

ABSTRACT: The authors analyze the legal issues and challenges the current FIFA transfer regulations must cope with in complying with the Diarra ruling by the European Court of Justice. They consider the ratione loci and temporis impact of the ruling on football. Furthermore, they explore potential outcomes in the short, medium, and long term, highlighting how the judgment could serve as an opportunity for the evolution of the FIFA transfer system. In this context, they offer possible solutions and alternative measures to align the FIFA rules with the goals of world football governing body, ensuring full compliance with the EU fundamental principles of freedom of movement and freedom of competition.

Gli autori analizzano le questioni legali sollevate dalla recente giurisprudenza Diarra della Corte di Giustizia dell'Unione europea e le sfide che la FIFA dovrà affrontare nel conformarsi a tale giurisprudenza. Essi considerano l'ambito di applicazione della sentenza ratione loci e ratione temporis. Inoltre, esplorano il potenziale impatto nel breve, medio e lungo termine, evidenziando come la sentenza possa rappresentare un'opportunità per l'evoluzione del sistema di trasferimenti FIFA. In questo contesto, gli autori offrono possibili soluzioni e misure alternative per allineare le regole FIFA con i suoi obiettivi nel pieno rispetto dei principi fondamentali dell'Unione europea in materia di libera circolazione e di libera concorrenza.

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Regole sui Trasferimenti – Responsabilità Solidale – Certificato di Trasferimento Internazionale – Libertà di Circolazione – Libertà di Concorrenza – Sanzioni Sportive – Proporzionalità.

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1. Introduction

On 4 October 2024, the European Court of Justice delivered its long-awaited judgement in the dispute between the former French national football player Lassana Diarra on one side, and the *Fédération Internationale de Football Association* ('FIFA') and the *Union Royale Belge des Sociétés de Football Association* ('URBSFA'), on the other.[1]

Following the Court's rulings on 21 December 2023 in the *ISU,*[2] *Superleague,*[3] and *FC Antwerp*[4] cases – often referred to as the 'Christmas

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[1] ECJ, judgement of 4 October 2024, *BZ v. FIFA and URBSFA*, case C- 650/22, ECLI:EU:C:2024:824.

[2] See A. Duval, *The International Skating Union Ruling of the CJEU and the Future of CAS Arbitration in Transnational Sports Governance*, The International Sports Law Journal, Springer Link, 2024.

[3] ECJ, judgment of 21 December 2023, *European Super League Company*, case C-333/21, ECLI:EU:C:2023:1011.

[4] ECJ, judgment of 21 December 2023 – *UL and Royal Antwerp Football Club v. URSBFA and UEFA*, case C-680/21, ECLI:EU:C:2023:1010. For a detailed analysis of the case law of the Court

trilogy' – and while awaiting the outcome of ongoing legal disputes regarding the FIFA Football Agents Regulations ('FFAR')[5] and *res judicata* effects of the Court of Arbitration for Sport ('CAS') awards in the *Seraing* case,[6] the *Diarra* case stands out as another significant judgement in the Court's growing body of case law on the governance and regulatory activities of sports organizations.[7]

This time, the Court was asked to analyze the FIFA Regulations on the Status and Transfer of Players ('RSTP') on the consequences of termination of employment contracts "without just cause" and the compatibility with the relevant EU rules.

The parties dispute as to whether FIFA and URBSFA are required to compensate a professional footballer for the loss of earnings (*i.e.* loss of offers of employment from clubs) suffered by automatic application of the following RSTP provisions:

a) a player and his new club are jointly and severally liable to pay compensation due to the club whose contract with the player was terminated without just cause (Art. 17(2) RSTP);
b) a club that signs a contract with a professional player who has breached his previous contract without just cause is presumed, until proven otherwise, to have induced the professional player to breach such a contract. In addition to pay compensation, the sporting sanction in case of termination during the so called "protected period", is a ban on the club registering new players, nationally or internationally, for two complete and consecutive registration periods (Art. 17(4) RSTP);
c) the former football association – to whom the former club is affiliated – is not allowed to deliver the international transfer certificate ('ITC') required to register the player, where there is a contractual dispute between that club and the player concerning the termination of the previous contract (Art. 9 (1) and Art. 8.2.7 of Annex 3 RSTP).

According to Diarra, these RSTP provisions are contrary to the freedom of movement (Art. 45 TFEU) and competition rules (Art. 101 TFEU) insofar as they prevent a player from being employed by a new club any time the player has terminated his previous contract without just cause and dissuade clubs from competing in the market of already recruited players.

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of Justice of 21 December 2023, A. Palomar Onida, R. Terol Gomez, C. Perez Gonzalez, J. Rodriguez Garcia, *Un Cambio en el Modelo de Relacion entre el Derecho dela UE y el Deporte*, Dykinson S.L., Madrid, 2024.

[5] FIFA Regulations on the Status and Transfer of Players, June 2024, https://digitalhub.fifa.com/m/69b5c4c7121b58d2/original/Regulations-on-the-Status-and-Transfer-of-Players-June-2024-edition.pdf (*last accessed on 20 November 2024*).

[6] ECJ, *Royal Football Club Seraing v. FIFA - UEFA -URSBFA*, cases C- 600/23, currently pending before the Court of Justice.

[7] For a complete overview of the ECJ jurisprudence in the field of sports law see S. Bastianon and M. Colucci, *The European Union and Sport*, SLPC, 2024.

2. The Genesis of the FIFA Transfer System

To better understand the *Diarra* case, a brief recap of the genesis of the FIFA transfer system stemming from the 1995 *Bosman*[8] case, which remains highly relevant, is required.

In 1995, the Court of Justice declared as contrary to the freedom of movement the international rules on a transfer fee to be paid after the end of the employment contract for players to move to another club as well as the quota systems on foreign players.

The judgement triggered the strong reaction of international football associations,[9] backed up by national associations, leagues, clubs and governments claiming the autonomy of sports associations and the specificity of sport as also enshrined in the relevant declarations annexed to the Treaty on Nice[10] and in the Treaty of Amsterdam.[11]

To avoid the risk of their players leaving for free, many clubs tried to tie them into longer contracts and implemented unilateral extension contractual clauses. Moreover, football clubs complained that the removal of transfer fees would put at risk their capability to invest in the training and education of young players, with clubs preferring to hire already trained players. Accordingly, clubs urged FIFA to establish an international transfer framework compliant with the EU provisions while protecting the clubs' financial interests.[12]

Over the years negotiations took place between FIFA, UEFA, the European Commission, and the *Fédération Internationale des Associations de*

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[8] ECJ, judgment of 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, case C-415/93, ECLI:EU:C:1995:463, paras. 73-76.

[9] B. Garcia, *UEFA and the European Union: from confrontation to co-operation*, in *Journal of contemporary European research*, 2007, vol. 3, No. 3, 201. The Author, quoting also B. Hopquin, *Bruxelles presse l'Uefa a se soumettre a l'arrêt Bosman*, *Le Monde*, 25 December 1995, recalls the following statements made immediately after the publication of the judgements in the *Bosman* case: L. Johansson, former UEFA President, The ruling "*is nothing short of a disaster*"; G. Aigner, UEFA General Secretary: Bosman is a decision "*taken by people that do not know anything about football*"; K. Van Miert, former European Commissioner for Competition: "*Uefa has to evolve, whether they like it or not*").

[10] Annex IV to the Treaty on Nice - Declaration on the Specific Characteristics of Sport and its Social Function in Europe, available at https://www.europarl.europa.eu/summits/nice2_en.htm#an4.

[11] Declaration 29 on Sport, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, 1997, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A11997D%2FAFI%2FDCL%2F29.

For a complete as well as detailed reconstruction of the factual and legal framework following the *Bosman* judgement until the adoption of the FIFA Regulation on Status and Transfer of Players (2001 ed.), see R. Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, Kluwer Law International, 2003.

[12] E. Auberg, *History of FIFA transfer regulations*, available at https://www.easportslaw.com/news/history-of-fifa-transfer-regulations-rstp (*last accessed on 27 November 2024*).

Footballeurs Professionnels ('FIFPro'), *i.e.* the international football players' union. FIFA, backed by UEFA, proposed a system prioritizing contractual stability, training compensation, and protective measures for minors.

It took six years from the *Bosman* judgement, and a failed attempt for a compromise in 1997,[13] for FIFA and UEFA to reach a gentlemen's agreement with the European Commission in March 2001. For the purposes of the analysis of the *Diarra* case, the following crucial points of that agreement are relevant:[14]

- "*The system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season.*
- *Financial compensation can be paid if a contract is breached unilaterally whether by the player or the club.*
- *Proportionate sporting sanctions to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period*".[15]

Based on FIFA's commitment to introduce such changes into its RSTP, the Commission closed the antitrust proceedings against FIFA.

For the sake of completeness, that agreement did not mention either the principle of joint responsibility or the ITC.

The agreement allowed FIFA and UEFA to implement standardized international transfer rules, although FIFPro was not completely satisfied, pushing for more freedom for players.[16] The new rules only applied to international transfers, giving national authorities discretion over domestic policies, who however ultimately followed suit by applying the FIFA transfer and training systems.

In more than twenty years, only once, in the *Balog* case, the same FIFA transfer rules examined in the *Bosman* case were challenged under EU competition law. Although the case was not the subject of a ruling by the Court of justice due to a last-minute agreement between the parties, the topic was addressed by the Advocate General Stix-Hackle in her (unpublished) opinion.[17] In particular, she acknowledged that FIFA transfer rules could restrict competition within the EU,

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[13] *Ibidem.*

[14] B. Garcia explains the political context leading to this Gentleman's agreement as the "*one where the art of politics and persuasion is as important as the hard facts of legal reasoning*". B. Garcia, *The 2001 Informal Agreement on the International Transfer System*, Contractual Stability, M. Colucci ed., SLPC, 2011, 25.

[15] European Commission, *Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers*, Press release IP/01/314, 6 March 2001, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_01_314 (*last accessed on 21 November 2024*).

[16] B. Garcia, *The 2001 Informal Agreement on the International Transfer System*, Contractual Stability, M. Colucci (ed.)., SLPC, 2011, 25.

[17] The dispute was amicably settled among the parties the day of the publication of the opinion of the Advocate General Stix – Hackle. Her opinion was thus not published on the official website of the Court of Justice, but it is surprisingly available in its entirety in R. Siekmann and J. Soek (ed.), *The European Union and Sport, Legal and Policy Documents*, TMC Asser Press, 2004, 701-723.

particularly by limiting player movement. However, she also suggested that such restrictions could be justified if they serve legitimate objectives, like ensuring the integrity of sporting competitions. She emphasized the need for a proportionality test to ensure these restrictions were necessary and not excessive.[18]

Thus, as in 1995 (*Bosman*),[19] also in 2001 (*Balog*),[20] the Advocate General concluded that the compatibility with EU competition law of the FIFA transfer rules would depend on their proportionality in respect of the objectives pursued.

3. *The Diarra Saga from 2013 to 2024 and Beyond*

The saga of Lassana Diarra, a former professional footballer living in Paris (France) started 11 years ago, on 20 August 2013, when he signed a four-year employment contract with the Russian football club Lokomotiv Moscow.

On 22 August 2014, Lokomotiv Moscow unilaterally terminated the contract with immediate effect, citing the player's numerous contractual breaches related to an unauthorized absence of two months, failure to train, to participate in an official event of the club and to provide reasonable explanations about the cause of his absence despite repeated requests from the club.[21]

The Advocate General Stix-Hackl addressed the issue of FIFA's transfer rules from the perspective of European Union (EU) competition law, particularly in relation to whether these rules may constitute an infringement of EU competition law, specifically Art. 101 TFEU (which prohibits anti-competitive agreements) and Art. 102 TFEU (which prohibits abuse of dominant position). She acknowledged that FIFA regulations, which govern the transfer of players between clubs, could have a potential restrictive effect on competition within the EU internal market. She highlighted the possibility that such rules might limit clubs' ability to freely negotiate and contract with players, potentially leading to anti-competitive behavior in the context of the EU's legal framework. She considered that certain aspects of the FIFA transfer rules could be viewed as restrictions on competition, particularly those that restrict player movement and the conditions under which players could be transferred between clubs, potentially leading to a less competitive environment within the EU sports market. However, she pointed out that these rules could be justified if they serve legitimate objectives, such as the integrity of sporting competition. She also emphasized that, under EU law, competition restrictions in the context of sport could be justified if they were necessary to achieve objectives that are inherently linked to the nature of sport, such as maintaining fairness, ensuring the integrity of competitions, or promoting solidarity within the sport. However, she cautioned that any restrictions on competition must be proportionate to the legitimate objectives they aim to achieve. Finally, she noted that while FIFA's rules might restrict competition, they would need to be assessed under a proportionality test. If the restrictions are deemed to be disproportionate to the legitimate aims they pursue (such as ensuring fair competition or protecting the integrity of the sport), they could potentially violate EU competition rules. See A. Egger and C. Stix-Hackl, *Sports and Competition Law: A Never-ending Story?,* E.C.L.R. 2002, 23(2), 81-91.

[18] *Ibidem*.

[19] Opinion of the Advocate General, Carl Otto Lenz, *Bosman,* C-415/93, ECLI:EU:C:1995:293. For a detailed analysis of the *Bosman* judgement and its impact on the relationship between football and the European Union see., A. Duval and B. Van Rumpuy (ed.), *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport,* Asser International Sports Series, 201A.

[20] *Tibor Balog v. Royal Charleroi Sporting Club Asbl*, case C-264/98.

[21] For a complete and detailed overview of the facts in the *Diarra* case, see O. Bellia, *CAS 2015/A/4094, Lassana Diarra v. FC Lokomotiv Moscow, Award of 27 May 2016*, A. Duval and A. Rigozzi, *Yearbook of International Sports Arbitration* 2016, 317, available on

On 15 September 2014, Lokomotiv Moscow applied to the FIFA Dispute Resolution Chamber ('DRC') to have Diarra condemned to pay compensation of EUR 20 million as per the liquidated damages clause established in the contract, alleging a breach of contract without just cause under Art. 17 RSTP.[22]

Subsequently, the player submitted a counterclaim to the DRC, objecting to the Club's unilateral termination; he claimed compensation for damages and requested an order directing Lokomotiv Moscow to pay him back wages and compensation equal to the remunerations he expected to receive under the contract terms.

Pending the dispute before the DRC, Diarra looked for a new football club willing to sign him, to no success.

To this end, the player cited the difficulties created by the risk placed on any club likely to sign him, of being considered jointly and severally liable for the payment of the compensation that he could have been condemned to pay to Lokomotiv Moscow, pursuant to Art. 17 (2) RSTP.

By letter dated 19 February 2015, the football professional club Sporting du Pays de Charleroi SA offered Diarra an employment contract, subject to two cumulative conditions:

(i) Charleroi wished to be reassured in writing by FIFA and URBSFA that Diarra could have been registered and regularly eligible to play for their first team; and

(ii) that Art. 17 RSTP on the joint liability for the payment of any compensation to be paid to Lokomotiv Moscow, would not be applied.

FIFA replied that only its competent decision-making body had the power to decide on this matter. For its part, the URBSFA answered that, in accordance with the FIFA rules, the player's registration could not take place until the Russian Football Federation had issued the ITC.[23]

On 10 April 2015 the DRC, firstly, partially upheld Lokomotiv Moscow's claim and ordered Diarra to compensate Lokomotiv Moscow with EUR 10.5 million based on the "specificity of sport",[24] and considering exclusively the non-amortized costs of the transfer compensation paid by that club to the player's previous club.[25] Secondly, it rejected the player's counterclaim.

Regarding the principle of joint liability under Art. 17(2) RSTP, the DRC concluded that, since following the termination of the contract the player did not find a new club and remained unemployed at the time of the decision being passed,

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https://vdoc.pub/documents/yearbook-of-international-sports-arbitration-2016-4ulqrr6ia520 (*last accessed on 20 November 2024*).

[22] Although the alleged breach occurred in the so called "protected period", the club did not claim the application of sporting sanctions against the player.

[23] Actually, according to FIFA's practice, the Belgian football association would have received a provisional ITC following the possible refusal of the Russian one.

[24] FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 187, available at https://inside.fifa.com/legal/news/fifa-publishes-third-edition-of-commentary-on-the-regulations-on-the-status-and-transfer-of-players (*last accessed on 27 November 2024*).

[25] See O. Bellia, *CAS 2015/A/4094, Lassana Diarra v. FC Lokomotiv Moscow, Award of 27 May 2016*, 319.

such a principle could not be applied nor should be applied in the future, should the player find a new club.[26]

Moreover, the DRC refrained from imposing sporting sanctions on the player, although the breach of contract occurred during the so-called "protected period".[27]

On 8 June 2015, Diarra filed a statement of appeal before the CAS, challenging the DRC decision.

On 9 December 2015, Diarra applied to the Commercial Court of Hainaut (Charleroi division) (Belgium) for an order that FIFA and URBSFA pay him a compensation of EUR 6 million for the loss he believed to have suffered because of the application of the RSTP provisions which he considered to be contrary to EU law. According to Diarra, such rules prevented him from signing a contract with the Belgian football club Sporting du Pays de Charleroi SA.

On 27 May 2016, the CAS award confirmed the DRC decision, upholding the calculation made based on the non-amortized transfer fee paid by Lokomotiv Moscow to the previous club.[28]

CAS emphasized that the DRC could have awarded a higher compensation, had it taken other factors into consideration. However, the Panel noted that there was no scope to increase the amount awarded, as the Club did not appeal against the DRC Decision and as such, there was no need to consider the issue further. Therefore, the Panel dismissed the appeal in its entirety and upheld the DRC decision.[29]

On 19 January 2017, the Belgian court accepted the arguments of the player and concluded[30] that Art. 17(2) FIFA RSTP was to be regarded as infringing the freedom of movement under EU law insofar as its application extended to cases where the club had dismissed a player due to the latter's breach.[31]

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[26] *Ibidem.* See also Duval, *The Diarra Ruling of the Tribunal of Charleroi: the new Pechstein, Bosman or Mutu*, Asser International Sports Law Blog, 20 January 2017, available at https://www.asser.nl/SportsLaw/Blog/post/the-diarra-ruling-of-the-tribunal-of-charleroi-the-new-pechstein-bosman-or-mutu (*last accessed on 20 November 2024*) as well as in F.M. De Weger and C.F.W. De Jong, *Aansprakelijkheid van (nieuwe) clubs vanuit FIFA RSTP, Tijdschrift voor Sport & Recht*, 2020-3/4,55, available at https://bmdw.nl/wp-content/uploads/F.M.-de-Weger-C.F.W.-de-Jong-Aansprakelijkheid-van-nieuwe-clubs-vanuit-FIFA-RSTP.pdf (*last accessed on 20 November 2024*), O. Bellia, *CAS 2015/A/4094, Lassana Diarra v. FC Lokomotiv Moscow, Award of 27 May 2016,* 319.

[27] FIFA Regulations on the Status and Transfer of Players, October 2024 ed., available at https://digitalhub.fifa.com/m/54fbb7c414e49237/original/Regulations-on-the-Status-and-Transfer-of-Players-October-2024-edition.pdf (*last accessed on 20 November 2024*). Art. 17(3) provides a sporting sanction of four-month restriction on playing in official matches against the player found to be in breach of contract during the protected period.

[28] CAS, Award of 27 May 2016, 2015/A/4094, *Lassana Diarra v. FC Lokomotiv Moscow*, unpublished.

[29] O. Bellia, *CAS 2015/A/4094, Lassana Diarra v. FC Lokomotiv Moscow, Award of 27 May 2016,* 326.

[30] Decision of the Commercial Tribunal of Hainaut, Charleroi division, A/16/00141, 19 January 2017.

[31] *Idem*, para. 28.

Regarding the ITC, the Hainaut Tribunal considered that allowing an association not to deliver an ITC in case of a contractual dispute between a dismissed player (who has not unilaterally terminated his contract) and his former club (which had unilaterally terminated the contract due to the player's breach) is a practice infringing EU law. This practice is equivalent to requiring the new club to pay the former club compensation for a player who is in fact out of contract.[32]

In that regard, by referring to the *Bosman* case, the judges noted that they had searched in vain for any agreement from the European Commission regarding the establishment of a mechanism for joint liability, which would require a club to compensate the club that terminated a player's contract for any amounts owed by the dismissed player.[33] The judges added that "*without any doubts, the Commission would never have approved such a system, as it ultimately prevents a dismissed worker – even one dismissed for misconduct – from finding new employment*".[34]

Finally, the Tribunal ordered FIFA and the URBSFA jointly and severally to pay a sum to Diarra of EUR 60.001 and, for the remainder, adjourned the proceedings indefinitely to allow the parties to find an agreement on the *quantum* regarding the harm suffered by Diarra as a result of the misconduct of the two associations.

In the meantime, the compensation established by the DRC and confirmed by CAS remained hanging on Diarra, so to speak, as a sword of Damocles.

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[32] O. Bellia, *CAS 2015/A/4094, Lassana Diarra v. FC Lokomotiv Moscow, Award of 27 May 2016,* 327.

[33] See C. Bertrand, *Football, Affaire Lassana Diarra: La Réglementation FIFA Contraire au Principe de Libre Circulation des Travailleurs,* 2017, available at https://www.bertrand-sport-avocat.com/blogs/post/football-affaire-lassana-diarra-la-réglementation-fifa-contraire-au-principe-de-libre-circulation-de (last accessed on 21 November 2024). The author recalls the French and authentic wording of the Court in the following terms: "*Les juges recherchent vainement un quelconque accord donné par la Commission européenne sur l'instauration d'un mécanisme de co-débition solidaire et indivisible à charge d'un club au paiement d'une indemnité qu'un joueur licencié devrait au club qui a rompu son contrat. Pour les juges, "il ne fait pas de doute que la Commission n'aurait jamais validé un tel système qui revient en définitive à empêcher un travailleur licencié - fût-ce même en raison de son comportement - de retrouver un nouvel emploi. Le TAS avait déjà, dans la sentence Mutu du 21 janvier 2015, indiqué que l'interprétation de l'article 17.2 RSTJ faite par les instances "ne peut être suivie dès lors que si le nouveau club doit indemniser l'ancien club même s'il est établi qu'il n'est en rien impliqué dans la violation de son contrat par le joueur, ce joueur ne pourrait jamais retrouver un nouvel employeur.* Ainsi, *un joueur peut se voir priver de toute possibilité de travailler et de gagner sa vie" en cas d'absence d'accord entre les clubs. Une telle interprétation serait "un sérieux retour en arrière, à l'époque pré-Bosman, en réinstaurant un régime d'indemnités de transfert constituant une entrave au principe de la libre circulation des travailleurs sur le territoire de l'Union européenne".*

[34] *Ibidem.*

4. The Arguments of the Parties and the Preliminary Questions Referred to the Court of Justice

FIFA appealed the judgment of the Commercial Court of Hainaut to the Court of Appeal of Mons (Belgium), claiming, without success, the exclusive jurisdiction of CAS.

The Court of Appeal argued that the claim could not be regarded as coming within the sole jurisdiction of the CAS under an arbitration agreement meeting the conditions of validity under Belgian law,[35] given the general and imprecise nature of the provisions of the FIFA Statutes. It is the second time that a Belgian court considers the arbitration clause contained in the FIFA Statutes non-compliant with Belgian law and, therefore, not enforceable in Belgium.

In fact, in the *Seraing* case, currently pending before the European Court of Justice,[36] the Brussels Court of Appeal, by an interlocutory ruling dated 29 August 2018, confirmed its jurisdiction, finding that the arbitration clause contained in the FIFA's Statutes was invalid under Belgian law, holding that the arbitration clause was not "specific enough".[37]

The Court of Appeal also rejected the argument of a 'jurisdictional fraud', arising from the fact that Diarra artificially created a dispute in Belgium by means

[35] ECJ, *BZ v. FIFA and URBSFA*, para. 37.

[36] ECJ, *Royal Football Club Seraing v. FIFA - UEFA - URSBFA*, cases C- 600/23, currently pending before the Court of Justice.

[37] C. Dos Santos, *The RFC Seraing's Saga Goes on: Arbitration Clause Contained in FIFA's Statutes Held Invalid under Belgian Law*, available at https://www.bakermckenzie.com/-/media/files/people/caroline-dos-santos/the-rfc-serainqs-saga-goes-on—arbitration-clause-contained-in-fifas-statut.pdf. (*last accessed on 24 November 2024*). In particular, according to Art. 1681 of the Belgian Judicial Code "*An arbitration agreement is an agreement by which the parties submit to arbitration all or certain disputes which have arisen, or which may arise between them with respect to a defined legal relationship, whether contractual or not*." By contrast, FIFA's arbitration clause refers generically to all "*disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents*". On 11 September 2018, the International Council of Arbitration for Sport (ICAS) issued a statement to argue that "The Court said that, in the light of Belgian law, the arbitration exception does not apply in this particular matter, on *the grounds that the arbitration clause in the FIFA Statutes is not specific enough. In other words, had that specific CAS clause been more detailed, the arbitration exception would have been upheld and the Brussels Court of Appeal could have denied its jurisdiction. Accordingly, the problem lies only with the wording of the CAS clause in the FIFA Statutes; such drafting issue does not affect the jurisdiction of CAS globally. The Court neither expressed any objection nor reservation towards sports arbitration as a dispute resolution mechanism globally, nor criticized the CAS system. Furthermore, no CAS arbitration clauses have been declared "illegal" in the Brussels judgment. Such judgment also does not revisit the reasons expressed by the German Federal Tribunal in the case ISU/Pechstein in 2016, whose decision confirmed the status of CAS as a genuine independent arbitration tribunal. The decision of the Brussels Court of Appeal does not affect the decision issued by CAS in this matter in 2017, which remains in force. The main difficulty is that one may potentially end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by CAS (and which was confirmed by the Swiss Federal Tribunal), enforceable in the rest of the world. In any event, the proceedings before the Belgian courts in the matter of RFC Seraing are still ongoing and for an undetermined period of time*", available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf (*last accessed on 22 November 2024*).

of fraudulent maneuvers, namely a fictitious offer of employment from Sporting du Pays de Charleroi.[38]

As to the merits, Diarra claimed that the joint application of Art. 17(2) and (4) and Art. 9(1) and Art. 8.2.7 of Annex 3 RSTP prevented him from working as a professional football player during the 2014/2015 football season in violation of Artt. 45 and 101 TFEU.[39]

In the player's view those rules must be regarded, in the light of the judgment in the *Bosman* case,[40] as hindering both freedom of movement for workers and competition.

In particular, the joint liability rule contained in Art. 17(2) of the RSTP would jeopardize the recruitment of players, to the detriment of both the player and the new club, particularly as to the amount of that compensation. Such compensation must subsequently be determined in the light of the criteria listed in Art. 17(1) of the RSTP and it is generally unknown or uncertain at the time when the parties involved intend to conclude an employment contract.

Moreover, this impediment would be reinforced by the provisions contained in Art. 17(4) of the regulations, providing that the new club is presumed to have induced the player to terminate the employment contract with his former club, exposing the new club to a sporting sanction.

Similarly, the rules set out in Art. 9(1) and in Art. 8.2.7 of Annex 3 of the RSTP would reinforce that impediment by prohibiting the national football association of the former club from issuing an ITC for the benefit of the player if there is a dispute between the former club and the player arising from the premature termination of the employment contract without mutual agreement.[41]

On their side, FIFA and URBSFA believed those rules should, in general, be understood in the light of the specific characteristics of sport recognized by Art. 165 TFEU. In essence, even if those rules were to impede the free movement of workers or competition, they would be justified considering the legitimate objectives which are, following their arguments, the maintenance of contractual stability and the stability of football teams and, more generally, the preservation of integrity, regularity and proper conduct of sporting competitions.[42]

It is worth noting that, to substantiate their request for a preliminary ruling, the Belgian judges stressed the "*strong, specific and consistent presumptions that the existence and the implementation of those rules may have prevented [Diarra] from being employed by a new professional football club following the termination of his employment contract with Lokomotiv Moscow*".[43]

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[38] ECJ, *BZ v. FIFA and URBSFA*, para. 39.
[39] *Idem*, para. 41.
[40] ECJ, *Bosman*, case C 415/93, EU:C:1995:463.
[41] ECJ, *BZ v. FIFA and URBSFA*, para. 42.
[42] *Idem*, para. 43.
[43] *Idem*, para. 44.

Therefore, the Court of Appeal of Mons decided to stay the proceedings and to ask the European Court of Justice whether Artt. 45 and 101 TFEU, respectively, on the freedom of movement of workers and freedom of competition, prohibit the application of the challenged FIFA rules on the consequences of a termination of contract without just cause.

5. On the Relevance and "Cross-border" Nature of the Dispute at Stake

The Court of Justice first focused on the relevance of the preliminary question and confirmed the "real nature" of the dispute at stake. According to the Belgian judges,[44] the dispute concerns the tangible question of whether Diarra was entitled to receive compensation for the loss he claimed to have suffered, because he was prevented to play football during the 2014/2015 football season, due to the legal and economic risks for any new club interested in hiring him., arising from the combined application of Art. 17(2) and (4), as well as Artt. 9(1) and 8.2.7 of Annex 3 RSTP.[45]

Furthermore, the Court highlighted the "cross-border" nature of the dispute[46] because, despite the fact that Diarra terminated his employment contract with a professional football club established in a non-member State (Russia), he was residing in a EU Member State (France) and he complained of having been hindered in his proven desire to exercise his freedom to move to other EU Member States for employment.

The Court concluded that the rules in question clearly have a direct impact on players' right to work,[47] but also on the competitions between football clubs. On the one hand, they are intended to establish the conditions under which the players can participate in certain competitions. On the other hand, since the composition of the teams represents an essential parameter of sports competitions, the rules at hand reveal a direct impact on competition between professional football clubs.

The Court of Justice's reference to competition law is crucial to fully understanding the territorial scope of the ruling because Art. 45 TFEU on freedom of movement is strictly limited to the EU territory. However, Art. 45 TFEU does not apply solely to EU nationals but also extends to all third country nationals who hold long-term resident status in the European Union pursuant to Directive

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[44] *Idem*, para. 68.

[45] *Idem*, para. 69. After recalling that it is for the national court to assess the need for a preliminary ruling and the relevance of the questions referred to the Court of Justice, the EU judges underlined that: (a) the questions referred by the national court enjoy a presumption of relevance; and (b) the Court of Justice may refuse to give a ruling only if (i) it is quite clear that the interpretation sought bears no relation to the actual facts of the dispute pending before the national court; (ii) the problem is hypothetical; or (iii) the Court does not know the factual and legal material necessary to give a useful answer. None of these hypotheses occur in the case at stake.

[46] *Idem*, para. 72.

[47] *Idem*, para. 80.

2003/109/EC. They enjoy certain rights of mobility within the European Union, although their freedom of movement is more limited compared to EU citizens.[48]

By extension, this principle of freedom of movement could also apply to non-EU football players who are under contract with a club in one Member State and decide to terminate their contract to sign a new one with a club based in another Member State. This supports the conclusion that the consequences of the *Diarra* judgment will, in fact, have a broader, generalized application.

Moreover, EU competition law applies extraterritorially, provided that the anti-competitive effects occur within the EU.[49] Accordingly, it cannot be ruled out that even a non-European footballer could theoretically rely on the *Diarra* ruling. Balog *docet*.

In light of the above, the Court of Justice argued that the rules at stake cannot be regarded as being extraneous to any economic activity (either because they are adopted exclusively for non-economic reasons or related to matters of interest only to sport)[50] and fall within the scope of Artt. 45 and 101 TFEU.[51] Finally, the EU judges took the opportunity to reiterate their position, already expressed in the *Superleague* case, on the "*undeniable specific characteristics of sporting activity*", according to which such specificity may be taken into account in the application of Artt. 45 TFEU and 101 TFEU, "*only in the context of and in compliance with the conditions and criteria of application provided for in each of those articles*".[52]

6. On the Compliance of the FIFA Rules with the Principle of Freedom of Movement (Art. 45 TFEU)

6.1 On the Restrictive Nature of the FIFA Rules

The Court shared the Advocate General's opinion that the FIFA rules hinder professional footballers who reside or work in their home Member State and seek to join a new club in another EU Member State. This unfairness arises when a player unilaterally terminates, or has already terminated, the employment contract with their previous club, which may result in the club making claims – whether substantiated or not – of a breach without just cause.[53]

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[48] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, 44. According to this directive, long-term residents may move to another EU Member State for specific purposes, such as employment, self-employment, education, or vocational training, provided they (i) hold valid long-term resident status in the first Member State, (ii) apply for a residence permit in the second Member State, and (iii) fulfill the conditions set by the second Member State, such as demonstrating sufficient resources, obtaining health insurance, or securing employment.

[49] See *infra* para. 10.

[50] ECJ, *BZ v. FIFA and URBSFA*, para. 81.

[51] *Idem*, para. 82.

[52] *Idem*, para. 84.

[53] *Idem*, para. 91.

According to the EU judges the provisions contained in Art. 17(1), (2), and (4) were such that they prevent a player from receiving an unconditional offer of employment from clubs established in other EU Member States, restricting their freedom of movement.[54]

Remarkably, the Court went on by stating that "*[t]he existence and combination of those rules have the consequence that those clubs bear significant legal risks, unpredictable and potentially very high financial risks and major sporting risks which, taken together, are clearly such as to dissuade them from signing such players*".[55]

The language used by the EU judges to describe the risks stemming from the application of FIFA rules is notably strong, highlighting a clear restrictive effect. Terms like 'significant,' 'unpredictable,' 'potentially very high,' and 'major', underscore the severity of risks.

Similarly, the rules prohibiting general and automatic issuance of the ITC necessary for the registration of professional players with their new club for as long as there is a dispute between those players and their former clubs relating to a lack of mutual agreement on premature termination of the employment contract "*are such as to prevent those players from exercising their economic activity in any Member State other than their Member State of origin and therefore to negate the essence of the sporting and economic interest in their potential employment by a club established in one of those other Member States. In addition, those latter rules apply specifically in the event of a player's cross-border movement, to the exclusion of any movement within one and the same State, as is also clear from Article 1, para. 1 of those regulations*".[56]

Coherently, the Court concluded that the contested FIFA rules hinder the freedom of movement of workers.

6.2 On the Existence of Justifications

Relying on its longstanding case-law on Art. 45 TFEU, the Court considered that the FIFA rules can be justified provided that: (i) they pursue a legitimate objective in the general interest; and (ii) they comply with the principle of proportionality which implies that they are suitable for securing the attainment of that objective and they do not go beyond what is necessary to attain it.[57]

To help the referring court to establish the existence of those two cumulative conditions the EU judges examined the three justifications that FIFA put forward, namely:

1. the maintenance of contractual stability and the stability of professional football club teams;

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[54] *Idem*, para. 92.
[55] *Ibidem.*
[56] *Idem*, para. 93.
[57] *Idem*, para. 95 and case law therein recalled.

2. the need to preserve the integrity, regularity and proper conduct of inter-club football competitions;
3. the protection of professional footballers as workers.[58]

The Court firmly rejected the last justification affirming that "*the protection of workers is not among the objectives of FIFA, as defined in its Statutes, nor is FIFA a private law association, entrusted by the public authorities with any particular mission in that area, nor it is clear how the FIFA rules contribute to the protection of professional footballers*".[59]

This ruling's reasoning may impact far beyond the *Diarra* case to influence the players' agents' case pending before the Court of Justice. In fact, the Court's conclusion that FIFA is not entrusted with the public authorities' mandate to protect professional footballers could be applied, *a fortiori*, to the activity of players' agents.

To this end, already in the 2005 *Laurent Piau*[60] case, the then Court of First Instance observed that the Players' Agents Regulations were adopted by FIFA on its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognized task in the general interest concerning sports.[61]

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[58] *Idem*, para. 98.

[59] *Idem*, para. 99.

[60] Court of First Instance, judgment of 26 January 2005, *Laurent Piau v Commission of the European Communities*, case T-193/02. ECLI:EU:T:2005:22.

[61] *Idem*, para. 74. Accordingly, the judges were eager to underline that, "*those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either. Moreover, with regard to FIFA's legitimacy to enact such rules, the judges argued that, since the rules at issue "do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football, is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded",* (para. 76). *"The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties, (*para. 77). The Court concluded that *"in principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities*" (para. 78). Despite this, in its ruling the Court of first instance did not expand on the legitimacy of the rule-making power exercised by FIFA, in the almost complete absence of national rules, but examined it only in so far as it affected the rules on competition, in the light of which the lawfulness of the contested decision must be assessed. While acknowledging that considerations relating to the legal basis that allows FIFA to carry on regulatory activity could be very important, such an issue was the subject of the General Court's judicial review, given that the *Piau* case only concerned the lawfulness of a decision taken by the Commission following a procedure carried out on the basis of a complaint lodged under former Regulation No 17. Therefore, judicial review is necessarily limited to the rules on competition and the assessment made by the Commission of the alleged infringements of those rules by the FIFA regulations.

Further, that Court acknowledged that the regularity of sporting competitions was already accepted as a legitimate objective within the general interest pursued by sports associations by imposing, for instance, the so-called "transfer windows" with a view to avoiding late transfers capable of altering the sporting value of a team throughout the course of a competition and, ultimately, of jeopardizing the proper conduct of that competition.[62]

Moreover, such objective is capable of justifying also the adoption of rules intended to ensure the maintenance of a "*certain degree of stability in clubs' squads*".[63] However, by way of subtle reasoning, the EU judges stress that maintaining a certain degree of stability in the composition of clubs and, therefore a certain continuity in the contracts with players, "*must thus be regarded not as constituting in itself a legitimate objective in the public interest, but 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*".[64]

The Court of Justice, therefore, limited the relevance of the objective of contractual stability repeatedly evoked by FIFA. The contractual stability, understood as the principle aiming at ensuring that the parties comply with the employment contract until its expiration, is not relevant as such, but only as one of the possible means to guarantee the regularity of competitions.

Accordingly, it cannot be ruled out that there could be other less restrictive means capable of achieving this objective.

Nevertheless, the Court of Justice offered no additional guidance on such alternatives, leaving it to FIFA to determine and adopt the most appropriate measures.

6.3 On the Proportionality of the FIFA Rules

After considering the legitimate objective and the justifications provided, the EU judges proceeded to assess the proportionality of the FIFA rules in question.

While they leave it to the referring Belgian judge to conduct the necessary investigations, the Court did not shy away from using straightforward language to emphasize that the FIFA rules "*seem, in a number of aspects, to go beyond, indeed, in some cases, far beyond, what is necessary to achieve that objective, a fortiori because they are intended to apply, to a large extent, in combination and, for some of them, for a significant period of time, to players whose careers, moreover, are relatively short, a situation that may well seriously hamper the development of their careers, and indeed cause some players to end their careers prematurely*".[65]

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[62] ECJ, *BZ v. FIFA and URBSFA*, para. 101 and *Superleague* case law therein recalled.

[63] *Idem*, para. 102.

[64] *Ibidem*.

[65] ECJ, *BZ v. FIFA and URBSFA*, para. 104.

In short, in the Court's opinion, the challenged FIFA rules are clearly disproportionate in light of the consequences they bear for the football players who have a relatively short professional career.

Furthermore, to support their conclusion, the EU judges emphasized that Art. 17(1) of the RSTP sets out various criteria for calculating the compensation that a player must pay in the event of unilateral termination of the employment contract "*without just cause*", underlying that the latter is an expression which, incidentally, "*is not precisely defined in the regulations themselves*".[66]

The Court's remark is noteworthy, as it is true that FIFA Regulations provide neither a precise definition nor a comprehensive list of what constitutes "just cause". However, it is important to recognize that it would be impossible in the context of a regulation to define all potential circumstances that might be just cause for the premature and unilateral termination of a contract.[67]

Moreover, as FIFA recalls in its commentary on the FIFA RSTP,[68] over the years the jurisprudence of CAS has established several criteria that define, in abstract terms, which combinations of circumstances could be considered as "just cause". In particular, it was stated that a contract may only be terminated prior to expiry of an agreed term where there is a "valid reason",[69] or a "good cause" to do so when the fundamental terms and conditions which formed the basis of the contractual arrangement are no longer respected by one of the parties.[70] Similarly, according to the DRC, there is "just cause" when there are "sufficiently serious" circumstances that would render it unreasonable to expect the employment relationship between the parties to continue, such as a serious breach of trust.[71]

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[66] *Idem*, para. 105.

[67] O. Ongaro, *Maintenance of Contractual Stability between Professional Football Players and Clubs – The FIFA Regulations on the Status and Transfer of Players and The Relevant Case Law of the Dispute Resolution Chamber*, Contractual Stability, M. Colucci (ed.), SLPC, 2011, 46.

[68] FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 129.

[69] CAS 2006/A/1062 *Da Nghe Football Club v. Ambroise Alain Franc'ois Ndzana Etoga*; CAS 2016/A/4846 *Amazulu FC v. Jacob Nambandi & FIFA & National Soccer League*; CAS 2017/A/5465 *Beìkeìscsaba 1912 Futball v. George Koroudjiev*; CAS 2018/A/5771 *Al Warka FC v. Gaston Maximiliano Sangoy & FIFA/CAS* 2018/A/5772 *Gaston Maximiliano Sangoy v. Al Warka.*

[70] CAS 2019/A/6452 *Sport Lisboa e Benfica Futebol SAD v. BIlal Ould-Chickh & FC Utrecht B.V. & FIFA,* CAS 2019/A/6521 & 6526 *Osmanlispor FK v. Patrick Cabral Lalau & Club Atletico Mineiro and Club Atletico Mineiro & Patrick Cabral Lalau v. Osmanlispor FK*, CAS 2019/A/6626 *Club Al Arabi SC v. Ashkan Dejagah*, CAS 2020/A/6770 *Sabah Football Association v. Igor Cerina, CAS 2020/A/7231 Nejmeh Club v. Issaka Abudu Diarra.*

[71] DRC decision of 25 October 2018, no. 10180471-E; DRC decision of 24 August 2018, no. 08180794-E; DRC decision of 1 February 2023, *Abdel Rahman Alattar*; CAS 2019/A/6306 & CAS 2019/A/6316 *Jean Philippe Mendy v. Baniyas Football Sports Club LLC & Baniyas Football Sports Club LLC v. Jean Philippe Mendy, Club NK Slaven Belupo & FIFA*; CAS 2019/A/6171 *Josué Filipe Soares Pesqueira v. Osmanlispor FK* & CAS 2019/A/6175 *Osmanlispor FK v. Josué Filipe Soares Pesqueira & Akhisar Belediyespor FC & FIFA*; CAS 2017/A/5180 *Club Antalyaspor v. Sammy Ndjock & Club Minnesota United; CAS 2017/A/5402 Club Al-Taawoun v. Darije Kalezic*.

6.4 The "Objective" Criteria

6.4.1 The Law in Force in the Country Concerned

For the first time, the Court reviewed one by one all the criteria defined as "objective" in the FIFA regulations and underlined some deficiencies.

As for the possibility to consider the "*law in force in the country concerned*", for the EU judges such a criterion does not guarantee effective compliance with that law,[72] because FIFA itself in its official commentary on the RSTP[73] acknowledges that it has almost never been applied in practice, as when passing a decision, the DRC essentially considers its owns regulations. For the sake of completeness when passing a decision, general principles of (contract) law are also considered and reference may be made to Swiss law only where gaps exist in the FIFA regulatory framework.[74]

It has been observed that the language of Art. 17(1) "*was left (or ended up being) somewhat open, allowing room for discussion whether the national law shall be applied when calculating compensation for breach. The expression 'with due consideration for' implies that national law is a matter to be weighed or considered when calculating the compensation for breach of contract, it does not necessarily mean that national law shall govern the decision-making process. The same applies to the wording 'any other objective criteria' which means that any such criteria should be carefully assessed, but not necessarily applied when the compensation is calculated. This clause has been further tangled up with an enumeration of criteria that can be considered objective. Yet such a list - willingly or not - has been left undefined, making its interpretation more complex. Art. 17 has provided the deciding bodies mostly exposed to it, the DRC and the CAS, with a considerable scope for discretion, especially to decide when national law should be applied*".[75]

However, this margin of discretion carries legal certainty's problems and the consequences arising from its application in terms of compensation do not necessarily reflect the position of the European Commission, especially considering the statements made by Commissioner Monti following the gentlemen's agreement of 2001.[76]

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[72] ECJ, *BZ v. FIFA and URBSFA*, para. 101 and *Superleague* case law therein recalled, para. 106.

[73] *Ibidem.*

[74] FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 178.

[75] P. Lombardi, *Compensation in Case of Breach of Contract according to Common Law Principles*, Contractual Stability, M. Colucci (ed.), SLPC, 2011. U. HAAS, *Applicable Law in Football related Disputes – The Relationship between CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law*, CAS Bulletin 2015/2, 7.

[76] Cf. Statement IP/02/824 of 5 June 2002 of the then Competition Commissioner Mario Monti: "*FIFA has now adopted new rules which are agreed by FIFpro, the main players' Union and which follow the principles acceptable to the Commission. The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships. It is now accepted that EU and*

The discretion in the application of the law of a country was previously acknowledged by CAS, in the *Webster* case, when the panel observed that, "[*a]s to article 17 par. 1 of the FIFA Status Regulations, it is clear from its wording that the reference to the "law of the country concerned" is not a choice-of-law clause, since it merely stipulates that such law is among the different elements to be taken into consideration in assessing the level of compensation. In other words, article 17 par. 1 does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the other elements and criteria listed in article 17 par. 1. It simply means that the decision-making body shall take into consideration the law of the country concerned while remaining free to determine what weight, if any, is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17 par. 1 itself and any other criteria deemed relevant in the circumstances of the case. (...). In other words, it is important to bear in mind that it is because employment contracts for football players are atypical, i.e. require that the particularities of the football labour market and the organization of the sport be accounted for, that article 17 was adopted. At the same time, footballers' contracts remain more akin to employment contracts (and are generally characterized as such under national laws), than to some form of commercial contract to which general rules on damage are applicable*".[77]

By contrast, in the Court of Justice's *Diarra* judgement, such a failure to take real account of and therefore have effective compliance with the law in force in the country concerned, clearly goes beyond what may be necessary to maintain a certain degree of stability in club staffing in order to ensure the regularity of inter-club football competitions.

Nevertheless, it is worth underlining that at the least, the DRC does not consider the law of the relevant country for two reasons.

First, and foremost, to the best of our knowledge, it is very rare that the parties in the proceedings support their arguments by making reference to the relevant national law, probably because of the consistent application of the other criteria listed in Art. 17 RSTP.

Second, the FIFA regulations apply to 211 FIFA Member Associations in 195 countries having their own distinct legal systems, which have not evolved uniformly and univocally, which set different legal and regulatory statutes, some of which being more legally developed than others. In some such countries the

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national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward".(emphasis added).

[77] CAS, 2007/A/1298, 1299 & 1300, *Wigan Athletic v/ Heart of Midlothian & Andrew Webster,* available at https://jurisprudence.tas-cas.org/Shared%20Documents/1298,%201299,%201300.pdf.

employment relationships are governed by collective bargaining agreements which may provide guarantees to both contractual parties, whereas in many others there are no football trade unions at all and possibly no agreed guarantees at all for the players.

Moreover, despite the progress made over the years and the recently relevant FIFA regulations setting some principles in terms of independence and impartiality,[78] only in some football associations there are domestic dispute resolutions chambers or arbitration bodies which mirror the structure of the FIFA DRC, at least in terms of composition and players' as well as clubs' representation.

In other words, not in all countries and football associations can players enjoy the same level of labour protection. Therefore, an international regulation setting at least a minimum of international labour standards, negotiated and agreed by the relevant stakeholders, can be beneficial not only to players but also to clubs. Additionally, foreign players are not necessarily aware of the relevant national rules applicable to their employment relationship or of the often lengthy and complex procedures applicable in case of a dispute, particularly when it occurs in a foreign country.[79]

International regulations and standards play a crucial role in ensuring that both players and clubs are held to the same high standards, particularly when it comes to labour protection.

This approach aligns with FIFA's aim to ensure uniformity in the way labour rights are enforced across different countries, irrespective of local laws or customs. However, the regulations of FIFA need to be compliant with general principles of law, *in primis* freedom of movement and freedom of competition.

6.4.2 The Specificity of Sport

The Court analyzed the second criterion listed in Art. 17 RSTP, *i.e.* the "specificity of sport" which has been at the core of discussion among international sports stakeholders and the EU institutions over the years.[80] It has been included in Art. 165 TFEU, with its meaning and scope recently "framed" in the light of the fundamental principles of freedom of movement and freedom of competition in the *Superleague* case.[81]

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[78] FIFA, *National Dispute Resolution Chamber Recognition Principles*, February 2024, available at https://digitalhub.fifa.com/m/2021f639165fb13e/original/National-Dispute-Resolution-Chamber-Recognition-Principles-February-2024.pdf (*last accessed on 25 November 2024*).

[79] In that regard, R. Parrish, *Contractual Stability: the case law of the Court of Arbitration for Sport*, Contractual Stability in Football, M. Colucci (ed.), SLPC, 2001, 77, has rightly stated that "*it would seem logical that when determining compensation sums for unilateral termination, the DRC and CAS should not necessarily prioritize and follow national law over the other criteria established in Article 17 RSTP. This is significant in so far as national rules on contractual damages vary*".

[80] See J. Meredith and B. Borja Garcia, *To be or not to be specific?: Understanding EU institutions' definition of the specific nature of sport*, *Sports Law Policy & Diplomacy Journal*, 1(1), 2023, 17- 44.

[81] ECJ, *European Super League Company*, case C-333/21, ECLI:EU:C:2023:1011.

The specificity of sport has also been used as a principle to establish compensation in case of termination of an employment contract without just cause.

The EU judges referred to it as a "general" concept, and underlined that the RSTP do not provide "*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, with the consequence that, 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*".[82]

In that regard, the authors can only concur that – at least in some cases – such a general concept could be prone to be used and, we dare to say, even 'abused' by the contractual parties to claim some additional compensation without even trying to justify the specific circumstances that should support their claim.

Nevertheless, it is fair to recall that in the initial phase of evaluating each case, at least the DRC calculates the compensation owed, focusing solely on elements outlined in the regulations and relevant legal framework, excluding the concept of the specificity of sport.[83]

Once a preliminary compensation amount is determined, as stipulated by the RSTP, the DRC members then consider the specificity of sport by examining factors or unique aspects of the case that might justify adjusting the compensation amount up or down.

Such factors may include, for instance, any particularly egregious conduct by the breaching party, the timing of the premature termination of the contract in the context of current registration periods; the player's role within the team (whether the breach involves the player or the club); and the player's level of commitment to the club before the early termination. These factors are all closely tied to sports-specific concerns inherent within football.[84]

It is interesting to note that the concept of specificity of sport has been used by the DRC in the *Diarra* case "*to deviate from the general formula of calculation contained in Art. 17(1)* RSTP, "*to take into account only the non-amortised portion of the fees and expenses paid or incurred by the former club into account when calculating the amount of compensation payable by the player and excluded the remuneration component from the calculation*".[85]

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[82] ECJ, *BZ v. FIFA and URBSFA*, para. 106.

[83] O. Ongaro, *Maintenance of Contractual Stability between Professional Football Players and Clubs – The FIFA Regulations on the Status and Transfer of Players and The Relevant Case Law of the Dispute Resolution Chamber*, Contractual Stability, M. Colucci (ed.), SLPC, 2011, 46.

[84] *Ibidem*.

[85] FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 186-187.

In its commentary, FIFA explained that the rationale for adopting this unusual approach is that the final compensation figure under the standard calculation method did not appear appropriate or justified. In such situations, the DRC has used the specificity of sport in accordance with CAS jurisprudence for the purpose "*of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors*".[86]

Consolidating this, CAS panels tend to use the specificity of sport as a criterion, among others, to make the compensation just and fair not only under a strict civil law point of view but also taking into due consideration the specific nature and needs of the football world. In this context, according to the CAS jurisprudence, the specificity of sport is neither an additional basis for compensation nor a criterion allowing a decision one way or the other in equity. Instead, it represents a "correcting factor" allowing the panel to award extra compensation in cases where it is not convinced that the costs awarded by the DRC fully compensate the party under Art. 17 FIFA RSTP.[87]

There is no indication at all about the content of such a concept[88] so that it may cover a broad range of criteria such as: the expiration of the so-called "protected period", the player's economic value, his status, the financial investments made by the club; and the image damages suffered.

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[86] *Ibidem.*

[87] For example, in *Al Gharafa S.C. & M. Bresciano v. Al Nasr S.C. & FIFA* (CAS 2013/A/3411), after recalling the fundamental importance to reach a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case, the Panel underlined that "*the 'specificity of sport' is not an additional head of compensation, nor a criteria allowing to decide* in ex aequo et bono*, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Art. 17 RSTP*". Similarly, in *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA* (CAS 2007/A/1358), the panel stressed that *"the criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football. Therefore, when weighing the specificity of the sport a panel may consider the specific nature of damages that a breach by a player of his employment contract with a club may cause. In particular, a panel may consider that in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club. Taking into consideration all of the above, the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player*".

[88] CAS *2007/A/1298, 1299 & 1300 Wigan Athletic v/ Heart of Midlothian & Andrew Webster* available at https://jurisprudence.tas-cas.org/Shared%20Documents/1298,%201299,%201300.pdf (*last accessed on 25 November 2024*), para. 131: "*With respect to the "specificity of sport", article 17(1) of the FIFA Status Regulations stipulates that it shall be taken into consideration, without however providing any indication as to the content of such concept*".

In the above recalled landmark *Webster* case, the CAS held that its obligation to calculate compensation in accordance with the "specificity of sport" required it to reach a solution, "*for the football world which would enable those applying the provision to make a reasonable balance between the needs of contractual stability on the one hand and the needs of free movement of the players on the other hand*".[89] At the same time, the panel held that, "*(...) compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation*".[90]

Nevertheless in its award *Shakhtar Donetsk v Matuzalem Francelino Da Silva & Real Zaragoza SAD & FIFA*[91] (hereinafter '*Matuzalem*') CAS arrived to the complete opposite conclusions and stated that the factor of specificity of sport may not be misused to compensate the injured party with an amount which would put such party, namely the player, in a better position that the one it would have if the termination had been mutually agreed.

By doing that, the CAS panel also emphasized that in football, unlike in other employer-employee relationships where the employee is generally the weaker party, players are not regarded as the weaker party *per se*.[92]

6.4.3 The "Other Objective Criteria"

The Court is very critical when examining the "other objective criteria" listed in Art. 17(1) RSTP, where it is affirmed that those other criteria, *"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*".[93]

In other words, while each of these criteria may be considered objectively valid on their own, their application could result in extreme and unpredictable consequences for the breaching parties, particularly in terms of the compensation they are required to pay.

6.4.3.1 Old and New Remuneration

In regard to the remuneration and other benefits due to the player concerned under the employment contract subsequently concluded with a new club, the Court

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[89] *Ibidem.*
[90] *Ibidem.*
[91] CAS 2008/A/1519&1520, *FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*, available at http://www.tas-cas.org/d2wfiles/document/3229/5048/0/Award%201519-1520%20_internet_.pdf (*last accessed on 25 November 2024*).
[92] *Ibidem.*
[93] ECJ, *BZ v. FIFA and URBSFA*, para. 107.

emphasized that such criterion relates to an employment relationship subsequent to the one which was terminated and promptly concludes that "*those elements must (...) be held to be unrelated to the latter employment relationship and its costs*".[94]

Thus, the Court questioned the reference to this criterion, despite the fact that the mitigation of damages in the context of a breach of employment contract refers to the obligation of the aggrieved party - typically the employee or the employer - to take reasonable steps to reduce the financial losses caused by the breach. This principle is generally accepted and is rooted in contract law and aims to prevent one party from unreasonably increasing their losses when these could have been avoided through reasonable efforts.

6.4.3.2 All Costs and Expenses linked to the Transfer of the Players: "Res inter alios acta tertio neque nocet neque prodest"

The Court focused on the criterion represented by all costs and expenses incurred by the former club in connection with the transfer of that player to it, amortized over the contractual period and concludes that "*irrespective of the fact that that element relates essentially to a previous contractual employment relationship, its being taken into account seems to be particularly excessive, since it is likely to enable what are potentially considerable charges which were prima face negotiated exclusively by other persons in their own interest, like the clubs parties to the transfer or the third parties who were involved in that context, to be passed on to the player*".[95]

As the ancient Romans said, '*Res inter alios acta tertio neque nocet neque prodest*' which translates, something agreed between two parties, does not harm and does not benefit third parties. Such a brocard applies and conveys that a player cannot be held liable to pay a compensation linked to a negotiation and to an agreement between two clubs to which he was not a party.

The Court seems to suggest that a player is only the "object" of negotiations between the clubs involved in the agreement on, sometimes, a very high transfer fee.

The player is not a party to that contract nor to the negotiations which culminated to the evaluation of his "market value". Therefore, condemning the player to pay the transfer fee would be a manifestation of an unjust, excessive and highly disproportionate penalty.

A comparison of the *Matuzalem* case with the *Diarra* ruling highlights the different perspectives taken by the CAS and the Court of Justice. In particular, the CAS panel noted that "*a player does not participate in his transfer fee (neither receiving any part of it, nor paying any part of it) in a regular transfer, this is part of Article 17 that has been applied by numerous CAS*

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[94] *Ibidem* and case law therein recalled.

[95] *Ibidem.*

panels in the past (...) and the panel sees no reason to depart from this line of jurisprudence".[96]

By contrast, the Court of Justice did not hesitate to state 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 DRC and the CAS, as is apparent from certain decisions of those bodies that appear in the file before the Court*".[97]

The Court of Justice's ruling did not expressly indicate which DRC decisions or CAS awards were submitted by the parties. However, the criteria to calculate compensation have been the subject matter of three main cases.

The first one is the above-mentioned *Webster* case, where the panel found that there was "*no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit*".[98] In particular, the panel stressed that: (i) "*there is no reason to believe that a player's value on the market owes more to training by a club than to a player's own efforts, discipline and natural talent*"; and (ii) "*the market value of a player is not mentioned in the criteria listed in art. 17, par. 1*".

By contrast, the panel argued that under a fixed-term employment contract, both club and player "*have a similar interest and expectation that the term of the contract will be respected, subject to termination by mutual consent*".[99] Accordingly, "*just as the player would be entitled in principle to the outstanding remuneration due until expiry of the term of the contract in case of unilateral termination by the club (...), the club should be entitled to receive an equivalent amount in case of termination by the player*".[100]

One year later, in the *Matuzalem* case,[101] contrary to the criteria followed in the *Webster* case, the CAS panel firstly applied the so-called "*positive interest*" doctrine. According to the panel, the term "compensation" referred to in Art. 17 RSTP must be understood as an amount to be paid to compensate the injured party for the damage suffered because of the breach or the premature termination

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[96] CAS 2008/A/1519&1520, *FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*, para. 243.

[97] ECJ, *BZ v. FIFA and URBSFA*, para. 107, (emphasis added).

[98] CAS 2007/A/1298 *Wigan Athletic FC v/ Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v/ Heart of Midlothian*, paras, 76 ss.

[99] *Idem*, para. 86.

[100] *Ibidem*.

[101] CAS 2008/A/1519 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & Fédération Internationale de Football Association (FIFA)* & CAS 2008/A/1520 *Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & Fédération Internationale de Football Association (FIFA)*.

on the contract. Accordingly, the compensation must be determined in an amount suitable to place the injured party in the position that the same party would have had if the contract had been executed properly.[102]

Lastly, in the *De Sanctis* case,[103] the CAS panel mainly relied on the "replacement costs" criterion. At first sight, this approach may be regarded as a departure from the positive interest doctrine, given that in the *Matuzalem* case the CAS panel argued that "*some replacement costs would arise in any event, i.e. after an ordinary expiry of an agreement same as upon a premature termination*".[104] To the contrary, the panel stressed that "*it was not put in a position (...) where it could safely value the services of the Player. In the absence of any concrete evidence with respect to the value of the Player, the Panel cannot apply exactly the same calculation as in [the Matuzalem case] and shall use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that [the club] would have got or saved if there had been no breach by the Player. By using the value of the replacement costs only rather than the estimated value of the Player, the Panel does not seek to depart from the [Matuzalem] jurisprudence but wishes to emphasize that there is not just one and only calculation method and that each case must be assessed in the light of the elements and evidence available to each CAS panel*".[105]

The above CAS case-law on the calculation of compensation reveals a significant margin of discretion, mainly because, according to CAS panels, the list of criteria in Art. 17 is not exhaustive. Nevertheless, this is exactly what the Court of Justice appears to condemn in the *Diarra* case when it refers to the high economic and legal risks to which players and clubs are exposed because of

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[102] In particular, the CAS panel took in consideration the following criteria: (i) the remuneration and other benefits due to the player under the existing and the new contract. In particular, the CAS panel stressed that "through the unjustified termination of a player, a club like any other employer, loses the value of the services of the employee. In this case, the Panel wishes to make the following consideration to calculate such value. One of the non-exclusive criteria mentioned in Art. 17 para. 1 of the FIFA Regulations is the remuneration and other benefits due to a player under the existing and the new contract. While the information on the remuneration under the existing contract may provide a first indication on the value of the services of the player for that employing club, the remuneration under the new contract may provide an indication not only on the value that the new club/clubs is/are giving to the player, but possibly also on the market value of the services of the player and the motive behind the decision of the player to breach or terminate prematurely the agreement" (paras. 45-46); (ii) the lost transfer value. According to the CAS panel, "the services provided by a player are traded and sought after on the market, are attributed an economic value and are worth of legal protection" (para. 57).

[103] CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A*. and CAS 2010/A/2146 *Morgan De Sanctis v. Udinese Calcio S.p.A*. and CAS 2010/A/2147 *Udinese Calcio S.p.A. v. Morgan De Sanctis & Sevilla FC SAD*.

[104] *Idem*, para. 89.

[105] *Idem*, para. 43.

the way the DRC and the CAS interpret and apply the criteria contained in Art. 17 RSTP.[106]

The inability of players to predict in advance the compensation they would be required to pay in the event of a contract termination, stems from the fact that some of the criteria used to determine such compensation are vague and non-exhaustive. As a result, such compensation remains an uncertain and looming threat over the players who are deterred from exercising their right of free movement because they do not have the legal background to fully understand the implications of unilaterally terminating a contract.

It is worth noting that in Art.17(1), points (i) and (ii) FIFA RSTP, there is a stark contrast between the criteria used to determine compensation in favor of clubs and those applied to compensate the players.

Where a club terminates a contract without just cause, the player is entitled to receive a compensation calculated on the "residual value of the contract", provided the player has not signed a new contract. However, if the player does sign a new contract, its value for the period corresponding to the time remaining on the prematurely terminated contract is deducted from the residual value of the early terminated contract, a process referred to as "mitigating compensation". Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the mitigated compensation, the player is entitled to an additional compensation corresponding to three monthly salaries. In case of egregious circumstances, the additional compensation may be increased up to a maximum of six-monthly salaries.

These provisions were introduced only in 2018[107] and reflect the DRC as well as CAS consolidated jurisprudence,[108] and aim at more clarity and legal certainty as to the consequences of termination without just cause upon the parties but also to the DRC when determining any compensation in favour of a player.

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[106] ECJ, judgement of 4 October 2024, *BZ v. FIFA and URBSFA*, case C- 650/22, ECLI:EU:C:2024:824, para. 107, last sentence, 111.

[107] FIFA Circular Letter 1625 of 16 April 2018 available at https://digitalhub.fifa.com/m/2036fa2bc8b4829a/original/bmkwifiiyexkdnicpsip-pdf.pdf. The amendments were introduced following the complaint introduced by FIFPro with the European Commission as mentioned in Mills & Reeve, *Amendments to the FIFA Regulations on the Status and Transfer of Players (RSTP),* 6 October 2021, available at https://www.mills-reeve.com/blogs/sports/april-2018/amendments-to-the-fifa-regulations-on-the-status-a/#:~:text=Nonetheless%2C%20on%2026%20April%202018,as%20of%201%20June%202018 (*last accessed on 25 November 2024*).

[108] See FIFA Commentary to Art. 17 (1), 184, and CAS Jurisprudence therein recalled: CAS 2019/A/6306 & CAS 2019/A/6316 *Jean Philippe Mendy v. Baniyas Football Sports Club LLC & Baniyas Football Sports Club LLC v. Jean Philippe Mendy, Club NK Slaven Belupo & FIFA*; CAS 2019/A/6171 *Josueì Filipe Soares Pesqueira v. Osmanlispor FK* & CAS 2019/A/6175 *Osmanlispor FK v. Josueì Filipe Soares Pesqueira & Akhisar Belediyespor FC & FIFA*; CAS 2018/A/5771 *Al Wakra FC v. Gastoìn Maximiliano Sangoy & FIFA & CAS 2018/A/5772 Gastoìn Maximiliano Sangoy v. Al Wakra FC*.

Likewise, it is difficult not to notice the clear disparity in treatment under FIFA rules depending on whether the compensation is due to the player or to the club. In the first scenario, the compensation is determined based on a few clear and precise criteria; in the second one, the compensation is not foreseeable in any way.

7. *On the Principle of Joint Liability*

The analysis of the criteria for determining compensation in cases of breach without just cause led the Court of Justice to important conclusions regarding the principle of joint liability, as outlined in Art. 17(2) RSTP.

This principle has been part of FIFA's regulations since their 2001 version, even though, as observed above, it was not in the Gentlemen's agreement with the European Commission at the time. Its inclusion reflects FIFA's intention to address specific challenges in the transfer system.

FIFA, in its commentary, defends the automatic application of the joint liability principle under Art. 17(2) of the RSTP, explaining that this provision aims at avoiding "*any debate or evidentiary difficulties regarding any potential involvement of the new club in the breach of contract*".[109]

Such a statement provides an insightful yet problematic clarification in the context of the *Diarra* case by recognizing the new club's joint liability together with the player, irrespective of whether the new club actively induced the player to breach their contract, and regardless of the new club's good or bad faith.

In fact, such a rigid approach offers a distinct interpretation that appears to be in contrast with the traditional principle of proportionality at the basis of EU law.

FIFA justifies the principle by pointing to three key objectives:

1. *Protection of the former club's financial interests*: joint liability ensures that the burden of compensation is shared between the player and the new club, protecting the former club's financial investment in the player.[110]
2. *Ensuring fairness for players*: the principle ensures that the player is not solely responsible for the financial burden of compensating the former club in cases of unjust termination of the contract.[111]
3. *Preventing unjust enrichment*: it helps to prevent the new club from benefiting from the breach of contract, which would allow it to profit from the player's actions without any financial repercussions for the breach.[112]

[109] FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 204.

[110] *Ibidem.*

[111] *Ibidem.*

[112] *Ibidem.* However, in this context, legal scholars have criticized FIFA's justifications of the principle of contractual stability, suggesting that its primary purpose was not to strengthen the stability of contracts, as FIFA claims, but rather to impose significant financial and sporting risks on both players and new clubs, effectively turning contracts into tradable "assets" subject to speculative transfers. See, A. Duval, *Football at a Crossroads: Why the Diarra Ruling Marks a Crucial Turning point for Football*, VerfBlog, 10 October 2024.

While FIFA's objectives may seem sound in theory, in practice the automatic application of joint liability often fails to achieve these goals and it risks generating serious unintended consequences. For instance, excessively punitive decisions under this principle can lead to situations where players are unable to meet compensation requirements, which could leave them without employment and with insurmountable financial burdens.

Similarly, clubs that are required to pay large sums under joint liability may face financial crisis, as evidenced by the *Matuzalem* case, in which Zaragoza FC went bankrupt after being held jointly liable with the player for a substantial compensation award.

Moreover, even when compensation is eventually awarded, the principle often leads to prolonged legal disputes. New and old clubs frequently engage in lengthy negotiations to reach a reduced settlement, undermining the original intent of the regulations, which was to ensure timely and fair outcomes. This is exemplified by the case of the player Ariel Ortega, whose long dispute with Fenerbahçe before both the DRC and CAS kept him out of football for more than one year, due to the fear of any football clubs to signing him and then being held liable to pay. This situation was solved only following the intervention of the Argentinian labour judge who acknowledged the player's right to work, and an amicable agreement between the relevant football clubs was made.[113]

This highlights the inefficiency and delay that can arise from the automatic application of joint liability, detracting from the protection of players' and clubs' interests that the principle originally sought to safeguard.

Thus, while FIFA's principle of joint liability was designed to balance the interests of players and clubs in the name of contractual stability, whatever was the meaning and purpose of such a principle, its practical application often results in financial instability for clubs and prolonged disputes for players, which could not be anticipated by the sports stakeholders.

From an EU law perspective, however, it is crucial to emphasize that the Court of Justice did not seem to object to the principle of joint liability as such. Instead, the EU judges criticize the automatic application of this principle and the relevant sanctions "*that is to say, without being dependent on any condition that would allow the relevant circumstances of the case to be taken into account, even to a limited extent, such as the condition requiring, for example, at the very least, that the former club be asked to provide sufficient evidence to support a finding that the new club induced the player to breach his or her contract*".[114]

Such an approach – they argued – runs counter to the principle of proportionality, a core tenet of EU law. Under this principle, liability should be determined based on a fair assessment of each party's individual responsibility

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[113] See CAS 2003/O/482, *Ariel Ortega v/ Fenerbahçe & Fédération Internationale de Football Association (FIFA).*

[114] ECJ, *BZ v. FIFA and URBSFA*, case C- 650/22, para. 110.

and the circumstances surrounding the breach of contract, rather than relying on a blanket rule that applies to all cases irrespective of context.[115]

To conclude, the EU judges did not consider FIFA's argument during the proceedings according to which the provision on joint liability is not applied systematically and does not apply where the new contract of a player who has breached his previous contract without just cause is signed after the date on which that previous contract expires.

At first sight, the Court of Justice's reasoning according to which, even assuming that such a circumstance is established, Art. 17(2) of the RSTP does not foresee such non-application and, therefore, does not provide the necessary legal certainty in that regard,[116] seems to reveal a literal interpretation of the rule.

In particular, the EU judges do not seem to consider the CAS case law (*Mutu* and *Aziz Abdul*)[117] where the Panel established that the principle of joint liability does not apply in cases where it is the club's decision to dismiss the player and where the new club had not committed any fault nor was it involved in the termination of the employment relationship between the old club and the player. Moreover, as explained in the FIFA Commentary on the RSTP, in the *Diarra* case itself the DRC decided not to apply the principle of joint and several liability, because following the termination of the contract by the club, the player did not find a new club and remained unemployed at the time DRC decision was taken.[118]

However, the Court of Justice's conclusions on the disproportionate nature of the joint liability is confirmed by FIFA itself in its Commentary on RSTP, when it acknowledges that the *Mutu, Aziz Abdul* and *Diarra* cases are exceptions to the ordinary application of this principle.[119]

In particular, FIFA recognizes that the "*Mutu approach is not applicable if a player terminates his contract without just cause to join a new club*"[120] and that in the *Aziz Abdul* case "*truly exceptional circumstances were at play, and this justified the decision not to apply the principle of automatic joint and several liability*".[121]

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[115] *Idem*, para. 111.

[116] *Ibidem.*

[117] See FIFA Commentary on RSTP, 208, and case law there in recalled CAS 2013/A/3365, *Juventus FC v. Chelsea FC* and CAS 2013/A/3366, *A.S. Livorno Calcio S.p.A. v. Chelsea FC*, Award of 21 January 2015; CAS 2017/A/4977 *Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & FIFA*.

[118] C*onsidering the time which elapsed between the date of the termination of the contract and the date on which the present decision was passed, and while taking into account the principle of legal certainty, according to which, after the passing of a decision, all parties to a dispute should be aware of the consequences of their behaviour, [...] since as at the time this decision is made there is no club with which the player has registered, article 17 para. 2, Regulations should also not apply in future, should the player find a new club*." FIFA Commentary on the Regulations on the Status and Transfer of Players, 2023 edition, 208.

[119] FIFA, *Commentary on the Regulations on the Status and Transfer of Players*, 2023 edition, 207.

[120] *Idem*, 208.

[121] *Idem*, 209.

8. On the Sporting Sanctions

As for the sporting sanctions imposed on clubs pursuant to Art. 17(4) RSTP, such sanctions consist of a general ban on registering new players for two complete and consecutive registration periods. If the player is recruited during the protected period of the contract that bound him to his former club, the EU Court stated that imposing sanctions based on mere presumptions about the role of the new club in inducing a player to terminate his contract with his club clearly does not meet the proportionality test.[122]

Indeed, "*[s]uch a sporting sanction, which the bodies competent to apply it do not have the power to adapt on a case-by-case basis according to specific criteria or circumstances, appears, in the light of its nature and its consequences, manifestly to bear no relation of proportionality to the breach attributed to the new club concerned*".[123]

The judges argued that, even assuming that the presumption is justified by the difficulties that a player's former club could face, if it had to prove that the player's new club had induced him to terminate his contract prematurely and without just cause, such an argument does not justify the presumption in question, given that it applies automatically, without taking into account the relevant circumstances of the case; for example, requiring the former club at the very least to adduce sufficient evidence to allow it to be considered that the new club had induced the player to terminate his contract.[124]

It follows from the foregoing that the Court of Justice's criticism does not refer to the sporting sanctions as such, but rather to the automatic presumption that the recruiting club induced the player to terminate the contract without just cause.

Finally, the Court of Justice, by recalling its *Superleague* jurisprudence, acknowledged that FIFA may impose sporting sanctions to pursue a legitimate objective in case of breach of its rules, but only, "*on condition that they are determined within a framework of criteria that are transparent, objective, non-discriminatory and proportionate, the last requirement entailing, inter alia, that the particular circumstances of the case are taken into account when the amount and the duration of the sanctions are fixed, as follows from the case-law cited in para. 108 of the present judgment. Such sanctions must, moreover, be capable of being the subject of effective review*".[125] Moreover, "*such criteria must be capable of effective review*".[126]

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[122] ECJ, *BZ v. FIFA and URBSFA*, case C- 650/22, ECLI:EU:C:2024:824, para. 109.
[123] *Idem*, para. 110.
[124] *Ibidem.*
[125] ECJ, *BZ v. FIFA and URBSFA*, para. 111, (see, to that effect, Case C-333/21 *European Superleague Company* EU:C:2023:1011, para. 257).
[126] *Ibidem.*

Once again, the EU judges emphasized the importance of adopting good governance principles that ensure associations are accountable, rules are enforced transparently and proportionally, and compliance is monitored with appropriate sanctions.

9. On the International Transfer Certificate (ITC)

Then the Court continued with the assessment of Art. 8.2.7 of Appendix 3 of the RSTP which prohibits the former association, as a general and automatic rule, subject to exceptional circumstances, from issuing an ITC if the former club and the player are involved in a contractual dispute concerning the termination of a contract without just cause.

Here, it is noteworthy that the ITC remains a mandatory document required for the transfer of a player from one country's football association to another and it is processed via the FIFA Transfer Matching System platform ('TMS'). It ensures that players are only registered with one association at a time and that transfers comply with FIFA's regulations.

Moreover, the ITC is the only official document that authorizes a player to register with a new club in another football association.[127] Under the above provision, the player is prohibited from carrying on his professional activity and the new club is barred from registering him because of an ongoing dispute between the player and his former club.

Accordingly, the Court of Justice bluntly affirms that the ITC provision, "*manifestly infringes the principle of proportionality*"[128] because it disregards the circumstances of each individual case, with the respective conduct of the player concerned and his former club, and the "role or lack of role"[129] played by the new club, which is always allegedly infringing the prohibition on registering that player.

The smooth running of sporting competitions cannot justify this prohibition.

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[127] For the sake of completeness, compared to the version of the FIFA RSTP of 2014 at stake in the judgement, the current version provides for a few exceptions or related processes within the FIFA system:

1. Temporary or Provisional Certificates: In cases where the transfer process is delayed or the previous association does not respond in time, FIFA may issue a provisional ITC, allowing the player to temporarily register with the new association until the official ITC is resolved.

2. Transfer Matching System (TMS): for professional transfers, the ITC process is managed through FIFA's TMS. Both clubs involved in the transfer must enter the relevant details into the system. This ensures transparency and streamlines the ITC process.

3. Special Exemptions: in some rare cases, such as when a player is moving between countries for reasons beyond football (e.g., humanitarian reasons), FIFA or a national association might provide a special exemption, though this would still likely involve the issuance of an ITC or similar documentation.

[128] ECJ, *BZ v. FIFA and URBSFA*, para. 112.

[129] *Ibidem.*

FIFA contended that when the new football association applies to register a player on behalf of their affiliated club, FIFA's services automatically and promptly initiate the process for the provisional registration of the player. However, it is quite striking that according to the Court of Justice, FIFA's argument does not challenge the non-suitability of the rule at stake to ensure the smooth running of sporting competitions, given that, "*the provision in question does not contain any reference to such provisional registration and, a fortiori, does not require it to be carried out*".[130]

The Court appears to place significant weight on a strictly literal interpretation of the rule, without fully considering the comprehensive and long-standing practice of the Chairperson or the Deputy-Chairperson of the Players' Status Chamber in this respect, delivering the international transfer certificate even in case of a refusal from the former football association.

In any case, the current FIFA TMS, as a refined version of FIFA's earlier transfer protocols, may be adjusted to provide an alternative pathway in the post-*Diarra* legal landscape. The conformity with the freedom of movement and freedom of competition rules would require amending the relevant FIFA rules insofar as to issue the ITC in all cases, while disclosing any ongoing dispute between the player and their former club. This would allow the new club to make an informed decision about whether to sign the player, while accepting the potential risks associated with the outcome of the dispute.

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[130] This is a solution already prospected in 2014 by J. F. Vandellos Alamilla, *Refusal to deliver the ITC in international transfers of football players and free movement of workers within the EU*, Lawinsport, available at https://www.lawinsport.com/topics/item/refusal-to-delivery-the-itc-in-international-transfers-of-football-players-and-free-movement-of-workers-within-the-eu-entry-b. The Author argues that "*the Transfer Match System (TMS) through which an ITC is necessarily produced is defined by FIFA as a web-based data information system, which "harnesses modern electronic technology with the aim of making international transfers more transparent and protecting minors". The same main objective is mentioned in the regulation itself. Although transparency in international transfers can hardly be questioned as being a legitimate objective to protect specially in a sometimes-obscure industry such as football transfers, it does not entirely justify the right of an association to block the player from continuing his career after his contract is terminated. It frankly seems to me, that the attainment of transparency is easily reached without trespassing the limits of freedom of movement of workers. To that end, it would suffice to amend the FIFA rule and make the delivery of the ITC mandatory under any circumstance while keeping the obligation to inform of the existence of a dispute between the player and the former club, so that the new club can freely decide whether to hire the player while assuming the consequences of a possible bad outcome of the conflict between the player and his former club. In conclusion, there does not appear to be overriding public interest reasons justifying the obligation imposed by the FIFA RSTP to the former national association of the player to reject the ITC delivery simply because a contractual dispute is pending. Such an obstacle proves to be a major barrier for players and opens the door to questionable practices from football clubs, aware of the FIFA slowness in issuing decisions*".

10. *The Court's Concluding Remarks on the Freedom of Movement*

The Court concluded that FIFA's principle of joint responsibility and the sporting sanctions imposed solely based on presumptions – together with the non-issuance of the ITC pending an employment dispute – infringe the principle of free movement of workers.

This is the case "*unless it is established that those rules, as interpreted and applied on the territory of the European Union, do not go beyond what is necessary for the pursuit of the objective consisting in ensuring the regularity of interclub football competitions, while maintaining a certain degree of stability in the player rosters of the professional football clubs*".[131]

Thus, the Court left the final determination on the proportionality of the FIFA regulations in question to the referring Belgian court. Specifically, it is now for the Belgian court to decide whether the FIFA restrictions, in the light of the specific facts of the case, are proportionate under Art. 45 TFEU.

Given the jurisprudence (including *Mutu* and other relevant cases), FIFA might argue that its regulations are not applied as rigidly or disproportionately as they may appear from a straightforward reading of the judgment. FIFA may assert that the joint liability principle and related sanctions are applied on a case-by-case way, thus adhering to the proportionality principle by considering the unique circumstances of each situation.

However, if we add on the Belgian judge's doubts in his preliminary question to the Court of Justice, the strong criticisms voiced by the Court regarding the necessity and proportionality of the contested FIFA rules, and the clarification on the rationale of the principle of joint liability provided by FIFA itself in its commentary,[132] it seems unlikely that the referral court may depart from the EU judges' interpretation.

11. *On the Compliance of the FIFA Rules with EU Competition Law Provisions*

In contrast to the *Bosman* case, where the Court did not find it necessary to assess those rules from a competition law perspective, in the *Diarra* case the Court went further by also examining the RSTP through the lens of competition law.

The rationale behind this approach is clearly articulated: "*since each of those two articles of the FEU Treaty [i.e. Art. 45 and Art. 101] has its own objective and its own specific conditions of application, since the application of the former does not preclude the application of the latter and vice versa, and since the consequences of an infringement, if established, are not the*

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[131] ECJ, *BZ v. FIFA and URBSFA*, para. 112.

[132] See above para. 4.

same in both cases, it is appropriate that the Court should interpret them in turn, as the referring court requests".[133]

Turning to Art. 101(1) TFEU, the Court of Justice first reaffirmed its well established jurisprudence according to which: (a) FIFA must be considered as an association of (associations of) undertakings;[134] (b) FIFA regulations are to be considered as decisions by association of undertakings under Art. 101(1) TFEU;[135] and (c) they surely have "*effect on trade between Member States*" because the FIFA regulations have a "*universal geographical scope*".[136]

Then the Court addressed the traditional dichotomy between "restrictions by object" and "restrictions by effect" stressing that the latter refers exclusively to certain types of coordination between undertakings, which reveal a sufficient degree of harmfulness to competition for it to be considered unnecessary to examine their effects.[137]

In assessing whether an agreement is inherently anti-competitive, the Court reiterated that it must examine: (a) the substance of the agreement, (b) the economic and legal context of the agreement and (c) the aims which it seeks to achieve.

In the case at stake, the combined reading of the FIFA rules at issue show that they "*are such as to constitute a generalized and drastic restriction, from a substantive viewpoint, of the competition which, in their absence, could pit any professional football club established in a Member State against any other professional football club established in another Member State as regards the recruitment of players already employed by a given club*".[138] Moreover, the Court of Justice stressed that "*the possibility of recruiting such players is an essential parameter of competition in the interclub professional football sector*".[139]

In order to dispel any doubts regarding the restrictive scope of the rules in question, the Court also highlighted that the "*generalized and drastic restriction of cross-border competition between clubs in the form of the unilateral*

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[133] ECJ, *BZ v. FIFA and URBSFA*, para. 83.
[134] *Idem*, para. 118.
[135] *Idem*, para. 121.
[136] *Idem*, para. 123.
[137] *Idem*, paras. 127 and 129. In particular, the Court refers to "*certain types of horizontal agreements other than cartels, for example those which lead to the exclusion of competing undertakings from the market*", as well as "*certain types of decisions by associations of undertakings*" concerning "*not only the goods or services marketed by the undertakings concerned, and therefore supply, but also the resources of any kind which the undertakings need to produce those goods or services, and therefore demand. The collusive behaviour of those undertakings may thus consist, for example, in sharing suppliers, using their collective market power to fix the price at which they will purchase their inputs or, (...), limiting or controlling the essential parameter of competition consisting, in certain sectors or on certain markets, in the recruitment of highly skilled workers, such as players who have already been trained in the professional football sector*".
[138] *Idem*, para. 138.
[139] *Ibidem*.

recruitment of players who are already employed, and therefore of access by clubs to the essence of the 'resources' represented by players, extends, from a geographic viewpoint, to the entire territory of the European Union and, from a temporal viewpoint, is permanent, in that it covers the entire duration of each of the employment contracts which a player may conclude successively with one club, then, in the event of a negotiated transfer to another club, with the latter club, as is also apparent from Article 13 of the RSTP".[140]

Despite that, the Court of Justice acknowledged that an association such as FIFA is fully entitled to establish common regulations to organize and coordinate international competitions, ensuring fairness, equal opportunity, and merit-based participation. Moreover, it has the authority to set rules governing how professional clubs form teams and how players compete, as well as to enforce compliance with these rules through sanctions when necessary.[141]

It follows that, in football competitions based on sporting merit, it may be legitimate for an association such as FIFA "*to seek to ensure, to a certain extent, the stability of the composition of the player rosters that serve as a pool for the teams which are put together by those clubs during a given season – for example by proscribing, as Article 16 of the RSTP does, the unilateral termination of employment contracts during the season – or during a given year*".[142]

Nevertheless, the Court emphatically warned that this "*cannot mean that it must be accepted that any possibility for clubs to engage in cross-border competition by unilaterally recruiting players already employed by a club established in another Member State or players whose employment contract with such a club has allegedly been terminated without just cause should be restricted in a generalized, drastic and permanent manner, or even prevented, throughout the territory of the European Union*".[143]

On this point, the reasoning of the Court of Justice is unequivocal and straightforward: "*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 national and local markets, to the advantage of the clubs as a whole*".[144]

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[140] ECJ, *BZ v. FIFA and URBSFA*, para. 140.

[141] The Court acknowledges that FIFA is legitimate also, "*to subject the organization and conduct of international competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall annual or seasonal calendar as well as, more broadly, to promote, in a suitable and effective manner, the holding of sporting competitions based on equal opportunities and merit". In particular, it is legitimate for such an association to regulate, by means of such common rules, the conditions in which professional football clubs can put together teams participating in such competitions and the conditions in which the players themselves may take part in them. Lastly, it is legitimate to ensure effective compliance with those common rules by means of rules allowing sanctions to be imposed*". Para. 143 and case law therein referred.

[142] ECJ, *BZ v. FIFA and URBSFA*, para. 144.

[143] *Idem*, para. 145.

[144] *Ibidem.*

In other words, while the rules are framed as measures to prevent aggressive recruitment practices, they essentially function as no-poaching agreements between clubs, resulting in the artificial segmentation of national and local markets, which benefit the clubs collectively.[145]

The Court went on emphasizing 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 the terms of that contract, are sufficient to ensure, on the one hand, the ongoing presence of that player in the first club mentioned, in accordance with those terms, and, on the other, the normal application between clubs of market rules, which allow them, on expiry of the normal term of the contract, or earlier if a financial agreement is concluded between clubs, to recruit the player in question*".[146]

Based on the above analysis, the Court concluded that the rules in question must be regarded as having the object of restricting, or even preventing, the competition throughout the territory of the European Union. Consequently, the *Meca Medina/Wouter* test (according to which an agreement falls outside the scope of Art. 101(1) TFEU provided that the consequential anti-competitive effects are inherent to a legitimate objective and do not go beyond what is necessary to attain the pursuit of that objective) does not apply.[147]

In so doing, the Court of Justice reaffirmed its jurisprudence established in the 'Christmas 2023 trilogy' without, however, offering any further detailed explanation to support this "new" approach.

Therefore, it is only pursuant to Art. 101(3) TFEU and provided that all the conditions therein are satisfied, that the benefit of an exemption from the prohibition laid down in Art. 101(1) TFEU may be granted.[148] This is the least comprehensive section of the Court's ruling. In fact, the EU judges simply focused on the indispensability or necessity of the conduct in question leaving to the national court the task to assess whether the four cumulative conditions are met.[149]

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[145] See also the currently pending case *CD Tondela – Futebol, SAD et Others/Portuguese Antitrust Authority* (Case C-133/24) concerning the compatibility with EU competition law of the agreement signed by all of the Portuguese First-Division professional football clubs and many of the Portuguese Second-Division professional football clubs under which those clubs agreed not to sign up any professional footballers in those divisions who had unilaterally terminated their employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of that pandemic, in particular to extend the sports season.

[146] ECJ, *BZ v. FIFA and URBSFA*, para. 145. It is worth noting that in this para. the EU judges mention the "classic mechanism of contract law" whereas in their analysis of the compensation criteria enlisted in Art. 17(1), they expressly point to the Belgian employment law as referred by Diarra in the proceedings.

[147] *Idem*, para. 148.

[148] *Idem*, para. 151 and caselaw therein referred.

[149] *Idem*, para. 157.

However, as already stated above, the margin of appreciation left to the national judge seems to be very narrow, especially considering the strong emphasis placed by the Court of Justice on key aspects of the case. The Court specifically underscored two critical points that significantly constrain the national court's discretion in interpreting the rules at stake.

Firstly, the Court of Justice highlighted that the RSTP provisions under scrutiny are marked by a combination of factors, many of which are discretionary and/or disproportionate. This is of particular importance because the discretionary nature of the rules gives rise to a level of uncertainty and variability in their application, while the disproportionate aspects suggest that the restrictions imposed by these rules may go beyond what is necessary to achieve their stated objectives.[150]

Secondly, the EU judges drew attention to the generalized, drastic, and permanent nature of the restriction on cross-border competition. By preventing clubs from unilaterally recruiting highly trained players, these rules impose an enduring and significant constraint on clubs' ability to compete across borders within the European Union. This restriction, according to the Court, is not only broad in scope but also affects the very essence of competition in the professional football sector, namely the recruitment of talent.[151]

Crucially, the Court of Justice explained that "*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*".[152]

The EU judges were essentially signalling that the mere presumption of efficiency gains is not enough to justify rules that impose such sweeping and restrictive measures.

This means that the national court must apply a high level of scrutiny when approaching the application of the RSTP rules and it is not only tasked with assessing the general proportionality of the rules, but also must actively examine whether the restrictions are genuinely necessary to achieve the stated objectives, particularly in light of their potentially disproportionate impact on cross-border competition.

12. *Some Considerations on the Temporal Effects of the Ruling*

Preliminary rulings are binding from the moment of their publication and, in principle, *ex tunc* (with retroactive force), unless the Court explicitly provides otherwise in application of the general principle of legal certainty inherent to the European legal order. Moreover, these rulings are binding not only on the referring court, but also on all national courts.[153]

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[150] *Ibidem.*
[151] *Ibidem.*
[152] *Ibidem.*
[153] ECJ, Judgment of the Court of 11 June 1987, *Pretore di Salò*, Case 14/86, ECLI:EU:C:1987:275; ECJ, Order of the Court of 5 March 1986, *Wünsche Handelsgesellschaft GmbH & Co. v Federal*

In the *Diarra* case, the Court of Justice clearly stated that the FIFA rules in question are restrictive of both free movement of workers and competition. However, the final determination on the incompatibility of those rules with EU law is left to the referring Belgian court. Specifically, the latter must assess whether: (a) those rules, as interpreted and applied in the territory of the European Union, do not go beyond what is necessary to achieve the goal of ensuring the regularity of inter-club football competitions, while maintaining a certain degree of stability in the player rosters of the professional football clubs; and (b) it can be demonstrated, through convincing arguments and evidence, that all of the conditions under Art. 101(3) TFEU are met.

Thus, it seems that the binding effect of the *Diarra* ruling should be confined to the restrictive nature of the FIFA rules and should not extend to the definitive incompatibility of these rules with Art. 45 TFEU and Art. 101 TFEU. Moreover, even if the Belgian referring court should declare the FIFA rules in question as disproportionate, such a national finding could not have retroactive effect, particularly with respect to past situations where the compensation pursuant to these rules had already been paid.

The distinction between the *Diarra* ruling and the *Bosman* case is significant. In 1995, the Court ruled that Art. 48 EEC Treaty (now Art. 45 TFEU) precluded UEFA rules requiring clubs to pay a transfer or training fee for a player transferring from one Member State to another. However, the Court acknowledged that overriding considerations of legal certainty were against calling in question legal situations whose effects had already been exhausted. Accordingly, it stated that its ruling could not be applied to claims for fees already paid or payable under obligations that arose before the date of the judgment, to avoid unsettling situations where the legal effects had already been completed.[154]

In contrast, the *Diarra* ruling has no retroactive effects simply because the Court of Justice did not declare FIFA's rules incompatible with the EU law giving the last word to the national referring court.

Accordingly, players or clubs seeking compensation for damages incurred due to the application of Art. 17 FIFA RSTP would face the following scenario.

Firstly, they would need to establish whether the FIFA rules are not only restrictive, but also disproportionate and thus incompatible with EU law. The decision of the Belgian court on this matter will not bind judges in other EU Member States.

Secondly, while the Court of Justice did not declare provisions such as Art. 13 (contract stability), Art. 16 (prohibition on unilateral contract termination

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Republic of Germany, Case 69/85, ECLI:EU:C:1986:104. For the sake of completeness, it is opportune to remind that the national courts can seize the Court again before solving the main case in case they still encounter difficulties in understanding or enforcing the ruling, when it is referring a new question of law or new elements, that may determine the Court to give a different answer to a question already referred.

[154] ECJ, *Bosman*, para. 242.

during the season), or Art. 17(1) (compensation for breach) of the FIFA RSTP incompatible with EU law, clubs and players cannot simply claim that compensation paid was unjustified due to incompatibility with EU law. They must demonstrate that the amount paid was excessive in relation to what would have been due under national legal rules, assuming the claims are not barred by the statute of limitations.

13. The Geographical Scope of Application of the Ruling

Regarding Art. 45 TFEU, the Court of Justice ruled that FIFA regulations are, "*likely to disadvantage professional soccer players who have their residence or place of work in their Member State of origin and who wish to carry out their economic activity on behalf of a new club established in the territory of another Member State by unilaterally terminating […] their employment contract with their former club, for a reason which the latter claims or risks claiming, rightly or wrongly, is not just*".[155]

Accordingly, the scope of application of the *Diarra* ruling must be restricted to cases where players invoke their right to freely move from an EU Member State to another one to carry out his/her economic activity.

In regard to Art. 101 TFEU, the Court of Justice concluded that FIFA rules allow for a "*generalized, drastic and permanent restriction, or even a prevention, throughout the entire territory of the European Union, of any possibility for clubs to engage in cross-border competition by unilaterally recruiting players already engaged by a club established in another Member State or players whose employment contract with such a club is allegedly terminated without just cause*".[156]

At first glance, it appears that the Court intended to limit the scope of application of the ruling to cases concerning EU club competitions on the market for players already recruited by a club established in another EU Member State or for players whose employment contract with such an EU club is allegedly terminated without just cause. However, in the *Diarra* case the player whose contract was terminated without just cause was hired by a club established outside the European Union.

To this regard, according to the "effects" doctrine,[157] EU antitrust rules can be applied extra-territorially in cases where the anticompetitive effects occur

[155] ECJ, *BZ v. FIFA and URBSFA*, para. 91.

[156] *Idem*, para. 145.

[157] In particular, EU competition law applies not only when foreign anticompetitive arrangements are implemented in the EU, (e.g. ECJ Judgment of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120), but also whenever foreign conduct has foreseeable, immediate and substantial effect in the EU (e.g. Judgment of the Court of First Instance of 25 March 1999, *Gencor Ltd v Commission of the European Communities*, Case T-102/96, ECLI:EU:T:1999:65; Judgment of the Court of 6 September 2017, *Intel v. Commission*, Case C 413/14 P, ECLI:EU:C:2017:632).

within the EU territory (provided that such effects are not merely indirect or remote), even if the anticompetitive conduct was carried out outside the EU territory.

Therefore, it seems that the *Diarra* ruling is likely to apply in all cases where it is possible to argue that the anticompetitive effects of FIFA rules occur within the EU territory, namely:

(i) where the two clubs involved are both established in a Member State;

(ii) where, like in the *Diarra* case, the former club is established in a non-Member State and the new (even only interested) club is established in a Member State; and

(iii) where the former club is established in a Member State and the new (even only interested) club is established in a non-Member State.

Ultimately, it could be argued that the *Diarra* ruling does not apply to cases where both clubs involved are located in a non-EU Member State, unless an anti-competitive effect, even a potential one, may be triggered within the EU territory, for instance by the offer of a club from the European Union, provided such an offer can be proven.

It is interesting to note that in her above recalled analysis of the FIFA transfer rules in the *Balog* case, the Advocate General Stix-Hackle argued that "*the prohibition in Article 81 (now Article 101 TFEU) catches only appreciable interferences with competition within the common market. That criterion does not, however, require that interference actually has appreciable effects; instead, potential effects suffice. Foreseeability with a sufficient degree of probability of appreciable adverse effects is enough*".[158]

Despite the above, it must be recognized that, although EU law directly applies only to EU Member States, the influence of the EU legal framework extends globally due to the role of European football leagues, clubs, and players in the global football market. This is the reason why, after the *Bosman* ruling, FIFA was under pressure to harmonize its transfer system to ensure compatibility between EU and non-EU football markets. And so, it did.

Thus, it is highly unlikely that FIFA would permit a geographical fragmentation of its regulations, as such an approach would ultimately undermine the integrity of the entire football ecosystem. Consequently, as already evidenced

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[158] "Since the threshold of appreciability is very low, no special study of the market share of the transfers affected by the transfer regulations is needed. An indication of the great importance of the transfer regulations for competition is the strong position and importance of the clubs and associations on the various markets.
The transfer rules at issue have the particular feature that it is a system applied worldwide. FIFA comprises over 200 national associations, to which the individual football clubs of the countries concerned in turn belong. All sources of supply are thus in principle brought into the transfer system, although there are some national differences. The circumstance that as a consequence of the Bosman judgment certain transfers were excluded from the system at issue does not change the appreciable effect of the interferences, since the alternative possibilities for clubs which wish to recruit players nevertheless remain restricted". A. EGGER and C. STIX-HACKL, *Sports and Competition law: A Never-ending Story*, 81-91.

in the *Bosman* case, once FIFA shall determine how to align its rules with the *Diarra* ruling, it might introduce a unitary regulation, effectively "globalizing" the effects of such a judgement.

14. *The Impact of the Diarra Case on the Sports World and the Need to Think "Outside the Box"*

In the aftermath of the *Diarra* case, the most recurring question was: *what happens now?* Although the answer is not straightforward, any response must necessarily consider several key factors.

Regarding the legal dispute currently pending before the Belgian judiciary, the matter is now before the Court of Appeal of Mons for further adjudication.[159]

According to the Court of Justice, the Belgian court has to establish if and to what extent the FIFA rules in question, as interpreted and applied on the territory of the European Union, go beyond what is necessary for the pursuit of the objective, which consists of ensuring the regularity of interclub football competitions, while maintaining a certain degree of stability in the player rosters of the professional football clubs.

As already observed above,[160] the wording of the ruling greatly reduces the referring court's margin of appreciation. Moreover, the burden of proof upon FIFA is heavy given that the latter can, at best, reasonably rely solely on the issuance of a provisional ITC which has always been released in case of a dispute. By contrast, regarding the criteria to determine the amount of the compensation and the joint liability principle, FIFA's Commentary on the RSTP precludes any possibility of discharging the evidentiary burden required by the Court of Justice.

From a competition law perspective, however, FIFA's burden of proof is even more considerable, given that it must show that the four cumulative conditions provided for in Art. 101(3) TFEU are fulfilled. FIFA should demonstrate the highly unlikely circumstance that the efficiency gains expected from the current rules may not be attained by measures which are less restrictive of competition.

To this end, a more accurate analysis of the real nature of the activity of football players (at least the so-called top players) should be a priority for both FIFA and the referring court.

In fact, the Court of Justice regards football players as ordinary employees (workers) and as such bound by the EU free movement rules.

By contrast, for the clubs, football players are employees and intangible assets to be registered in their balance sheets at fair and true value. Since both perspectives have their own validity, given that there are some football players that are income-generating assets for the clubs in the same way as a stadium or a

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[159] Just for the sake of completeness, the ruling of the referring court could still be appealed to the Belgian Supreme Court, which in turn could refer the matter back to the Court of Justice for clarifications in light of FIFA's possible arguments.

[160] See above para. 7.

sponsorship contract, those players should not be treated just as ordinary employees. At the same time, the clubs' attitude to indiscriminately consider all players as intangible assets represents an evident alteration of reality, which is motivated by economic purposes.

The immediate and most significant impact of the *Diarra* ruling was felt within FIFA's own disciplinary structures. Surprisingly, following the European Court of Justice's judgment, the letter dated 25 November 2024 and signed by the Chairman of the FIFA Disciplinary Committee, announcing the suspension of all pending disciplinary cases concerning the enforcement of financial entitlements awarded based on the provisions of Art. 17 RSTP, has become of public knowledge.[161]

At a regulatory level there is no doubt that FIFA will intervene to make its rules compatible with EU law. Therefore, the real question is not whether FIFA is ready to amend its own rules, but when, how and to what extent.

Regarding the ITC, it is proposed that a rephrasing of the current rule in line of course with the *Diarra* judgement, could be sufficient, given that the Court of Justice's criticism pointed to the fact that the possibility to issue a provisional ITC in case of a dispute, and therefore register a player on a provisional basis, is not mentioned within the rule at issue.

The same is true for the joint liability principle. As examined above, the Court does not seem to oppose to such a principle, yet the EU judges have said that its automatic application does not comply with the principle of proportionality.

To correct this incompatibility, potential approaches could be tailored to the specific context of football.

First, a case-by-case comprehensive liability assessment, rather than a rigid and automatic application of the joint liability, could help to comply with the principle of proportionality. This approach requires an evaluation of each dispute based on specific factors, such as the role of the new club in the dispute (e.g. whether it encouraged the contract breach or not and when it approached the player).

Moreover, the Court itself seems to suggest a solution when it states that "*the former club (could) be asked to provide sufficient evidence to support a finding that the new club induced the player to breach his or her contract*".[162] In so doing, the system may prevent disproportionately high financial risks that

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[161] Moreover, the suspension also includes cases where, following a decision of the Football Tribunal, a subsequent decision of the FIFA Disciplinary Committee has been rendered based on Art. 21 of the FIFA Disciplinary Code, ed. 2023 or on Art. 15 ed. 2019.
See Football Legal, *FIFA Suspends All Pending Cases Before the FIFA Disciplinary Committee in Relation to Article 17!,* available at https://www.football-legal.com/content/fifa-suspends-all-pending-cases-before-the-fifa-disciplinary-committee-in-relation-to-article-17 (*last accessed on 29 November 2024*).

[162] ECJ, *BZ v. FIFA and URBSFA*, case C- 650/22, para. 110.

deter new clubs from signing players in good faith.[163] Thus, it is submitted that the current rule could be amended in order to expressly reflect the following:

(i) The former club must first establish facts from which it may be inferred that there has been an inducement to breach the contract; only after such evidence is provided, the burden of proof shifts to the new club, which must then prove that it did not induce the player to breach the contract.

(ii) The principle of joint liability does not apply when the new contract of the player terminating the contract without just cause is signed after the date of expiry of the earlier employment agreement.

(iii) Cases in which it is the club's decision to dismiss the player and there is clear evidence that the new club was not involved in any way in the termination of the employment relationship between the old club and the player (i.e. CAS case law evidenced in *Mutu)*.

As for the criteria to determine the compensation in case of termination of contract without just cause, given that the Court of Justice rejected all the criteria mentioned in Art. 17 RSTP FIFA, the latter should now make the effort to identify one or more methods for the calculation of the termination fee that are clear, precise, non-discriminatory and proportionate. After all, in 2018 FIFA introduced the current and uncontested method of calculation of compensation in favour of the players contained in Art. 17(1) paras. (i) and (ii).

In the meantime, eventually players and clubs will insert more and more buy out clauses in their employment contracts which nevertheless need to satisfy the criteria of proportionality and reciprocity as per the DRC and CAS jurisprudence.

In the perspective of a regulatory reform, the sports stakeholders should explore the possibility to enhance the social dialogue at least at European level which has been in place since many years precisely thanks to the European Commission.[164]

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[163] In this sense, see F.M. De Weger and C.F.W. De Jong*, Aansprakelijkheid van (nieuwe) clubs vanuit FIFA RSTP, Tijdschrift voor Sport & Recht* 2020-3/4, 55, available at https://bmdw.nl/wp-content/uploads/F.M.-de-Weger-C.F.W.-de-Jong-Aansprakelijkheid-van-nieuwe-clubs-vanuit-FIFA-RSTP.pdf (*last accessed on 20 November 2024*).The Authors examine all relevant DRC and CAS jurisprudence coming to the conclusion that only in exceptional circumstances the principle of Joint Responsibility should be applied.

[164] See M. Colucci and A. Geeraert, *Social Dialogue in European Professional Football*, The International Sports Law Journal, Asser Press, issue 3-4, 2011. It is noteworthy that, according to a legal scholar, "the CJEU has not yet had to reconcile the provisions of a collective bargaining agreement applicable to the employment of athletes in a professional sports competition with Art. 101 TFEU or to determine conclusively whether a regulatory rule that produces restrictive effects in a market and is collectively agreed by stakeholders is justified under the *Meca Medina* test. Accordingly, there is an element of uncertainty surrounding the scope of the exception established in *Albany* and *FNV*, with respect to the unique working conditions of athletes that may produce anti-competitive effects and harm competition in the market, for example, by a salary cap that has an anti-competitive object", L. O'Leary, *ISU, Royal Antwerp, European Superleague & employment relations in sport*, The International Sports Law Journal, 2023, 23,431-435.

In that regard, we like to remind that, unlike what happened in the aftermath of the *Bosman* case, when it took 6 years to FIFA and UEFA to reach an agreement on transfer of players in 2001, following the *Diarra* judgement, FIFA promptly has conducted an open consultation process acknowledging the evolution of the transfer system and the importance to revise it.[165]

For the sake of completeness, it should not be forgotten that collective bargaining can prevent the application of competition rules under the so-called *Albany* exception,[166] but not those on free movement.[167]

Then, should the judgment lead to a major overhaul of the transfer system and a related reduction in transfer fees, given the possibility of losing a player based on the unilateral termination of the contract against a much lower compensation, it may be important to also examine the impact that this would have

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[165] FIFA, *FIFA receives extensive feedback on possible modifications to Regulations on the Status and Transfer of Players*, available at https://inside.fifa.com/legal/football-regulatory/news/fifa-receives-extensive-feedback-possible-modifications-regulations-status-transfer-players (*last accessed on 30 November 2024*).

[166] This exception refers to three judgments of the Court, handed down on the same day, relating to compulsory affiliation to sectoral pension schemes. Thus, in *Albany*, a Dutch company challenged the compulsory affiliation of all workers in a given sector to a supplementary pension scheme, arguing that such a requirement restricted competition and infringed what is now Art. 101 TFEU because companies could not offer alternative pensions to attract employees. In its judgment of 21 September 1999, *Albany*, case C 67/96, EU:C:1999:430, para. 59 et seq., the Court held that while it was 'beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers', such agreements 'must, by virtue of their nature and purpose, be regarded as falling outside the scope of Art. [101(1) TFEU]'. See also judgments of 21 September 1999, *Brentjens'*, cases C 115/97 to C 117/97, EU:C:1999:434, para. 56 et seq., and of 21 September 1999, *Drijvende Bokken*, case C 219/97, EU:C:1999:437, para. 46 et seq.

[167] See Opinion of Advocate General Spuznar who, in para. of his Opinion, states: " *the contested provisions constitute decisions by associations of undertakings, within the meaning of Article 101(1) TFEU, (23) which are capable of affecting trade between Member States within the meaning of that same provision. (24) In this connection, I should like to stress that the fact that the contested provisions concern what would typically be regarded as labour law does not alter this finding. In particular, what has become known as the 'Albany exception' does not apply to the present case, for the simple reason that the contested provisions do not amount to collective agreements between employers and employees. Rather, as is rightly emphasised by BZ, it is because of the absence of such agreements that FIFA has adopted the RSTP*", Opinion of the Advocate General M. Szpunar, *BZ v. FIFA and URBSFA*, case C- 650/22, ECLI:EU:C:2024:375.

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on the training compensation system as well as on the FIFA's solidarity mechanism, which is financed by the compensation paid for an early contract termination and related club transfer.[168]

The *Diarra* case may have consequences for football clubs too. The foreseeable relaxation of the joint and severally liability principle as currently regulated by FIFA could ultimately enrich clubs that are less reluctant to sign players who are already under contract with other clubs.

Moreover, it has been rightly pointed out that the Court of Justice's criticism on the transfer value of players as a parameter for establishing compensation in the event of termination without just cause risks to profoundly impact the players' valuations, with possible, yet unpredictable, effects on player trading and, accordingly, on clubs' accounting books.[169]

The removal of constraints on player mobility may reduce the compensation amounts clubs can demand. This could reduce transfer-related revenue and impact on the reporting of capital gains derived from players' transfers, especially for clubs heavily reliant on transfer markets for income.

Clubs may face challenges in valuing players as assets on balance sheets.[170] Previously, strict contractual obligations provided financial predictability, but easier player exits might lead to shorter contracts, affecting amortization schedules and reducing stakeholders/investors' expectations in the relevant clubs.[171]

The Court's decision might widen disparities between large and small clubs. Wealthier clubs may capitalize on reduced transfer fees and sign talent at

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[168] Art. 21 of the RSTP states that if a professional is transferred before the expiry of his contract, any club that has contributed to his or her education and training shall receive a proportion of the compensation paid to the former club. The solidarity contribution is in principle calculated based on 5% of any compensation and reflects the number of years (calculated pro-rata if less than one year) a player was registered with the relevant club(s) between the calendar years of his 12th and 23rd birthdays, in accordance with Annex 5 of the RSTP.

[169] R. Houben at the occasion of the AIAS conference on international Sports Law, Genova, 14 October 2024.

[170] M.V. Lenz, *Contractual Stability and Transfer System from an Economic Point of View*, Contractual Stability, M. Colucci (ed.), SLPC, 2011, 313. The Author emphasizes that: "*Contractual Stability is a principle of major importance for securing sporting and economic interests. Both clubs and players are looking for planning security. Focusing on the club's economic perspective, players are considered as assets and thus, directly reflected in accounts and balance sheets of clubs respectively their affiliated companies. A lack of contractual stability reduces planning security and influences the clubs' finances significantly: firstly, the squad defines the foundation of sporting and commercial success. Secondly, taking the external ownership structures of clubs into account, investors build expectations and react consistently on the stock market. The withdrawal of majority shareholders – i.e. due to reduced profit expectations – can lead to a chain reaction as new stakeholders reduce their expectations and takeover bids accordingly. Players consequently do have a strong signalling function for the sporting success that leads to major importance of contractual stability if only from a pure economic point of view. From the player's perspective, the specificities of a career in sports – i.e. the short career period and the high risks associated with their activities – necessitate contractual planning security and outweigh the constrained freedom of movement*".

[171] *Idem*, 313-315.

more affordable prices, while smaller clubs, which rely on transfer profits as a core revenue source, may struggle to maintain their financial stability.

As for the players, the *Diarra* case highlighted that restrictive transfer and compensation rules could impede players' rights to freely move and seek employment across the EU. This judgment supports EU players' freedom to change clubs, reinforcing their rights to pursue career opportunities without facing disproportionate barriers.

In other words, the *Diarra* ruling is likely to increase the contractual power of some players, carrying them higher remuneration, as clubs will not need to pay any transfer fee or compensation based on the principle of joint liability.

By criticizing rules that impose stringent compensation or sanctions, the ruling may help to protect players from excessive contractual sanctions or barriers when seeking to terminate contracts or move to new teams. This may count for athlete's career security, whose occupations does not last for long.

At the same time, most footballers may face some consequences. If there is a shift towards shorter contracts, even annual ones, less famous and talented players will find themselves at risk of having to negotiate a new contract every year. Currently, when players sign a contract, they know that the contract binds the parties for a given period (five years maximum according to FIFA).[172]

In other words, the risk of negotiating new contracts annually could create financial instability for players with less bargaining power, highlighting the need for a careful balance between flexibility and long-term security in players' contracts.

Without any doubts, the *Diarra* judgment offers a unique opportunity for all sports stakeholders to "think out of the box" and reimagine the international transfer system considering the significant evolution football has undergone over the past decades.

This case is a powerful reminder that EU laws apply to the sports sector, underscoring the need to balance the preservation of sporting integrity with the fundamental principles of free movement and competition. While safeguarding the core values of sport is essential, regulatory measures must not unduly restrict players' mobility or stifle competition among clubs.

Adhering to EU principles ensures that all stakeholders – whether players, clubs, or sports governing bodies – operate within a framework that is fair, transparent, and legally robust. When compliance is achieved through universally agreed-upon, clear and proportionate rules, it benefits all parties and enhances the credibility and long-term legal and economic sustainability of the entire football ecosystem.

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[172] For the sake of completeness, Art. 18 RSTP provides that "*Contracts of any other length shall only be permitted if consistent with national laws*".

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