

## FROM BOSMAN TO DIARRA: THE EU CONTINUES TO IMPOSE LIMITS ON SPORTS AUTHORITY

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After the BOSMAN ruling, for many years everybody believed that both the International and European Football Associations had learned their lesson and understood the need to respect the Fundamental Principles of European Law. Indeed, the European Football Federation proactively submitted its regulations regarding transfer systems to the EU Competition Commission, hoping to avoid a second humiliation like the one in the BOSMAN case. Yet, despite these efforts, in 2024, a decision by the Court of Justice of the European Union concerning footballer Lassana Diarra, which is being heard in the Belgian courts, serves as a reminder to UEFA as well as to the powerful global sports establishment, that the sports authority's power ends where its regulations conflict with the provisions of the international organizations.

### **I. The essence of the Diarra case**

According to Article 9(1) of the RSTP, titled “*International Transfer Certificate*” (ITC):

“Players registered with one association may only be registered with a new association once the latter has received an International Transfer Certificate (ITC) from the former association. The ITC shall be issued free of charge, without any conditions or time limit. Any provisions to the contrary shall be deemed null and void. The association issuing the ITC shall lodge a copy with FIFA. The administrative procedures for issuing the ITC are included in Annexe 3, Article 8 and Annexe 3a of these Regulations.”

Every professional player registered with a club affiliated to one association may be registered with a club affiliated to another association only after the ITC has been issued by the first association and the new association has confirmed its receipt. Upon receiving the ITC request, the first association must immediately ask the former club and the professional player to confirm whether the player's contract has expired, whether an early mutual termination has been agreed upon, or whether there is a contractual dispute. Within seven days from the ITC request, the first association must either issue the ITC in favor of the new association or reject the ITC request, stating the reason for refusal — which may only be that the contract between the first club and the professional player has not yet expired or that there is no mutual agreement for early termination.

Once an ITC has been issued in accordance with the above procedure, the player may be registered and play for the new club. If there are outstanding issues between the player and the former club, these shall be resolved in accordance with Article 22 of the RSTP.

As is evident, the RSTP establishes clear rules for the player transfer process, particularly regarding the creation, issuance, and acceptance of the ITC.

Lassana Diarra was a former professional footballer and resident of Paris, France. On 20 August 2013, he signed a four-year contract with the football club Lokomotiv Moscow, a professional club based in Russia. On 22 August 2014, Lokomotiv Moscow unilaterally terminated the contract, citing reasons related to his conduct — namely, termination for just cause attributable to the player. On 15 September 2014, Diarra submitted a claim to the FIFA Dispute Resolution Chamber (DRC) under Articles 22(a) and 24 of the RSTP, seeking €20 million in compensation for “termination of contract without just cause” as defined in Article 17 of the RSTP.

Subsequently, Diarra filed a counterclaim, requesting that the DRC award him outstanding wages and compensation equal to the amount he would have earned had the contract been performed until its natural expiry.

While awaiting the DRC’s decision, Diarra stated that he sought to sign with another professional club but faced difficulties, since any club signing him risked being held jointly liable for the compensation owed to Lokomotiv Moscow (under Article 17 of the RSTP) if the DRC ultimately ruled against him.

On 19 February 2015, the Belgian club Sporting du Pays de Charleroi SA offered him employment, but only under certain conditions: that he be registered and eligible to play, and that the club would not be held liable for any compensation due to Lokomotiv Moscow.

Following this, on 20 February 2015, Diarra contacted FIFA and the URBSFA (Royal Belgian Football Association), seeking assurances that he could be registered and allowed to play, and that Article 17 of the RSTP would not apply against Charleroi. FIFA replied that only the DRC was competent to decide the matter, while the URBSFA stated that registration could not occur without an ITC from Lokomotiv Moscow.

The DRC issued its decision on 18 May 2015, partially upholding Lokomotiv Moscow’s claim and ordering the player to pay €10.5 million in compensation, while rejecting Diarra’s counterclaim. Diarra appealed to the Court of Arbitration for Sport (CAS), which upheld the DRC’s decision on 27 May 2016.

On 9 December 2015, Diarra filed a civil lawsuit against FIFA and the URBSFA before the Ordinary Courts of Charleroi, seeking €6 million in damages for harm allegedly suffered due to the rules applied against him.

The Charleroi Court examined the case and referred a preliminary question to the Court of Justice of the European Union (CJEU), summarized as follows:

*Is Article 17 of the RSTP, as applied by FIFA, compatible with European Un-*

*ion law, and in particular with the provisions on the free movement of workers and the freedom of establishment?*

This question concerned the interpretation of Articles 45 and 49 of the Treaty on the Functioning of the European Union (TFEU) and the principles derived therefrom, particularly regarding proportionality and the respect for free movement. The CJEU was thus asked to determine whether the provisions of Article 17 of the RSTP disproportionately restrict that freedom.

The question therefore was whether FIFA's rules — specifically Article 17 of the RSTP — comply with EU law, and in particular:

1. Whether the liability-sharing mechanism for compensation under Article 17 restricts the free movement of workers and freedom of establishment; and
2. Whether those rules are proportionate to the legitimate objective pursued, namely the protection of contractual stability in professional football.

According to the **Principle of Proportionality**, which the CJEU almost always applies in sports-related cases, any restriction on free movement must be justified and must not exceed what is strictly necessary to achieve a legitimate objective.

According to established case law of the CJEU, insofar as sport constitutes an economic activity, it is subject to EU law governing such activities, and only certain specific rules — adopted purely for non-economic reasons and relating exclusively to sporting matters — may be excluded from this scope. Such examples include rules excluding foreign players from national competitions or criteria for ranking athletes in individual tournaments. The rules at issue in this case do not fall within those exceptions. This exemption cannot be used to exclude an entire sporting activity from the scope of EU economic law.

Moreover, beyond the above-mentioned principles, rules adopted by sports associations governing paid employment, the provision of services by professional or semi-professional athletes, or even those indirectly affecting such employment, may fall within the scope of Articles 45, 49, and 56 TFEU.

Additionally, the rules or conduct of such associations may fall under EU competition law, provided the relevant conditions are met. This means that such associations may be classified as “undertakings” within the meaning of Articles 101 and 102 TFEU, or that the contested rules may be deemed “decisions of associations of undertakings” under Article 101 TFEU.

The rules in this case were found to have a direct impact on football players' employment, as they regulate the employment contracts of professional players, determining their working conditions and, indirectly, the related economic activity and their participation in competitions — the core of their professional activity. The composition of teams is one of the essential parameters of the competitions in which professional football clubs participate, and these competitions generate economic activity. Therefore, rules concerning player contracts or transfers must be regarded as directly affecting the conditions of participation in

that economic activity and competition between professional football clubs engaged in it (see judgment of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, para. 61).

These rules, therefore, fall within the scope of Articles 45 and 101 TFEU.

Nevertheless, the CJEU clarified that there are indeed certain undisputed and characteristic features of sporting activity which may, where relevant, be taken into account together with other factors when applying Articles 45 and 101 TFEU — but only within the framework and in accordance with the conditions and criteria set out in each of those provisions (see judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:10).

## II. The Cjeu Decision

Article 45 TFEU was found to prohibit FIFA rules that make the new club of a football player jointly and severally liable with the player for the payment of compensation to the previous club where the player was employed. It also prohibits any dispute between a player and his former club from preventing the player's transfer to a new club. Furthermore, the CJEU held that under Article 101 TFEU, FIFA's rules constitute a decision by an association of undertakings, which is prohibited under Competition Law.

## III. Comparison with the Bosman ruling

It is evident that this decision strongly reminds us of the *Bosman* ruling delivered by the CJEU three decades ago. The difference, however, lies in the fact that the transfer system in the *Bosman* era was designed to strengthen smaller clubs. Smaller clubs did not have the financial capacity to buy top players and were therefore compelled to develop them through their own academies. They thus had an incentive to create new talent, something that larger clubs did not need to do, as they could simply buy talented players once they were already developed.

Under the transfer system of the *Bosman* era, smaller clubs also enjoyed a financial benefit when a player they had developed was purchased by a bigger club. This allowed smaller clubs to acquire better players and remain competitive against larger teams that inevitably attract all talented players. If small clubs produce talented players and all of them end up in large clubs without any benefit to the small ones, then the large clubs will continually grow stronger, while the small ones will become progressively weaker, thus creating a larger gap between them.

This would mean either competitions that include all teams but with no real suspense or balance — since the outcome would be known in advance — or

“closed” leagues reserved for the big clubs, the aristocracy of football, with separate leagues for the rest.

The *Bosman* ruling effectively destroyed FIFA’s plan to prevent this negative scenario. Nevertheless, football authorities devised alternative mechanisms intended to achieve the same balancing effect. Article 20 of the RSTP provides for **Training Compensation**, which must be paid by a player’s new club to his former club up to the age of 23. Furthermore, Article 21 of the RSTP establishes the **Solidarity Mechanism**, according to which, whenever compensation is due for breach of contract, all clubs that contributed to the player’s training are entitled to receive a percentage of that compensation — the so-called *Solidarity Contribution*.

While the *Bosman* decision temporarily disrupted this mechanism for balancing smaller and larger clubs, the *Diarra* decision strikes at football’s protection from a more systemic danger — namely, the interference of ordinary, state courts in sports related cases. Article 17(2) of the RSTP provides that if a player owes compensation for the termination of a contract without just cause, the player and his new club shall be jointly and severally liable for its payment.

Through this mechanism, players cannot avoid fulfilling their financial obligations towards their clubs. If the football system does not maintain its own fast and well-functioning mechanism ensuring that the decisions of sporting tribunals concerning compensation are enforced easily, swiftly, and with minimal bureaucracy — almost automatically — then it is obvious that sporting stakeholders risk turning to state courts instead, moving away from the sports arbitration system.

#### IV. Why the risk is systemic

Sport enjoys a special status known as *autonomy* or *self-governance*. In practice, however, through the regulations of sports federations, the monopoly they maintain, and the enforcement power deriving from the sanction of exclusion, sport has managed to create a parallel *quasi-legal order* that operates alongside national and international legal systems. The establishment of a global sports tribunal, the **Court of Arbitration for Sport (CAS)**, has greatly contributed to the independence of this sporting legal order from state jurisdictions.

Sport appears to possess greater strength than state legal systems, allowing it, in cases of conflict with a single state, to preserve its autonomy relatively easily.

**However**, when sport comes into conflict with associations of states — that is, international bodies — matters become far more complex. The *Bosman* decision, along with other cases adjudicated before the ordinary Swiss courts and

the Swiss Federal Supreme Court, taught the world of sport that **sports-related disputes should never be decided by ordinary judges.**

## V. The three methods used by sport to avoid ordinary courts

The sports world employs three main strategies to avoid the jurisdiction of state courts:

### 1. Influencing the Legislative Process

Sports organizations pressure states to amend their legislation to include favorable provisions and exemptions from general rules. This often occurs in the context of *mega-events* and mainly concerns tax exemptions and the exclusive distribution of tickets backed by state authority. This method is the most commonly used, but it can only be applied at the **national**, not the **global**, level.

### 2. Exclusive Jurisdiction

The requirement that sports-related disputes fall under the exclusive competence of sports adjudicatory bodies is the most effective form of enforcement — one that sport has successfully implemented through the creation of the **CAS**.

### 3. Invoking the Specificity of Sport

This is the least favorable (and usually last-resort) option for sports authorities. It involves appearing before a non-sporting body or court to argue that the unique nature of sport justifies exceptions to general legal rules. In doing so, sport finds itself in the uncomfortable position of acknowledging the jurisdiction of an external authority and having to persuade it to accept as legitimate certain principles taken for granted within sport — such as the necessity of federations' monopoly power.

## VI. Similarities and differences

In the *Bosman* case, what was at stake was the transfer system designed to maintain a balance in the sporting strength of clubs, and therefore to safeguard the quality of football as a spectacle. The *Diarra* case, by contrast, concerns the **independence of sport from state interference**, which would inevitably arise if disputes were resolved by ordinary courts.

In both cases, however, FIFA's regulations imposed burdens on football players and exerted downward pressure on their wages, whereas their abolition liberated players and allowed salaries to rise.

## Conclusions

As soon as the decision was announced, two diametrically opposite reactions emerged. Player associations **celebrated the collapse of FIFA's transfer system**, while FIFA itself **celebrated the (indirect) confirmation of the validity of its transfer framework**, since only a very limited aspect of it was found incompatible with EU law.

So, who is right?

The safest observation is that **neither side is entirely right**. The ruling as an answer to a *preliminary question* referred by a Belgian court, certainly does not abolish the existing transfer system, as it concerns only a very small part of it, and its practical impact will depend on how the Belgian court applies it.

Finally, it must be remembered that this judgment applies only **within the European Union**, although it is highly unlikely that it will not influence global football as well.

For now, FIFA holds the initiative. It may overcome the issue easily — or not — depending on the provisions with which it chooses to replace the problematic ones.

Nevertheless, unless FIFA devises a **fast, effective, and perhaps automatic mechanism** for the collection of debts between sports stakeholders, the risk remains very real that it will increasingly face the nightmare scenario of appearing before **ordinary courts** empowered to review its regulations and to have the **final word** on their validity.

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