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European Court of Justice rules on FIFA transfer rules

On 4 October 2024, the European Court of Justice (CJ) held that FIFA's international transfer rules for football players breached EU competition law and were comparable to 'no poach' agreements between clubs. The judgment adds to the growing body of case law dealing with the application of antitrust rules in the sport sector.

Background

The case concerned a challenge by professional football player Lassana Diarra against certain rules contained in FIFA's Regulations on the Status and Transfer of Players (Regulations). The Regulations contained requirements that limited players' ability to move between clubs in specific circumstances. In particular, the Regulations stipulated that:

- when a player terminates an existing contract with a club before the expiry of the contract term and without 'just cause', and subsequently joins a new football club, both the player and the new club are jointly and severally liable to compensate the former club. In addition to the obligation to pay compensation, the new club may face penalties, including a potential ban on signing new players for a given period; and
- where a dispute arises in relation to such a player transfer, the player's former national football association is prohibited from issuing the necessary International Transfer Certificate (ITC) to enable the player to compete for their new club until the resolution of the dispute.

A dispute arose between FIFA and Diarra when the latter was ordered to pay compensation to his former football club, Lokomotiv Moscow, and was prevented by the Belgian Football Federation from registering with his new club, Sporting Charleroi in Belgium, due to the ongoing dispute.

Diarra brought proceedings in Belgium alleging that FIFA's transfer rules were anti-competitive under Article 101 of the Treaty on the Functioning of the European Union (TFEU) as well as a restriction on his freedom of movement as a worker pursuant to Article 45 TFEU. The Belgian court referred questions on the compatibility of the FIFA transfer rules with EU law to the CJ.

The Court of Justice's findings

The CJ found that those rules in FIFA's transfer system, which imposed financial compensation obligations and sporting sanctions on clubs and players in cases of early contract termination, were incompatible with EU competition law and the principle of workers' freedom of movement.

Restriction of competition by object

Recalling its findings from last year's landmark *Superleague* judgment, the CJ re-affirmed that the rules adopted by sports federations generally fall within the scope of EU law

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including the prohibition on anti-competitive agreements in Article 101(1) TFEU. See our previous client briefing on the *Superleague* case here.

In this case, the CJ ruled that the transfer rules challenged by Diarra had as their object the restriction and prevention of cross-border competition, in that they amounted to a “*general, absolute and permanent*” ban on football clubs’ ability to unilaterally recruit players under contract with another club. In particular, the significant risk of unpredictable compensation payments and potential bans on registering new players created a “*drastic*” hindrance on football clubs’ unilateral recruitment efforts across the EU.

The CJ recalled that “*the composition of teams is one of the essential parameters of competition*” and likened the effects of these rules to no-poach agreements. On this point, the CJ reiterated its position in Royal Antwerp that an essential parameter of competition between clubs is the ability to compete to recruit players. The CJ found that, while FIFA might have intended to maintain squad stability throughout a season and prevent aggressive recruitment by wealthier clubs, the Regulations effectively prevented movements of players unless transfers were mutually agreed upon between clubs, resulting in a form of market partitioning between clubs.

Interestingly, the CJ highlighted that “*classic mechanisms of contract law*” that provide remedies to parties in the event of a breach or early termination of contract are sufficient to ensure the “*lasting presence*” of a player in a club, while allowing normal competition to take place between clubs.

The judgment notes that it will be for the referring Belgian court to verify whether the FIFA rules might still be defensible under Article 101(3) TFEU, on the basis that they may be indispensable to achieve a legitimate objective and provided they result in efficiencies and do not eliminate competition on a substantial part of the market.

Freedom of movement

The CJ also found that FIFA’s player transfer rules impede the free movement of professional footballers wishing to develop their career by going to work for a new club established in another Member State. Cross-border player mobility was hindered because of the joint liability imposed on new clubs for compensatory damages, as well as the unpredictability of compensation amounts, which significantly deterred clubs from signing players under dispute with their former teams. The CJ also ruled that the requirement to withhold ITCs during ongoing disputes significantly restricted player mobility and career progression.

“Professional athletes, like other workers, must be able to make autonomous choices about their careers without undue constraints imposed by governing bodies”

The judgment left it to the referring court in Belgium to determine whether these rules, in practice, “*go beyond what is necessary to pursue the objective of ensuring the regularity of interclub football competitions by maintaining… stability in the membership of… clubs*”. However, it strongly suggested that the rules seem to go further than necessary to pursue such legitimate objectives.

Next steps

The CJ’s judgment in *Diarra* does not question FIFA's position as the world governing body of football and its legitimacy to regulate international football. However, the findings that aspects of FIFA’s player transfer rules amounted to a by-object infringement of EU competition law continue to add to the growing body of case law about competition issues involving sport governing bodies and their rules, particularly football. The CJ’s comments about the possibility for ordinary contract law mechanisms to achieve some of the objectives that FIFA was arguing it was seeking to protect may provide football clubs with some room for manoeuvre in the future.

The case now returns to the Belgian court. In response to the ruling, FIFA has stated that it plans to open a global dialogue with stakeholders to determine what conclusions must be drawn from the judgment - noting that it sees the *Diarra* decision as an “*opportunity to keep modernising its regulatory framework*”.

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OTHER DEVELOPMENTS

MERGER CONTROL

CMA clears Barratt/Redrow merger

On 4 October 2024, the UK Competition and Markets Authority (CMA) announced that it had accepted undertakings in lieu of reference for a Phase 2 investigation, concluding its investigation into the completed takeover by Barratt Developments plc of Redrow Plc. Redrow is a leading housebuilder across England and Wales with a reputation for building homes for premium buyers and those looking to downsize. The merger with housebuilder Barratt will combine the parties' complementary offerings and help accelerate the much-needed delivery of homes in the UK.

On 13 June 2024, the CMA announced that it had started a Phase 1 merger investigation. On 8 August 2024, the CMA announced that the merger would be referred for a Phase 2 merger investigation unless the parties offered suitable undertakings in lieu of a reference. The CMA found in its Phase 1 investigation that the merger raised competition concerns in one local catchment area - where a Barratt development site at Tilstock Road, Whitchurch, competes with a Redrow development site in Kingsbourne, Nantwich.

To address the CMA's concerns, Barratt and Redrow offered the following undertakings in lieu of a reference:

- appointing an independent third-party agent to manage the sale of the remaining plots at Redrow's Kingsbourne site;
- ensuring that unbuilt houses and unbuilt infrastructure on the development are constructed in a timely manner and to Redrow's quality standards; and
- providing aftersales services to all buyers at or exceeding Redrow's pre-merger standards.

The undertakings will be supervised by a monitoring trustee and Savills will act as the third-party agent. The CMA described the undertakings as "*clear-cut and appropriate to remedy, mitigate or prevent the competition concerns*".

Australia's final merger control reform bill proceeds to Parliament

On 10 October 2024, the Australian Government introduced into Parliament the final Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (Bill), following its earlier public consultation exercises in July and August this year (see our previous editions of the newsletter here and here). The most significant provisions under the current proposal are highlighted below.

Notification thresholds

While the final thresholds will be released separately, the Australian Government has announced that the following monetary thresholds will likely be adopted (in addition to the requirement that the target has a "*material connection to Australia*"):

1) **Limb 1 (general threshold):** the Australian turnover of the combined businesses exceeds AU$200 million (around £102 million), and either the business/assets being acquired has Australian turnover exceeding AU$50 million (around £26 million) or the global transaction value exceeds AU$250 million (around £129 million); or
2) **Limb 2 (very large businesses)**: a very large business with Australian turnover exceeding AU$500 million (around £258 million) acquires a smaller business or assets with Australian turnover exceeding AU$10 million (around £5 million); or
3) **Limb 3 (serial acquisitions):** all mergers by businesses with combined Australian turnover exceeding AU$200 million (around £102 million) where the cumulative Australian turnover from acquisitions in the

same or similar goods or services over a 3-year period is at least AU$50 million (around £26 million), or AU$10 million (around £5 million) if a very large business is involved.

Contrary to earlier proposals, market share-based thresholds will not be included. This has been received as a positive development as it helps reduce uncertainty and complexity in the regime.

Nevertheless, the Bill proposes to give the Government broad discretionary powers which may be used to adjust the thresholds to capture "*high-risk mergers*". For instance, the Government has announced its intention to require notification of all mergers in the Australian supermarket sector, and other sectors such as fuel, liquor and oncology-radiology are also under consideration for similar designation requirements. Purchases of interests over 20% in a private company, if one of the companies involved in the deal has Australian turnover exceeding AU$200 million (around £102 million), are also likely to be designated as notifiable transactions under such powers. More details regarding these designation requirements are expected to be released by the Government in due course.

Unlike the approach taken in other Asian jurisdictions such as China and Korea, the Bill does not give the Australian Competition and Consumer Commission (ACCC) the power to call in below-threshold deals for review. However, a low-cost targeted screening tool is being considered by the Government which would provide the ACCC with visibility of mergers below the monetary thresholds in select concentrated regions and sectors.

Other new features

Waiver process: The ACCC may waive the notification obligation upon application by the merging parties. However, details regarding the procedure remain unclear, including the information requirements, timeframes, and the criteria for granting the waiver.

Confidential review: While all notified acquisitions will be published on a public register, a confidential review process is now available for certain acquisitions, including surprise hostile takeovers, to enable the ACCC to make a confidential decision within a specified period.

Penalties

The maximum fine for gun jumping under the Bill is the greater of (a) AU$50 million (around £26 million), (b) if this can be determined, three times the value of the benefit obtained in relation to the breach, or (c) if the value of the benefit cannot be determined, 30% of the body corporate's adjusted turnover during the breach turnover period. Giving false or misleading information to the ACCC in connection with merger reviews may also result in a fine under the Bill.

Apart from financial penalties, the Bill provides that the ACCC may apply to the Federal Court to unwind or prevent a transaction for gun jumping or a failure to comply with conditions, or if information provided to the ACCC in connection with the merger review was false or misleading in a material particular.

Transitional period

A longer transitional period has been proposed to facilitate a smooth transition. While the new merger regime will become mandatory from 1 January 2026, the parties may elect to notify their transactions under the new framework from 1 July 2025.

Deals that receive informal clearance by the ACCC before 31 December 2025 will also be protected under grandfathering provisions, if they are completed within 12 months of the clearance.

While it is positive to see that the Government has taken on board public feedback in refining its new merger control framework, the Bill has introduced a number of important new features, the detail of which remains unclear at this stage. Further guidance and subordinate legislation are required to shed light on how the new regime will operate in practice.

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REGULATORY

European Commission publishes findings of Digital Fairness Fitness Check

On 3 October 2024, the European Commission published its findings following its legal analysis of digital problems in EU consumer law and the functioning of the Digital Single Market, during a six-year period from 2017 to 2023. The Fitness Check reviewed three core Directives, determining that these remain relevant and vital to protect consumers: the Unfair Commercial Practices Directive, the Consumer Rights Directive, and the Unfair Contract Terms Directive. The Fitness Check also assessed the interplay between recently adopted legislation (such as the Digital Markets Act, the Digital Services Act, and the Artificial Intelligence Act) and EU consumer law.

The report identified that the current digital rulebook does not cover all traders and noted specific problems for which existing legislation does not provide sufficient consumer protections. These include hidden marketing and promoting scams or dangerous products by social media influencers, dark patterns in online interfaces, the addictive design of digital products, the default use of AI chatbots which could hinder customers from exercising their rights, and difficulties with managing digital subscriptions and online profiling which takes advantage of consumers' vulnerabilities. The report found that harmful online commercial practices cost EU consumers at least €7.9 billion each year, while the cost to businesses to comply with EU consumer law is estimated to be less than €737 million each year.

According to the report, the effectiveness of EU consumer law is undermined by insufficient enforcement, regulatory fragmentation as a result of Member States' national approaches and a lack of incentivisation for businesses to aim for the highest standards of consumer protection. There has also been an increase in the complexity of applying consumer protection rules in the digital area in conjunction with other digital legislation.

The Fitness Check points to the need to take further action to ensure a consistent application of EU consumer law and the broader digital rulebook. Although the report does not provide any explicit policy recommendations, it is expected to inform legislation such as the Digital Fairness Act and comes at an important time for the Commission, given the upcoming change in leadership.

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