

Red card for Article 17 RSTP, FIFA sent off the pitch!

Exploring the possibility of collective bargaining as a way to restructure the football transfer system in the aftermath of the CJEU's Diarra judgment



Master's thesis
LLM European Law

Thomas Paardekooper | 1071114
t.paardekooper@students.uu.nl

First supervisor: Dr. Baskaran Balasingham
Second supervisor: Dr. Małgorzata Kozak

27/06/2025 | 15,974 words

TABLE OF CONTENTS

List of abbreviations	3
Chapter 1: Introduction	4
1.1: Problem statement	4
1.2: Aim and relevance	6
1.3: Research question and sub-research questions	7
1.4: Methodology	7
1.5: General outline	8
Chapter 2: Setting the scene: a historical overview of EU sports law	9
2.1: The early days: Walrave and Koch and Donà	9
2.2: Bosman	10
2.3: Meca-Medina	11
2.4: ESL and ISU	12
2.4.1: <i>Background to the cases</i>	12
2.4.2: <i>Judgments by the Court</i>	13
2.4.3: <i>Delineation of the Wouters-exception</i>	13
2.5: Specificity of sport	14
2.5.1: <i>Development of the concept of ‘sports specificity’</i>	14
2.5.2: <i>Special characteristics of sports</i>	15
Chapter 3: The Diarra judgment	17
3.1: FIFA’s transfer rules and the story of Lassana Diarra	17
3.2: The ‘by object’ versus ‘by effect’ debate: before and during Diarra	18
3.2.1: <i>Debate after the Court’s judgments of 21 December 2023</i>	18
3.2.2: <i>The Court’s judgment</i>	19
Chapter 4: Aftermath of Diarra and its implications: how to move forward?	22
4.1: Implications of the Diarra judgment	22
4.2: Exclusion of legitimate objectives after ESL and ISU	22
4.3: A new competition law framework in the sports sector	23
4.3.1: <i>Step 1 - By default-designation of ‘by effect’ restrictions</i>	23
4.3.1.1: <i>Blurred distinction between object and effect restrictions</i>	23
4.3.1.2: <i>Inclusion of legitimate objectives and return to Wouters</i>	24
4.3.1.3: <i>Rule of reason and regulatory ancillarity</i>	25
4.3.1.4: <i>‘By effect’ restrictions as the standard</i>	26
4.3.2: <i>Step 2 - Wouters as only justification route</i>	27
4.3.2.1: <i>Efficiency gains defense</i>	27
4.3.2.2: <i>Scope of legitimate objectives in Wouters/Article 101(3) TFEU</i>	28

Chapter 5: Collective bargaining as a recommendation	30
5.1: Collective bargaining: the way to go?	30
5.2: European and US Model of sport	30
5.3: Specificities of employment relationships in the sports industry	32
5.4: Collective bargaining agreements in the realm of competition law	32
5.4.1: <i>US law: the non-statutory labour exemption</i>	32
5.4.2: <i>EU law: Albany</i>	33
5.5: Application of collective bargaining agreements to novel framework	33
5.5.1: <i>Collective bargaining agreements as restrictions by effect</i>	33
5.5.2: <i>Application to the Wouters/Meca-Medina doctrine</i>	34
5.5.3: <i>Albany in the sports sector</i>	36
 Chapter 6: Conclusion	 38
 Bibliography	 40

LIST OF ABBREVIATIONS

AG	Advocate General
Commission	European Commission
Court	Court of Justice of the European Union
ECA	European Club Association
ESL	European Super League
EU	European Union
FFF	French Football Association
FIFA	Fédération Internationale de Football Association
FIFPRO	Fédération Internationale des Associations de Footballeurs Professionnelles
ISU	International Skating Union
ITC	International Transfer Certificate
MLS	Major League Soccer
RSTP	Regulations on the Status and Transfer of Players
TFEU	Treaty on the Functioning of the European Union
UEFA	Union of European Football Associations
URBSFA	Belgian Football Association
US	United States
WLF	World Leagues Forum

CHAPTER 1: INTRODUCTION

1.1. Problem statement

Sport holds a special place in the hearts of Europeans and appears to have increasingly drawn the attention of the Court of Justice of the European Union ('Court'). On 4 October 2024, the Court delivered its much-anticipated judgment in the case brought by Fédération Internationale de Football Association ('FIFA') against BZ, commonly referred to as the *Diarra* case, given the involvement of former French professional footballer and ex-international Lassana Diarra.¹ This ruling of the Court marked the climax of a lengthy dispute that commenced nearly a decade ago.

The case had already attracted significant media attention before the Court's judgment and was characterised as potentially groundbreaking, with commentators suggesting it could bring about the collapse of the transfer market in football as it currently exists. At the heart of the dispute were two specific elements of FIFA's *Regulations on the Status and Transfer of Players* ('RSTP'), namely Articles 9(1) and 17. The Court found these specific RSTP provisions concerning financial compensation and the imposition of sporting sanctions affecting both football clubs and players as a result of the early termination of contracts without just cause to constitute an unlawful restriction on the freedom of movement and incompatible with competition law.² Shortly after the judgment was handed down, the Fédération Internationale des Associations de Footballeurs Professionnelles ('FIFPRO'), a worldwide organisation defending the working rights of international football players, issued a statement in which it described the *Diarra* judgment as a major ruling on the regulation of the labour market in football'.³

The *Diarra* judgment was delivered less than a year after the Court issued rulings in three landmark cases for sports in European Union (EU) and competition law: *European Super League (ESL)*⁴, *International Skating Union (ISU)*⁵ and *Royal Antwerp FC*.⁶ In these judgments, the Court introduced a novel framework for assessing the compatibility of rules by sports governing bodies with EU competition law. Cases involving a restriction of competition by its very nature (*by object*) can only be justified on the ground of the efficiency gains defence based on Article 101(3) of the Treaty on the Functioning of the European Union ('TFEU').⁷ The so-called *Wouters*-exemption, which previously could also be invoked in the context of

¹ Case C-650/22 *Fédération internationale de football association (FIFA) v BZ*, ECLI:EU:C:2024:824 (*Diarra*).

² *Diarra* (n 1) paras. 114, 158.

³ FIFPRO, 'FIFPRO Statement: Decision of European Court of Justice' ([fifpro.org](https://fifpro.org/en/supporting-players/obtaining-justice/governance-and-representation/fifpro-statement-decision-of-european-court-of-justice), 4 October 2024) <<https://fifpro.org/en/supporting-players/obtaining-justice/governance-and-representation/fifpro-statement-decision-of-european-court-of-justice>> accessed 3 December 2024.

⁴ Case C-333/21 *European Superleague Company v UEFA, FIFA*, ECLI:EU:C:2023:1011 (*ESL*).

⁵ Case C-124/21 P *International Skating Union v Commission*, ECLI:EU:C:2023:1012 (*ISU*).

⁶ Case C-680/21 *SA Royal Antwerp Football Club v Union royale belge des sociétés de sociétés de football association ASBL*, ECLI:EU:C:2023:1010 (*Royal Antwerp FC*).

⁷ *ISU* (n 5) para 113; *Royal Antwerp FC* (n 6) para 117.

restrictions by object, may now only serve as justification in cases involving a restriction of competition by effect.⁸

The emergence of this new framework has sparked a renewed wave of scholarly debate, particularly about how and when to determine whether rules constitute ‘by object’ or ‘by effect’-restrictions. Weatherill has expressed reservations about the Court’s reasoning, particularly the line of argument that ultimately leads to a restriction by object. He argues that this approach may ultimately preclude an assessment of the unique characteristics attributed to sport as part of the legal analysis.⁹ Consequently, he recommends that sports governance cases should be concluded with a restriction by effect.¹⁰ In contrast, Advocate General (‘AG’) Szpunar presented the argument in his opinion in *Diarra* that the RSTP rules constitute a restriction of competition by object, and that ‘special features’ of sports can only justify rules that restrict competition in case of a restriction by effect.¹¹ This perspective has attracted support from prominent scholars such as Houben. As follows from the *Diarra* judgment, the Court appears to have endorsed AG Szpunar’s line of reasoning by concluding that FIFA’s transfer rules amount to a restriction of competition by object.¹²

Additionally, the *Diarra* judgment may be special for another reason. There are signs that point towards the Court having blurred the previously strict distinction between object and effect restrictions, reducing it to a semantic divide. Doing so, the Court appears to return to its *Wouters* line of reasoning and cross out the framework it had set out in *ESL* (and *ISU*), which delineated the scope of the *Wouters*-exemption to only restrictions by effect. If the Court is indeed reverting to the logic of *Wouters*, this would imply that both the *Wouters*-exemption and the efficiency gains defence under Article 101(3) TFEU may be invoked in cases involving either type of restriction.

From a broader perspective, it is evident that the existing transfer system in football - which can be traced back to the Court’s landmark *Bosman* ruling three decades ago - is now hanging by a thread and needs to go through a thorough process of reform.¹³ In this context, it is perhaps unsurprising that the *Diarra* ruling of 4 October has been dubbed ‘Bosman 2.0’ by various

⁸ Case C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98 (*Wouters*); Case C-519/04 P *Meca Medina and Macjen v Commission*, ECLI:EU:C:2006:492 (*Meca-Medina*); *ESL* (n 4) para. 186.

⁹ Stephen Weatherill, ‘Protecting the Conditional Autonomy of Governing Bodies in Sport From Review ‘From a Competition Standpoint’: How the Court Should Decide Its Pending Cases on the Transfer System, the Regulation of Agents and Club (Re)Location’ (2024) 8 European Competition and Regulatory Law Review 67, 81.

¹⁰ *ibid.*

¹¹ Case C-650/22 *Fédération internationale de football association (FIFA) v BZ*. ECLI:EU:C:2024:824, Opinion of AG Szpunar, paras. 51-56.

¹² *Diarra* (n 1) para. 148.

¹³ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others*, ECLI:EU:C:1995:463 (*Bosman*); Mark James, ‘The *Diarra* case’ (2024) 24 The International Sports Law Journal 205, 206-207.

media outlets.¹⁴ At the same time, both pre- and post-*Diarra* academic literature has highlighted collective bargaining as a potentially viable solution for future reform. James argues that either football players, their unions, or both, should play a central role in the process of developing and shaping a new system and new regulations through a global, social dialogue.¹⁵ Houben draws a comparison with the United States ('US'), where collective bargaining agreements within sports are much more commonly used, whereas in the EU, only one collective agreement has been successfully adopted so far.¹⁶ Despite the need for further progress, a potential avenue for advancement may have been presented by the Court in *Albany*. Under the so-called *Albany*-exemption, collective bargaining agreements that intend to improve social policy objectives are excluded from the scope of Article 101 TFEU.¹⁷ According to O'Leary, the precise scope of the *Albany*-exemption remains unclear, however: the Court has yet to decide whether collective agreements in sports leagues fall outside the scope of Article 101 TFEU.¹⁸ This creates opportunities for addressing challenges arising from, *inter alia*, the *Diarra* case. Could collective bargaining therefore serve as a solution to the challenges identified in the *Diarra* judgment?

1.2. Aim and relevance

There is a 'vast unexplored space for reform in professional sports in general, and football in particular'.¹⁹ The aim of this research is therefore to analyse the Court's *Diarra* judgment, and more importantly, its impact on the global transfer system as we know it since *Bosman*. As the Court determined that the RSTP provisions in question had the object of restricting competition, the possibility of invoking public interest justifications is now excluded. However, as previously mentioned, the distinction between the concepts of *object* and *effect* restrictions have become blurred and semantic. In light of the specificity of sport, its special characteristics and legitimate objectives in the sporting context, this thesis addresses a notable *lacuna* in legal literature following *Diarra*: it proposes a novel evaluative framework limited to the sports sector under Article 101 TFEU. At the same time, this thesis aims to combine the proposed novel framework to practical reform: how to proceed with restructuring the global transfer system itself? Collective bargaining is used as a case study to analyse whether this policy recommendation aligns with the law after the *Diarra* judgment, and whether it may be successful for restructuring the transfer system by applying the recommendation to the newly proposed framework.

¹⁴ See e.g. William Sternheimer and others, 'Diarra vs FIFA's RSTP - Bosman 2.0?' (*Morgan Sports Law*, 7 October 2024) <<https://morgansl.com/en/latest/lassana-diarra-fifa-rstp-transfer-system-illegal-cjeu-bosman>> accessed 14 April 2025.

¹⁵ James (n 13) 207.

¹⁶ Robby Houben, 'Sports Governance and the Rule of Law' in Annette Greenhow and John Wolohan (eds), *The Routledge Handbook on Sports Law and Governance* (Routledge 2025) 31, 45.

¹⁷ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430 (*Albany*), paras. 59-60.

¹⁸ Leanne O'Leary, 'Professional team sports and collective labour law in the European Union' in Anderson J and others (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing Limited 2018) 410, 425.

¹⁹ Houben (n 16) 45.

The relevance of this research stems from the recent nature of the Court's ruling in the *Diarra* case, delivered on 4 October 2024. Despite extensive media coverage in the lead-up to the judgment, academic discourse remained limited to conjecture regarding the likelihood of the Court following the opinion of AG Szpunar. Regardless of the answer to the question whether collective bargaining is a successful solution, also on the basis of the novel framework, it is in the best interest of football clubs, players and their union to anticipate and prepare for inevitable changes in the transfer market during the upcoming period.²⁰ Enabling them to engage in a constructive dialogue on how to balance their interests, and lay down those arrangements by means of a collective bargaining agreement, would constitute a meaningful step in the right direction.

1.3. Research question and sub-research questions

In light of the aim of this research, the main research question of this thesis is as follows:

In light of the Diarra judgment, to what extent could collective bargaining be used to restructure the football transfer system in accordance with Article 101 TFEU?

To answer the main research question, the answers to the following sub-research questions will be considered after first setting the scene with an overview of EU sports law:

- 1) How has the Court's ruling in the *Diarra* judgment regarding the legality of FIFA's transfer rules led to a call for a restructuring of the football transfer system?
- 2) What new evaluative framework for EU competition law can be derived from an interpretation of the *Diarra* judgment, in particular by focusing on the distinction between restrictions by object and effect?
- 3) Could collective bargaining be used to restructure the international football transfer system in compliance with Article 101 TFEU?

1.4. Methodology

The research methodology employed in this thesis will be library-based as well as practical-based and should be considered legal doctrinal. This method involves a focus on, and analysis of case law, legislation and authoritative literature. Chapter 2 and 3 analyse the relevant case law of the Court, as well as relevant academic literature that has been published on the topic so far by leading EU sports law academics such as, but certainly not limited to, Robby Houben, Leanne O'Leary and Stephen Weatherill. Focus is given to literature published following the *ESL*, *ISU* and *Royal Antwerp FC* judgments, which sparked academic discussion on object and effect restrictions once again. A legal doctrinal method is most suitable for this research as it allows for an analysis based on which a new competition law framework for the sports sector in Chapter 4 is built, to test whether the policy recommendation of collective bargaining

²⁰ Robby Houben, Oliver Budzinski and Melchior Wathelet, 'The Transfer System in Football; Diarra and What's Next' (*SSRN*, 20 June 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871477> accessed 30 November 2024.

agreements - discussed in Chapter 5 - aligns with the law. Arriving at certain principles and steps of the framework will mostly be done by incorporating, *inter alia*, legitimate objectives and characteristics that are specific to the sports sector from existing case law and literature. This provides the context for the final chapter, where collective bargaining is used as a case study to evaluate its role as a potential policy tool through the lens of the novel framework, and in a broader sense, its potential as a recommendation for a restructuring of the football transfer system.

1.5. General outline

The main research question addressed in this thesis is evaluative in nature, with elements of a normative nature included in Chapter 4. To find an answer to the main research question, this thesis is structured into six chapters, with Chapter 1 being the introduction.

Chapter 2 sets the scene, offering a historical overview of the Court's case law in EU sports law. Beginning with *Walrave and Koch*, this chapter presents landmark cases - descriptively - in chronological order. Special attention will be drawn to the *Bosman* case, which provided the foundations for the current football transfer system. Additionally, it explores the concept of 'sports specificity'.

The first sub-research question, addressed in Chapter 3, undertakes a comprehensive evaluative analysis of the *Diarra* judgment, particularly focusing on the academic debate it has reignited regarding restrictions by object and by effect. In preparation for the policy recommendation analysis of collective bargaining in Chapter 5, this chapter also provides a concise explanation of the current football transfer system as well as FIFA's RSTP.

Chapter 4 is of an evaluative nature while also incorporating a normative dimension. To answer the second sub-research question, a new evaluative framework for competition law, specifically Article 101 TFEU, is established. The normative character of this chapter has its foundation in the fact that it is argued that this novel framework shall be limited to the sporting sector.

The third sub-research question, addressed in Chapter 5, is of an evaluative nature as well. This chapter is devoted to a case study of collective bargaining agreements, with the final goal of applying this recommendation to the established framework in Chapter 4 and evaluating whether they could serve as an effective solution for reforming the transfer system. The chapter draws comparative insights from the US, where collective bargaining has long played an important role in professional sports. First, the different aspects from the US and EU Sport Models will be compared, as well as the non-statutory labour exemption and the *Albany*-exemption. This is followed by an application of collective agreements to the *Wouters/Meca-Medina*-doctrine and *Albany*-exemption. It is important to note, however, that all references to the US in this chapter are merely illustrative.

A conclusion is presented in Chapter 6, summarising the findings and proposing possible directions for future reform of the transfer system.

CHAPTER 2: SETTING THE SCENE: A HISTORICAL OVERVIEW OF EU SPORTS LAW

2.1. The early days: Walrave and Koch and Donà

Until the entry into force of the Treaty of Lisbon on 1 December 2009, there had not been a legal basis or legislative competence for the EU following from the EU Treaties to regulate the sports sector. The Treaty of Lisbon added Article 165(1) TFEU, which states: “*The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*”. This does not mean, however, that ‘EU sports law’ and ‘the specific nature of sports’ were new concepts introduced by the Treaty of Lisbon - their development has primarily been driven by case law instead.²¹ In fact, it had already been ‘established’ long before the 2009 Treaty reforms, when the Court issued its landmark ruling in the *Walrave and Koch* case in 1974.²² This case is the starting point of the Court’s case law in the area of sports that will be described chronologically in this chapter, namely *Bosman*, *Meca-Medina*, *ESL* and *ISU*. Afterwards, the concept of the specificity of sport will be analysed.

Walrave and Koch, a case which concerned nationality discrimination in motor-paced cycling, was the first time where the Court had to decide upon whether EU law was applicable to sport.²³ The Court established that “the practice of sport is subject to Union law only in so far as it constitutes an economic activity within Article 2 of the Treaty [of Rome]”.²⁴ The judgment is perhaps even more famous because of the Court’s apparent introduction of what is referred to as the ‘sporting exception’ in literature: rules of “purely sporting interest” without economic impact fall outside the scope of EU law.²⁵ In this particular case, the Court held that nationality-based discrimination concerning the composition of (national) sports teams is a “question of purely sporting interest” instead of economic activity, leaving regulation to sports authorities.²⁶

A similar issue arose in the *Donà* case, two years after *Walrave and Koch*. *Donà* involved a football agent challenging nationality restrictions in club football in Italy, after he had attempted to recruit foreign players.²⁷ The Court went on to confirm the approach it had set out in *Walrave and Koch*, although in slightly different words: it appeared to acknowledge that

²¹ Robert Brewer, ‘When Sporting Regulators Don’t Play Ball: Rejecting the Sporting Exception in EU Competition Law’ (*Kluwer Competition Law Blog*, 23 August 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/08/23/when-sporting-regulators-dont-play-ball-rejecting-the-sporting-exception-in-eu-competition-law-2/>> accessed 14 April 2025.

²² Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140 (*Walrave and Koch*).

²³ Richard Parrish, ‘Case C-36/74 Walrave and Koch [1974] ECR 1405’ in Jack Anderson (ed) *Leading cases in Sports Law* (Springer 2013) 46.

²⁴ *Walrave and Koch* (n 22) para. 4.

²⁵ *ibid*, para. 8.

²⁶ *ibid*.

²⁷ Parrish (n 23) 50.

team composition could involve factors beyond purely sporting concerns.²⁸ Parrish and Brewer have interpreted the Court's judgment in *Donà* as narrowing the scope of the 'sporting exception'.²⁹

2.2. Bosman

In *Bosman*, the Court finally revisited its *Walrave and Koch* and *Donà* rulings and gave more clarity on the sporting exception. At stake in the judgment was the 3+2 rule - by which football clubs were only allowed to play a maximum of three non-nationals in their team and an additional two players - non-nationals - who had played in the respective country for five years or longer - and the transfer system.³⁰

At the center of the discussion on the transfer system was Jean-Marc Bosman, a football player at RC Liège. After he arrived at the end of his contract, he wanted to transfer to US Dunkerque. Another transfer system was in place at the time, and it was exactly this system of which Bosman fell foul.³¹ Players were effectively deprived of the ability to exercise their contractual freedom to transfer freely between clubs. In practice, a footballer could only be eligible to participate in official matches once the receiving club had obtained the player's registration which was retained by the former club. The release of this registration was contingent upon the previous club's agreement to the terms proposed by the new club.³² Bosman's transfer ultimately failed because RC Liège did not ask the Belgian Football Association ('URBSFA') to send a transfer certificate to the French Football Association ('FFF').³³

The Court held that the transfer rules in question were "likely to restrict the freedom of movement of players", especially those seeking to continue their professional careers in another Member State, as they can strongly discourage them from departing their current clubs, even after their contracts have expired.³⁴ The rules were also found to constitute an obstacle to freedom of movement for workers.³⁵ The Court then seemingly went on to opt for a justification analysis instead of its 'sporting exception': the transfer rules could only be justified "if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interests".³⁶ The Court allowed two justification grounds to be brought forward by the industry that were accepted in light of the social importance of sports (football in particular) in the EU: first, promoting balance among clubs by ensuring a degree of equality and unpredictability of outcomes, and second, fostering the recruitment and development of

²⁸ *ibid*, p. 51.

²⁹ Brewer (n 21); Parrish (n 23) 51.

³⁰ Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press 2003) 92.

³¹ Stephen Weatherill, 'Bosman Changed Everything: The Rise of EC Sports Law' in Stephen Weatherill (ed) *European Sports Law* (2nd edn, Springer 2014) 498.

³² *ibid*.

³³ *Bosman* (n 13) paras. 31-33.

³⁴ *ibid*, para. 99.

³⁵ *ibid*, para. 100.

³⁶ *ibid*, para. 104.

young players.³⁷ Although the Court recognised that the transfer system at issue sought to achieve various legitimate objectives, it nevertheless concluded that these objectives eventually led to a restriction of players' fundamental freedoms.³⁸ All arguments in light of these aims accepted by the Court were rejected. Yet, the Court acknowledged that these aims *could* be achieved through alternative means that do not interfere with the free movement of workers.³⁹ It therefore followed AG Lenz, who expressed positive views in his opinion on introducing collective (wage) agreements to set limits on the salaries that clubs may offer to players.⁴⁰ The mentioning of collective agreements by AG Lenz also raises the question how this could contribute to reforming the transfer system in the more recent debate after *Diarra*.⁴¹ AG Spzunar may have been inspired by AG Lenz, as Spzunar implicitly proposed the idea of collective (bargaining) agreements in his opinion on *Diarra* as a solution for the current issues regarding the transfer system.⁴²

It should be noted that the Court only specifically targeted transfer fees for intra-EU transfers involving (professional) football players whose contracts had expired.⁴³ It refrained from addressing other components of the system, and left the responsibility to revise the system as a whole to the sports associations.⁴⁴ A new transfer system and regulations were eventually created in 2001.⁴⁵ Ever since, questions have been raised about the compatibility of this system with EU law, on which the Court provided clarity in its *Diarra* judgment after more than two decades.

2.3. Meca-Medina

For a long time, competition law had been kept out of the sporting context. In *Bosman*, the Court even declined to rule “on the interpretation of Articles 85 and 86 [now: Articles 101 and 102 TFEU] of the Treaty”.⁴⁶ In 2006, the EU competition law provisions and sport finally collided in *Meca-Medina*, which involved anti-doping rules imposed by the International Olympic Committee and implemented by the International Swimming Federation, following positive nandrolone tests by two professional swimmers. They were banned from competition and ultimately, the Court had to decide whether their exclusion constituted a restriction of competition.

³⁷ *ibid*, para. 106.

³⁸ *ibid*, paras. 107-114.

³⁹ *ibid*, para. 110.

⁴⁰ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others*, ECLI:EU:C:1995:293, Opinion of AG Lenz, para. 226.

⁴¹ For a further analysis, see Chapter 5.

⁴² Opinion of AG Spzunar in *Diarra* (n 11), para. 46.

⁴³ Stefaan van den Bogaert, ‘From Bosman to Bernard C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177’ in Jack Anderson (ed) *Leading cases in Sports Law* (Springer 2013) 100.

⁴⁴ *ibid*.

⁴⁵ *ibid* 147.

⁴⁶ *Bosman* (n 13) para. 138.

The Court explicitly eliminated the ‘purely sporting interest’ rule in *Meca-Medina*, as the mere fact that one speaks of such a rule “does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule of the body which has laid it down”.⁴⁷ After pointing out the relevance of competition law, the Court applied its earlier *Wouters* case law to the area of sports, and re-introduced a specific route through which rules from sports (governing) bodies could fall outside the prohibition laid down in Article 101(1) TFEU.⁴⁸ This has been commonly referred to as the *Wouters*-exception, and consists of a three-step test that allows a restrictive element of certain rules to be justified if it is “inherent in the pursuit of legitimate objectives of public interest and proportionate to these objectives”.⁴⁹ Doing so, the Court has given sport bodies an effective opportunity to protect themselves from the EU competition law framework, allowing them to show why their rules are necessary in light of sport-related objectives.

The Court first ruled that the underlying objective of the anti-doping rules was the fair conduct of sport and the preservation of athletes’ health as well as integrity and objectivity of competition in sports.⁵⁰ In addition, it found that any impact on the athlete’s ability to compete is inherent to the proper organisation of competitive sport, and that the ban was a proportionate punishment.⁵¹ Thus, the anti-doping rules did not constitute a restriction of competition.

2.4. ESL and ISU

2.4.1. Background to the cases

More recently, the Court got to decide on, *inter alia*, the issue relating to what is referred to as ‘double hatting’ in sports: the dual role of sports governing bodies that allows them to combine their regulatory role with the organisation of competitions, which is often monopolistic.⁵² AG Szpunar identified that these bodies are private entities, and that this duality creates an inherent conflict of interest, as it would be irrational for them to act against their own economic interests to uphold public objectives.⁵³ Both *ESL* and *ISU* show how this conflict manifests itself in reality. When a new competition is created by a third party, the sports governing body retains the right of prior approval and usually rejects these new competitions.

The provisions at issue in *ESL* and *ISU* were rules found in the FIFA, UEFA and ISU statutes, requiring prior approval for the organisation of competitions by third parties, as well as for alliances among members of FIFA, UEFA and ISU aiming to launch new competitions,

⁴⁷ *Meca-Medina* (n 8) para. 27.

⁴⁸ *ibid*, para. 42.

⁴⁹ Houben, Budzinski and Wathelet (n 20) 1.

⁵⁰ *Meca-Medina* (n 8) para. 43.

⁵¹ *ibid*, paras. 45, 47.

⁵² Houben (n 16) 33.

⁵³ Case C-680/21 *SA Royal Antwerp Football Club v Union royale belge des sociétés de sociétés de football association ASBL*, ECLI:EU:C:2023:188 (*Royal Antwerp FC*), Opinion of AG Szpunar, para. 58.

eligibility rules and sanctions established for when these provisions were not complied with.⁵⁴ In both cases, the main question to be answered by the Court was whether the provisions of the governing bodies for speed skating and football respectively amounted to a restriction of competition as meant in Article 101 TFEU. Additionally, in *ESL* the question was raised whether there was abuse of dominance by the football bodies, although the latter is less relevant in light of this thesis.

2.4.2. Judgment by the Court

As established in *OTOC*, holding both regulatory and commercial powers does not, in itself, breach EU competition law.⁵⁵ However, the Court also makes clear that genuine competition in the internal market depends on ensuring equal opportunities among undertakings. When an undertaking - in this case, the sports governing body - controlling access to the market can favour its own operations, it may gain a structural advantage compared to competitors. This especially concerns decisions on prior authorisations or refusal of access. To prevent such abuse, the powers of sports governing bodies should be constrained by a framework of procedural and substantive criteria “which are transparent, clear and precise” and “must be suitable for ensuring that such power is exercised in a non-discriminatory manner”.⁵⁶ The Court in *ESL* concluded that such a framework was missing. FIFA and UEFA’s prior approval rules and rules on sanctions were seen as a sufficient harm on competition by their object within the meaning of Article 101(1) TFEU.⁵⁷ Houben attributes this choice of the Court to the lack of safeguards in general.⁵⁸ In *ISU*, the prior authorisation and eligibility rules of ISU also lacked the substantive criteria and procedural safeguards necessary to limit and control ISU’s regulatory powers. The Court ruled that they also restricted competition by their object, as they granted the ISU the power to authorise and control the conditions for market access, as well as to determine the degree of competition.⁵⁹

2.4.3. Delineation of the Wouters-exception

The most significant contribution of the *ESL* and *ISU* judgments - and *Royal Antwerp FC*, which did not concern prior approval rules but was nevertheless ruled upon - lies in the Court’s clarification of the relationship between restrictions of competition *by effect* and *by object*, and the scope of the *Wouters/Meca-Medina*-exception. In all three judgments, the Court held that the exception only applies in cases involving conduct that has as its effect - not as its object - the restriction, prevention or distortion of competition.⁶⁰ As a result, only the efficiency gains defence from Article 101(3) TFEU may be relied upon to save certain conduct leading to

⁵⁴ Bernadette Zelger, ‘Object Restrictions in Sports after the ECJ’s Decisions in *ISU* and *Superleague*’ (2024) 15 Journal of European Competition Law & Practice 90.

⁵⁵ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127 (*OTOC*).

⁵⁶ *ESL* (n 4) paras. 135-135; *ISU* (n 5) paras. 132, 135.

⁵⁷ *ESL* (n 4) para. 178.

⁵⁸ Houben (n 16) 34.

⁵⁹ *ISU* (n 5) para. 145.

⁶⁰ *ESL* (n 4) para. 186; *ISU* (n 5) para. 113; *Royal Antwerp FC* (n 6) para. 115.

restrictions of competition by object from the prohibition laid down in Article 101(1) TFEU.⁶¹ Additionally, the Court in *ESL* ruled that Articles 101 and 102 TFEU “must be interpreted consistently”: thus, the *Wouters*-exception is not available to conduct that infringes Article 102 TFEU ‘by object’ either.⁶²

The Court’s underlying rationale for delineating the scope of the *Wouters*-exception is not clear from the judgments themselves, which gave rise to academic debate, discussed in the next chapter, and influenced commentators’ expectations regarding the Court’s approach in *Diarra*.

2.5. Specificity of sport

2.5.1. Development of the concept of ‘sports specificity’

Concurrent with the jurisprudential developments has been the evolution of the concept of ‘sports specificity’. It is generally agreed upon that already in *Walrave and Koch*, the Court made it implicit that sport is special, in the sense that (some of) its characteristics differ from other industries. During the 1990s and 2000s, soft law documents such as the Declaration on sport annexed to the Treaty of Amsterdam, the Helsinki Report on Sport and the Nice Declaration of Sport designated *inter alia* result unpredictability and the pyramid structure as characteristics specific to sports.⁶³ The White Paper on Sport, published by the Commission in 2007, was the first - non-legally binding - document in which more ‘clarity’ was provided on the definition of the concept itself, which was defined as “the distinctive features setting sport apart from other economic activities”.⁶⁴ This aligns with how sport specificity is generally understood in literature, often broadly referred to as the distinctive features of sport that set it apart from other sectors of economic activity. Meredith and García wonder whether the absence of a single definition in literature could be the result of the accumulation of many sectors in which sport specificity plays a role.⁶⁵ Flanagan appears to have the most expansive definition, as he sees autonomy as inherent to the notion of specificity and is in favour of assigning *complete* autonomy to sports governing bodies.⁶⁶ A more nuanced approach that is mostly followed in literature is put forward by both García and Meredith and Weatherill, who “suggest specificity as a step below autonomy”.⁶⁷ Indeed, *Meca-Medina* is a statement of the *conditional* autonomy that sports governing bodies have, as the restrictions that they impose “must be

⁶¹ *ESL* (n 4) para. 187; *ISU* (n 5) para. 114; *Royal Antwerp FC* (n 6) para. 116. See also Case C-209/07 *Competition Authority v Beef Industry Development Society*, ECLI:EU:C:2008:643 (*BIDS*), para. 21.

⁶² *ESL* (n 4) para. 186.

⁶³ Jack Meredith and Borja García, ‘To be or not to be specific? Understanding EU institutions’ definition of the specific nature of sport’ (2023) 1 *Sports Law, Policy & Diplomacy Journal* 17, 28.

⁶⁴ Commission, ‘White Paper on Sport’ COM(2007) 391 final.

⁶⁵ *ibid* 20.

⁶⁶ Christopher Flanagan, ‘A Tricky European Fixture: An Assessment of UEFA’s Financial Fair Play Regulations and their Comparability with EU Law’ (2013) 13 *The International Sports Law Journal* 148, 153.

⁶⁷ Meredith and García (n 63) 20.

limited to what is necessary to ensure the proper conduct of competitive sport”.⁶⁸ It is perhaps not a coincidence that only a few years after both *Meca-Medina* and the Commission’s White Paper on Sport, sports specificity was formally recognised in Article 165(1) TFEU in the Treaty of Lisbon.

2.5.2. Special characteristics of sports

The fact that sport is special has gained increasing recognition through the identification of certain features that set sport apart from other social and economic activities.⁶⁹ Meredith and García have identified four core characteristics considered specific to sport in literature. First, rivalry is necessary in sports, unlike conventional markets where competitors aim to eliminate rivals. On an economic level, there is interdependence between clubs as opponents are required for meaningful competition. Second, the governance of sports is often described as a pyramidal structure, with one governing body or federation - FIFA for football, ISU for speed skating - overseeing each sport. It is the extent to which these bodies have autonomy in the organisation of sports that distinguishes them and limits external market entry.⁷⁰ The third key characteristic identified is unpredictability of results. This does not merely refer to the protection of integrity through rules against, for example, doping: Budzinski also believes that it pertains to the goal of avoiding competitive imbalance as a result of a monopoly.⁷¹ Finally, Meredith and García refer to the societal benefits of sport, perhaps even better referred to by Villanueva as the societal recognition of sport, by which she means “a recognition beyond economic interest but that places sport in the broader societal context of European society”.⁷² To exemplify, the Court in *Bernard* referred to both a social and *educational* function in relation to sports.⁷³ Weatherill furthermore speaks of sport’s cultural, public health and recreational functions in this regard.⁷⁴

Drawing this chapter to a close, the Court has played an important role in the development of EU sports law over the past 50 years. Nevertheless, it was not until the entry into force of the Lisbon Treaty in 2009 that EU sports law was formally recognised, through Article 165 TFEU. As follows from this article, the special nature of sports should be considered - acknowledged as the specificity of sport, a concept which, to this day, lacks a clear definition. What is certain, however, is that the origins of EU sports law can be traced back to *Walrave and Koch*, and that the field has further evolved through judgments such as *Bosman*, which gave rise to the transfer system that was at the center of *Diarra*, and *Meca-Medina*, which linked sport to competition

⁶⁸ *Meca-Medina* (n 8) para. 47.

⁶⁹ Meredith and García (n 63) 21.

⁷⁰ *ibid.*

⁷¹ Oliver Budzinski, ‘The Institutional Framework for doing Sports Business: Principles of EU Competition Policy in Sports Markets’, (2012) 11 *International Journal of Sport Management and Marketing* 44, 56.

⁷² Aurélie Villanueva, ‘Accounting for the specificity of sport in EU law: Old and new directions in the 21 December 2023 judgments’, (2023) 23 *The International Sports Law Journal* 422, 424.

⁷³ Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI:EU:C:2010:143 (*Bernard*), para. 40.

⁷⁴ Stephen Weatherill, ‘The White Paper on Sport as an Exercise in ‘Better Regulation’ in Stephen Weatherill (ed) *European Sports Law* (2nd edn, Springer 2014) 435.

law. Recently, the *ESL* ruling provided a delineation of the scope of the so-called *Wouters*-exception and thus introduced a novel competition framework. This framework set the stage for the debate surrounding the *Diarra* case, which will be addressed in the following chapter.

CHAPTER 3: THE DIARRA JUDGMENT

3.1. FIFA's transfer rules and the story of Lassana Diarra

This chapter focuses on an analysis of the *Diarra* judgment. This first requires an outline of the relevant facts, followed by an overview of the academic debate surrounding restrictions 'by object' and 'by effect', sparked by the *ESL* and *ISU* judgments and the opinion of AG Szpunar in the *Diarra* case. This discussion will then serve as a basis for analysing the Court's judgment of the football transfer system rules under Article 101 TFEU and, to a more limited extent, Article 45 TFEU. These rules are referred to as the *RSTP*, adopted after various versions of FIFA regulations in 2014.⁷⁵ At issue in *Diarra* were two RSTP provisions. First, Article 17 regulates the consequences of unilateral termination of a footballer's employment contract 'without just cause'. The party in breach must pay compensation to the club on the basis of several objective criteria, and the new club of a player would be jointly and severally liable for his or her payment of compensation. In addition to the compensation, sporting sanctions may also be imposed on a player, potentially reaching up to six months suspension from official matches. The possibility of a high compensation amount causes players to refrain from unilaterally terminating their contract. This has been met with criticism in literature, with Parrish warning of 'potentially numerous restrictive effects' on a football player.⁷⁶ Second, Article 9(1) together with Annex 3 stipulates that the previous association should issue an International Transfer Certificate ('ITC') to the football association of which the new club is part. The former association must, however, not deliver an ITC if it considers that the player remains contractually bound to their former club or if there is no mutual agreement on an early termination of the contract.⁷⁷

The *Diarra* case stems from a contractual dispute involving ex-French professional footballer Lassana Diarra. Despite signing a four-year contract with Lokomotiv Moscow in 2013, Diarra left after one year following a salary reduction. According to Lokomotiv Moscow, this amounted to a breach of contract without just cause under the RSTP, and the club lodged a complaint before the Dispute Resolution Chamber of FIFA consequently. Although ordering Diarra to pay €10.5 million in compensation, the Chamber also ruled in 2015 that future clubs would not bear joint liability. Following this decision, Diarra initiated legal proceedings against FIFA and the Belgian Football Association before the Commercial Court of Hainaut and sought €6 million in compensation, with the court ruling in favour of Diarra. At the appellate level - after a cross-appeal from Diarra, the Court of Appeal of Mons referred questions to the Court

⁷⁵ FIFA, 'Regulations on the Status and Transfer of Players' (July 2014) <<https://digitalhub.fifa.com/m/.pdf>> accessed 18 April 2025.

⁷⁶ Richard Parrish, 'Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law' (2015) 22 Maastricht Journal of European and Comparative Law 256, 276.

⁷⁷ Annex 3 RTSP, Article 8.2.7.

in Luxembourg on the compatibility of Articles 9(1) and 17 RSTP with EU competition law and EU law in general.⁷⁸

3.2. The 'by object' versus 'by effect' debate: before and during *Diarra*

3.2.1. Debate after the Court's judgments of 21 December 2023

In the aftermath of the Court's *ESL* and *ISU* judgments, literature has demonstrated a dichotomy concerning the Court's decision to delineate the scope of the *Wouters*-exception. Van Rompuy argues that the decision that the application of the exception when anti-competitive effects "can be presumed" is now excluded, is rather undesirable and certainly not needed.⁷⁹ Weatherill attributes the Court's choice to a growing concern that the *Wouters*-exception may in fact have undermined the efficiency gains defence route of Article 101(3) TFEU.⁸⁰ The other side of the coin is discussed by Zelger, as she argues that the Court's decision has helped to clarify a consistent framework assessing how regulatory rules - also in the sporting context - can constitute restrictions by object, even when pursuing legitimate objectives.⁸¹ According to Tokić, who was one of the first to point out the issue, the acceptance of restrictions by *object* under the *Wouters*-exception by the Court would have "opened Pandora's box to any kind of (supposed) legitimate objectives in the general interest".⁸²

The debate was further intensified after AG Szpunar issued his opinion in *Diarra*. The AG took a firm stance on FIFA's transfer rules, describing the consequences for players who terminate contracts without just cause as "draconian" and finding that the contested rules were designed to "send a chill down each player's spine", but also have a chilling effect for clubs seeking to sign the football players.⁸³ He then concludes that the transfer rules constitute a restriction of competition by object, and the criteria for the efficiency gains defence, the only route left to save the practice, are "clearly not met".⁸⁴ Game over for FIFA's RSTP, if it were up to the AG.

According to AG Szpunar, the *Wouters*-exception is comparable to the public interest test that follows from *Cassis de Dijon*. He states that when applying Article 45 TFEU, justification based on legitimate objectives is always an option, while the *Wouters*-exception may now only be invoked in cases of *effect* restrictions. It is hard to reconcile, however, how certain conduct

⁷⁸ Sinziana Ianc and Aurélien Hömann, 'Certain FIFA transfer rules contrary to EU law: Case C-650/22 FIFA v BZ' [2025] Journal of European Competition Law & Practice 1, 1-2.

⁷⁹ Ben van Rompuy, 'EU Court of Justice Delineates the Scope of the Wouters Exception' (*Kluwer Competition Law Blog*, 15 January 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/01/15/eu-court-of-justice-delineates-the-scope-of-the-wouters-exception/>> accessed 21 April 2025.

⁸⁰ Stephen Weatherill, 'The impact of the rulings of 21 December 2023 on the structure of EU sports law (2024) 23 Int Sports Law J 409, 411.

⁸¹ Zelger (n 54) 101.

⁸² Adnan Tokić, 'Wouters Exception for Hardcore Price Fixing?' (*Kluwer Competition Law Blog*, 15 February 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/02/15/wouters-exception-for-hardcore-price-fixing/>> accessed 21 April 2025.

⁸³ Opinion of AG Szpunar in *Diarra* (n 11) para. 53.

⁸⁴ *ibid*, paras. 56-58.

may therefore be regarded as an object restriction, yet lead to a paradoxical situation where it is exempted on the basis of the Article 45 TFEU test: it appears problematic that justifications deemed irrelevant under Article 101 TFEU can nonetheless be considered under Article 45 TFEU. AG Szpunar recognises this, but nonetheless moves on to qualify the RSTP provisions as restrictions by object.⁸⁵ I find it hard to grasp how such a situation could contribute positively to a coherent approach towards free movement and competition law. The AG should have adopted a strict approach on the restrictions by object and given more importance to the specificities of sports. It must indeed be noted that the AG has widely opened the door towards acceptance of legitimate objectives in his analysis of Article 45 TFEU, such as contractual stability and maintaining a balance between clubs in competitions.⁸⁶ Similar concerns are shared by Weatherill, as he argues that an assessment of the transfer system should take place as if it is a restriction by effect, in “its full context, embracing both the structure of the sport and the effect on the market”.⁸⁷ It would also lead to alignment of competition and internal market law.

Finally, Houben proposes a different, more positive view on the matter and draws attention to the competition standpoint that the Court hung onto in *ESL* and *ISU*. In his words, “if a certain conduct is inspired by a sufficient degree of harm to competition, other, regulatory, motives, will not suffice to justify the conduct, that may or not be intended to harm competition”.⁸⁸ Doing so, the Court has apparently given more importance to compliance with competition law, and also seems to give a warning that sports governing bodies, while still autonomous, should refrain from setting rules that could lead to a restriction by object, as the efficiency gains defence would then be the only available justification. This is a clear signal towards sports governing bodies that a rule co-inspired by regulatory motives but clearly restrictive in design cannot be justified simply by appealing to the special nature of sport.⁸⁹ A competition law perspective should be taken into account.

3.2.2. The Court’s judgment

According to the Court, Articles 9(1) and 17 RSTP impose unlawful restrictions on the freedom of movement under Article 45 TFEU. The rules laid down in Article 17 could potentially dissuade clubs from hiring football players who reside or work in another Member State, as these clubs are major legal, financial and sporting risks that go hand in hand with unpredictability.⁹⁰ The question of whether such rules can be justified is then left to the national judge.⁹¹ The Court acknowledged that the rules could potentially be appropriate to achieve the

⁸⁵ *ibid*, paras. 35, 59.

⁸⁶ *ibid*, para. 64.

⁸⁷ Weatherill (n 9) 79.

⁸⁸ Robby Houben, ‘The Transfer System in Football: A First Case Study of the CJEU’s Novel Competition Law Framework (for Sports)’ *Diarra and What’s Next* (SSRN, 19 June 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4838909> accessed 16 January 2025.

⁸⁹ *ibid*.

⁹⁰ *Diarra* (n 1), paras. 92-93.

⁹¹ *ibid*, para. 96.

objectives of the RSTP as brought forward by FIFA and URBSFA, namely (i) contractual stability and the stability of teams, (ii) the integrity and regularity of interclub competitions and (iii) protection of professional footballers. However, the Court then finds that the rules go (far) beyond necessary, having a high impact on players with short careers.⁹² In doing so, it cites a plethora of deficiencies. The notion of “without just cause” lacks precise definition in the RSTPs, while others are rarely applied in practice and “specificity of sport” in Article 17(1) is also not further defined, leading to an “application which is discretionary and therefore unpredictable and difficult to verify”.⁹³ Instead of ensuring the proper conduct of competitions, the Court finds that the criteria for compensation are more likely to preserve the financial interests of the club.⁹⁴ In addition, the Court notes that the automatic imposition of sporting sanctions on the new clubs of players, based on the presumption of incitement, is disproportionate.⁹⁵ Finally, the rule that prohibits the former association to issue an ITC if the dispute between the former club and player is still ongoing, was also found “manifestly disregard the principle of proportionality”.⁹⁶ In the first part of the examination of Article 101 TFEU, the Court refers back to these same arguments.⁹⁷ Referring to the opinion of AG Szpunar, the transfer system is seen as a “generalised and drastic restriction, [...] of the competition” between professional football clubs “as regards the recruitment of players”.⁹⁸

Sports governing bodies such as FIFA are generally permitted to create and enforce rules governing how sporting competitions are run and how athletes participate. The Court considers it legitimate for such organisations to introduce common rules aimed at guaranteeing “homogeneity and coordination across those competitions” within an overall calendar, but also at organising “competitions based on equal opportunity and (sporting) merit” that can only be achieved through “homogeneous regulatory and technical conditions”, but also to set rules that appropiate imposing sanctions in case of non-compliance.⁹⁹ Making sure that there is stability in the composition of player rosters may be legitimate to achieve this.¹⁰⁰ However, the Court then finds that the transfer rules at stake correspond to a no-poaching agreement between clubs.¹⁰¹ The football clubs benefit, the football players do not. In fact, these rules constitute a “general, absolute and permanent ban” on unilaterally recruiting players who are under contract already.¹⁰² The rules are then found to constitute a restriction of competition by object. An assessment of the framework following from *ESL* and *ISU* is to be made by the national court, yet the precedent set by the Court itself could not have been clearer: it points out that account should be taken of a combination of factors, of which “a significant number are discretionary and/or disproportionate” and the drastic restriction of competition between clubs, and that

⁹² *ibid.*, paras. 102-104.

⁹³ *ibid.*, para. 106.

⁹⁴ *ibid.*, para. 107.

⁹⁵ *ibid.*, paras. 109-110.

⁹⁶ *ibid.*, para. 113.

⁹⁷ *ibid.*, para. 135.

⁹⁸ *ibid.*, para. 138.

⁹⁹ *ibid.*, paras. 143-144.

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*, para. 145.

¹⁰² *ibid.*, para. 146.

because of these factors the rules cannot be considered indispensable or necessary to achieve efficiency gains.¹⁰³ The defense under Article 101(3) TFEU, FIFA's final hope, is then also not met.

In reflection of the above, the Court appears to have closed the door by aligning itself with the opinion of the AG, as it classified the transfer rules in question as 'restrictions by object' and formally used the *ESL* and *ISU* framework. Game over for FIFA and its transfer rules. At least, so it seems. However, the academic debate reveals that the Court's reasoning may not be as straightforward as it seems, particularly given the questions raised as to why a 'by effect' approach was not pursued. This raises a question to be answered in the following chapter(s): could there be a way out?

¹⁰³ *ibid*, para. 157.

CHAPTER 4: AFTERMATH OF DIARRA AND ITS IMPLICATIONS: HOW TO MOVE FORWARD?

4.1. Implications of the Diarra judgment

The Court's *Diarra* ruling has effectively brought the current transfer system to an end, or, at the very least, demonstrated that a thorough revision of the transfer rules is needed. FIFA put a more positive spin on the judgment and its impact, expressing particular satisfaction that the Court confirmed the key principles of the transfer system. It should be acknowledged that the judgment does in fact *target* core elements of the system: FIFA's transfer rules must be reformed to ensure greater predictability as well as less restriction, and the gap between the treatment of contracted and out-of-contract players will have to be narrowed.

In addition to the consequences of the ruling for football and sports in general, *Diarra* seems to provide strong indications that the framework introduced in *ESL* is unclear and subject to change. The existing body of literature has hitherto researched this issue only to a limited extent. The remainder of this chapter will therefore be devoted to an extensive analysis of the current framework. Subsequently, a new framework, limited to the sports sector, to be applied in future cases will be established, consisting of 'by effect' restrictions and the *Wouters*-exception. To substantiate this framework, this chapter will also evaluate the use of legitimate objectives, the blurred distinction between object and effect restrictions that follows from the *Diarra* judgment, the rule of reason and the notion of regulatory ancillarity and, finally, the efficiency gains defense from Article 101(3) TFEU.

4.2. Exclusion of legitimate objectives after *ESL* and *ISU*

As illustrated before, while a model of *conditional* autonomy remains intact in some way after the Court's *ESL* and *ISU* judgments - allowing sports governing bodies latitude to pursue legitimate objectives - the method for evaluating the necessity of their actions under Article 101 TFEU has changed and specifically concerns the consequence of conduct having an anticompetitive object or effect.¹⁰⁴ Only if a practice restricts competition by its effect, a sports governing body may defend it under Article 101(1) by invoking the *Wouters*-exception. Classifying FIFA's transfer rules as restrictions by object would now have the consequence of excluding legitimate objectives pursued by sports governing bodies from assessment under Article 101(1) TFEU, assuming they do not fall under Article 101(3) TFEU. As Weatherill puts it, "competition law prevents sport's (claimed) special features even being assessed".¹⁰⁵ This approach contrasts with the precedent established in sports cases up to and including *Meca-Medina*, wherein the Court acknowledged a degree of sporting autonomy provided that the practices were necessary in the context of legitimate sporting objectives.

¹⁰⁴ Weatherill (n 9) 70.

¹⁰⁵ *ibid* 78.

4.3. A new competition law framework in the sports sector

The present section is dedicated to the establishment of a new competition law framework, based on Article 101 TFEU, in the sports sector. The reason for this is *Diarra*'s indication of a blurred distinction between object and effect restrictions, on the basis of which the Court appears to revert to its line of reasoning following *Wouters*. The framework consists of two fixed steps. Firstly, any restriction of competition in the sports sector should, by default, be referred to as 'by effect'. Secondly, only the *Wouters*-exception can serve as a justification route, allowing sport-specific arguments and objectives to be considered.

4.3.1. Step 1 - By default-designation of 'by effect' restrictions

4.3.1.1. Blurred distinction between object and effect restrictions

Ever since *Société Technique Minière*, it has been established in case law that the concepts of restrictions by 'object' and 'effect' should be read disjunctively.¹⁰⁶ The concept of restrictions by object refers to conduct of undertakings that reveals a sufficient degree of harm to competition, such that its anticompetitive potential is presumed without needing to prove adverse market effects.¹⁰⁷ The broader legal and economic context should also be taken account of.¹⁰⁸ Only when there is no restriction of competition by object, an analysis of a possible restrictive effect shall be conducted. As will be argued further below, the Court appears to have refrained from applying a disjunctive treatment of object and effect restrictions, with *Diarra* being the latest example.¹⁰⁹

The notion of restriction of competition has been criticised for being used too broadly since as early as 1966, when AG Roemer argued that the Commission had not been "wholly consistent" while using the concept.¹¹⁰ In *Cartes Bancaires*, the Court limited the rapidly expanding object box and decided that the concept of 'restriction of competition by object' must be interpreted restrictively.¹¹¹ What was new, however, was that the Court held that all relevant aspects of the legal and economic context should be taken into account, "it being immaterial whether or not such an aspect relates to the relevant market".¹¹² This has caused several authors to point out the associated risks to such an extended review of the legal and economic context: this "in an object case might turn into effects analysis, which would undermine the object-effect distinction".¹¹³ Enchelmaier finds an object analysis to closely mirror an effect analysis in

¹⁰⁶ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 (STM), p. 249.

¹⁰⁷ Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610 (*GlaxoSmithKline*), para. 55.

¹⁰⁸ *BIDS* (n 61) para. 21; *GlaxoSmithKline* (n 107) para. 58.

¹⁰⁹ See §4.3.1.2.

¹¹⁰ Joined cases C-56/64 and C-58/64 *Consten and Grundig v Commission of the EEC*, ECLI:EU:C:1966:19 (*Consten and Grundig*), Opinion of AG Roemer, p. 358.

¹¹¹ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 129.

¹¹² Case C-67/13 P *Groupeement des Cartes Bancaires v European Commission*, ECLI:EU:C:2014:2204 (*Cartes Bancaires*), para. 78.

¹¹³ Whish and Bailey (n 111) 130.

numerous aspects, making the both of them indistinguishable.¹¹⁴ It may well be possible that the lack of identity in these analyses may have been the underlying rationale behind the referring Hungarian court in *Budapest Bank* asking for clarification as the fact that both the actual, economic and legal context of an agreement restricting competition should be taken into account, “makes it particularly unclear where examination of the agreement from the perspective of its object ends and where examination of the agreement from the perspective of its effects begins”.¹¹⁵ According to Bergqvist, there is support in *Budapest Bank* and *Generics* for invoking the concept of ‘anticompetitive by object’ only in circumstances where the agreement in question lacks a legitimate aim.¹¹⁶ Finally, AG Bobek has explicitly stated that the difference between an object analysis and effects analysis “is more one of degree than of kind”.¹¹⁷

4.3.1.2. Inclusion of legitimate objectives and return to Wouters

Both the opinion of AG Szpunar and the judgment of the Court in *Diarra* contain various legitimate objectives invoked by FIFA to justify its transfer rules.¹¹⁸ Contractual stability is seen as a valuable objective in professional football from the perspective of all parties involved. Not only does it provide clubs with the assurance that players will remain for the full length of their contracts, thereby supporting long-term sporting and financial planning, it is also beneficial to players for which it offers job security and a stable working environment. In some cases, both parties enter into long-term contracts with the understanding that a transfer may occur later. In this way, their interests align, for example in terms of career progression or financial situation.¹¹⁹ This balance can break down, however, as a club may want to reduce its wage bill by transferring a player, even if the football player prefers to stay. Another example is that of *Diarra*, where a player might want to leave for better opportunities elsewhere, while the club refuses either to maintain its team strength or because of financial reasons.¹²⁰ Finally, maintaining integrity in football is also a legitimate objective, more specifically through ensuring a “certain degree of stability in the player rosters” via transfer windows.¹²¹ It is difficult to understand how the rules in Articles 9(1) and 17 RSTP link to this objective.¹²²

Interestingly, the Court in *Diarra* does not only take account of legitimate objectives in the assessment relating to Article 45 TFEU, but also in relation to Article 101 TFEU. The most

¹¹⁴ Stefan Enchelmaier, ‘Restrictions by object after *Generics*, *Lundbeck* and *Budapest Bank*: are we any wiser now?’ (2023) 11 *Journal of Antitrust Enforcement* 72, 75.

¹¹⁵ Case C-228/18 *Budapest Bank Nyrt. and Others*, ECLI:EU:C:2020:265 (*Budapest Bank*), para. 22.

¹¹⁶ Christian Bergqvist, ‘Collective Bargaining and Platforms’ (*Kluwer Competition Law Blog*, 11 December 2020) <<https://competitionlawblog.kluwercompetitionlaw.com/2020/12/11/collective-bargaining-and-platforms/>> accessed 6 May 2025; *Budapest Bank* (n 115) paras. 82-86; Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52 (*Generics*), paras. 87-90.

¹¹⁷ Case C-228/18 *Budapest Bank Nyrt. and Others*, ECLI:EU:C:2019:678 (*Budapest Bank*), Opinion of AG Bobek, para. 49.

¹¹⁸ Opinion of AG Szpunar in *Diarra* (n 11) para. 61; *Diarra* (n 1) para. 43.

¹¹⁹ Houben (n 88) 11.

¹²⁰ *ibid.*

¹²¹ *Diarra* (n 1) para. 103.

¹²² Houben (n 88) 11.

explicit reference is provided by the Court in the following words: “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*” during the football season.¹²³ Less explicit mentions in the judgment include rules relating to deadlines to avoid late transfers that affect the comparability of results and integrity of the competition, as well as maintaining contractual stability.¹²⁴ Even if one would argue that the concept of ‘stability of the composition of player rosters’ moves too far away from the legitimate objective of the stability of football teams, which the FIFA claims its RSTP rules pursue, its mentioning still signifies that the Court accepts these rules could help achieving the objective of maintaining the regularity of club football competitions, which is yet another implicit mention of a legitimate objective in itself.¹²⁵ Most of these legitimate objectives had already been deemed relevant by scholars within a possible ‘by effect-route’ before the Court had issued its final judgment.¹²⁶ They have now become part of a ‘shadow’-by effect analysis within a ‘by object’ analysis, as the Court took these sport-specific legitimate objectives into account, while still ruling that the transfer rules restrict competition by object in the end. This further blurs the distinction between ‘object’ and ‘effect’ restrictions. More specifically, instead of living up to its framework set out in *ESL* where these (sport-related) legitimate objectives may come into play only in relation to by effect-restrictions, the Court appears to return to its *Wouters* line of reasoning, where these legitimate objectives under the *Wouters*-exception could be invoked in case of restrictions by effect *and* object.

4.3.1.3. Rule of reason and regulatory ancillarity

Ever since *Wouters*, there has been debate as to whether this case has given rise to a so-called ‘rule of reason’ in EU competition law. This concept originates from US law - section 1 of the Sherman Act 1890 - which states that agreements or practices that unreasonably restrain trade or commerce shall be prohibited. The rule of reason is used to interpret this section and requires a balancing of pro- and anticompetitive effects of an agreement or practice. In *Métropole v Commission*, the Court made clear that there was no rule of reason under Article 101 TFEU.¹²⁷ The debate was nevertheless reignited after *Wouters*, as the Court ruled that the agreement in question did not violate Article 101(1) TFEU. It came to this conclusion without any application of the exemption of Article 101(3) TFEU, and based on non-economic considerations. As mentioned by Monti, *Wouters* gave strong indications of the Court introducing an “European-style rule of reason” in EU competition law - and later to the area of sports in *Meca-Medina*.¹²⁸ Whether one may actually speak of the introduction of a rule of reason in *Wouters* is doubtful, as economic arguments should be involved in the balancing act of pro- and anticompetitive effects. As seen in, *inter alia*, *Diarra*, the Court does now appear to allow a balancing ‘act’ between anticompetitive effects and legitimate objectives for all

¹²³ *Diarra* (n 1), para 144 (emphasis added).

¹²⁴ *ibid*, paras. 98-100.

¹²⁵ This also forms a part of the Article 45 TFEU analysis, see *Diarra* (n 1) para. 106.

¹²⁶ Houben (n 88) 9-11.

¹²⁷ Case T-112/99 *Métropole télévision v Commission*, ECLI:EU:T:2001:215 (*Métropole v Commission*), para. 72.

¹²⁸ Giorgio Monti, ‘Article 81 and Public Policy (2002) 39 Common Market Law Review 1057, 1088.

restrictions. This should however be viewed as a continuation of the line of argumentation in *Wouters* which introduced a balancing act between objectives following from competition law and non-economic interests.¹²⁹ Account must be taken of the Court's explicit warning that the efficacy of Article 101(3) could be hindered if the examination of both pro- and anticompetitive effects were to be conducted at a prior stage (Article 101(1)).¹³⁰ It is therefore not recommended including a rule of reason in the novel framework.

Instead, Whish and Bailey have referred to the exception in *Wouters* as introducing a 'regulatory ancillarity'.¹³¹ *Wouters* shares a link with the notion of ancillarity, as certain restrictions (that may appear anticompetitive) will not infringe Article 101(1) if 'ancillary' to another legitimate objective.¹³² Although there are more examples of 'commercial ancillarity', the restriction in *Wouters* was ancillary to a regulatory function.¹³³ As Pijetlovic mentions, from case law on regulatory ancillarity such as *Meca-Medina*, *OTOC* and *Italian Geologists*, it can be observed that "the exception is applicable only in cases of regulatory restrictions imposed by collective private bodies in public interests".¹³⁴ The mentioned cases all concern (restrictive) rules with a public law component laid down by private bodies whose powers stem from (inter)national law.¹³⁵ It is not known how far *Wouters* reaches, or whether it applies to private regulatory situations without the involvement of public law. An adjustment within EU competition law may be necessary in light of the growing trend of private governance in the sports sector. This could specifically be done by extending *Wouters* to agreements concluded by football bodies such as FIFA, whose powers do not stem from public law and who operate in a context where no formal public regulator is present to safeguard public interests.¹³⁶ Relating to the above, AG Rantos recalls how case law on commercial ancillarity has been extended to "restrictions considered necessary on public grounds", leading to "regulatory ancillary restraints", and that the Court has recognised how non-commercial objectives may sometimes be of higher importance than a restriction of competition when weighed, resulting in no violation of Article 101 TFEU.¹³⁷

4.3.1.4. 'By effect' restrictions as the standard

Despite the analysis revealing that the distinction between object and effect has become increasingly blurred, AG Emiliou went as far in his recent opinion in *CD Tondela* that the

¹²⁹ Katarina Pijetlovic, 'EU Competition Law and Organisational Rules' in Katarina Pijetlovic (ed) *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport* (Springer 2016) 156.

¹³⁰ *Métropole v Commission* (n 127), para. 74.

¹³¹ Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 140.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Pijetlovic (n 129) 156.

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Case C-333/21 *European Superleague Company v UEFA, FIFA*, ECLI:EU:C:2022:993 (*ESL*), Opinion of AG Rantos, paras. 87-88.

distinction had long remained elusive, but was clarified in *ISU*, *ESL* and *Royal Antwerp*.¹³⁸ I argue differently: to put an end to the discussion, I submit that restrictions of competition in the sports sector by default must be labelled as ‘by effect’ and not as ‘by object’. This would imply that the door to *Wouters* is open for all restrictions in the sporting sector. As mentioned before, the Court acknowledges that sport has special characteristics and an important social, cultural and educational function.¹³⁹ As an example, The Court in *ESL* refers to “the principles, values and rules of the game underpinning professional football”, and that the fact that the sports governing body should ensure the creation of “the environment within which the game is played” is unusual compared to other sectors: its basis is a high degree of interdependence between clubs.¹⁴⁰ This is what makes sport special compared to other sectors, and shows how there is a limit to integrating this sector into regular industries and to applying an overarching, general assessment for all sectors. As Weatherill illustrates, classifying UEFA rules aimed at safeguarding the organisation of *national* leagues as restrictions by object would neglect the sport-specific argument that these rules are a driving force behind the development of sport within the EU.¹⁴¹ Applying ‘by effect’ restrictions as standard allows for a wider range of social, cultural and sporting objectives as well as sport-specific arguments to be brought forward.

A starting point for an approach to this first step of the framework may be derived from *ESL*, in which the Court accepted that the pursuit of legitimate objectives could be regarded as the object of “requiring that new competitions be open”.¹⁴² The effect could then be that it restricts competition. Similarly, it could be said that the object of the transfer system in *Diarra* is maintaining contractual stability, the stability of teams and the regularity of sporting competitions, while its effect would be that it restricts competition.¹⁴³

4.3.2. Step 2 - *Wouters* as only justification route

4.3.2.1. Efficiency gains defense

A by default-designation of conduct as ‘by effect’ restrictions results in two possible justification routes: the *Wouters*-exception, and the efficiency gains defense, for which the criteria have been found to be more stringent.¹⁴⁴ In relation to sports, these criteria have been laid down in *ESL*. Firstly, anticompetitive practices should be able “to achieve quantifiable efficiency gains (for the market), by contributing either to improving the production or distribution of the products or services concerned, or to promoting technical progress”, and the efficiency gains should be able to compensate for disadvantages.¹⁴⁵ Secondly, “an equitable

¹³⁸ Case C-133/24 *CD Tondela v Autoridade da Concorrência*, ECLI:EU:C:2025:364 (*CD Tondela*), Opinion of AG Emiliou, paras. 23-25.

¹³⁹ *ESL* (n 4) para. 102.

¹⁴⁰ *ESL* (n 4) para. 176; Weatherill (n 9) 81.

¹⁴¹ Weatherill (n 9) 81.

¹⁴² *ibid.*

¹⁴³ *Diarra* (n 1), para. 98.

¹⁴⁴ *Diarra* (n 1) para. 153; *ESL* (n 4) para. 189.

¹⁴⁵ *ESL* (n 4), para. 190.

part of the profit from those efficiency gains is reserved for the users”.¹⁴⁶ Here, the Court has adopted a broader meaning than ‘consumers’ in Article 101(3): theoretically, this would imply that the effect on professional football clubs and professional football players would also have to be assessed in *Diarra*. This appears to be a much stricter criterion than the proportionality test from the *Wouters*-exception, as further argued below. The third criterion implies that to achieve the efficiency gains, conduct must be indispensable. Finally, the Court held that the practice should not “eliminate all effective competition for a substantial part of the products or services concerned”.¹⁴⁷

Article 101(3) TFEU has generally been regarded as permitting agreements and practices only that result in improvements in *economic* efficiency.¹⁴⁸ A rather exceptional example can be found in the Commission’s *UEFA* decision: in the application to media rights sales to the Champions League, financial solidarity was seen as contributing to European football’s development.¹⁴⁹ More recently, however, the Court in *ESL* has also accepted that the centralised sale of rights related to football competitions could eventually lead to solidarity redistribution, which would be beneficial to all users. It then refers to “preserving a certain equality of opportunity” between football clubs, as well as a maintained balance during its assessment.¹⁵⁰ Doing so, the Court appears to have opened the door to bring sport-specific arguments into the efficiency gains defence, as both arguments cannot be merely seen as related to economic efficiency. In its *Diarra* judgment, the Court placed a strong emphasis on the need for review of the indispensability criterion. This is nothing short of a strong indication that Article 101(3) will not succeed.

4.3.2.2. Scope of legitimate objectives in *Wouters* and Article 101(3) TFEU

There does not seem to be an equivocal answer to what is to be understood as a legitimate objective under the *Wouters*-exception. In the *ISU* decision, it was determined that this should not include objectives of an economic nature.¹⁵¹ Because of the Court’s failure to provide explicit guidance on the scope of a legitimate objective, I share Van Rompuy’s view that this reinforces the idea of ‘blurry boundaries’ between non-economic and economic objectives.¹⁵² He argues that ‘maximising commercial revenue’ could be reinterpreted as safeguarding the sports ecosystem, thereby supporting grassroots development.¹⁵³ This research submits, however, that framing could also occur in the opposite direction: when ‘supporting grassroots development’ is invoked in the *Wouters*-exception, it is based on the maximisation of commercial revenue, i.e. an economic objective. Janssen and Kloosterhuis conclude that

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ Whish and Bailey (n 111) 162.

¹⁴⁹ *ibid* 164; Joint selling of the commercial rights of the UEFA Champions League (Case COMP/C.2.-37.398) Commission Decision 2003/778/EC [2003] OJ L 291/25, para. 164.

¹⁵⁰ *ESL* (n 4) paras. 234-235.

¹⁵¹ International Skating Union’s Eligibility Rules (Case AT.40208) Commission Decision 2018/C148/06 [2018] OJ L2018/9, para. 220.

¹⁵² Van Rompuy (n 79).

¹⁵³ *ibid.*

interventions framed as non-economic often address underlying market failures and thus do not inherently conflict with efficiency: objectives considered under *Wouters* “are not that much different” than those assessed under Article 101(3) TFEU.¹⁵⁴ Still, the conditions to fulfil the efficiency gains exemption are more stringent than the *Wouters*-exception criteria.¹⁵⁵ It is on this ground that I argue that the second component of the new competition law framework to be used in the sports sector is a standard review of whether the *Wouters*-exception could be invoked. For a sports governing body, it would be illogical to invoke economic arguments through Article 101(3) TFEU when under *Wouters*, special emphasis can be placed on sport-specific characteristics and objectives, such as the ones following from *Diarra* and others such as financial solidarity.¹⁵⁶ Article 101(3) TFEU will thus *not* be considered as a possible justification route in the novel framework.

In summary, the newly established framework, limited to the sports sector, consists of two major components; (i) a by default-designation of a ‘by effect’ restriction of competition and an (ii) application of the exception that follows from *Wouters/Meca-Medina*, while taking into account the specificity of sports as well as legitimate objectives that are characteristic to a sport-related context. From a broader perspective, particularly in the sporting realm, it is interesting to see if, and how, the novel framework can apply to the transfer system to which the Court turned its back in *Diarra*. The subsequent chapter will apply the most frequently mentioned solution for reform in literature, namely collective bargaining agreements, to the framework.

¹⁵⁴ Charlotte Janssen and Erik Kloosterhuis, ‘The *Wouters* case law, special for a different reason?’ (2016) 37 E.C.L.R. 335, 336.

¹⁵⁵ *ESL* (n 4) para. 183.

¹⁵⁶ See §5.5.2. for an application of sport-specific legitimate objectives to the *Wouters*-doctrine in relation to collective bargaining agreements.

CHAPTER 5: COLLECTIVE BARGAINING AS A RECOMMENDATION

5.1. Collective bargaining: the way to go?

In the aftermath of *Diarra*, the prevailing opinion in literature is that, while a transfer system is not per se unlawful, the RSTP articles, deemed unlawful by the Court, occupy such an important role within the current transfer system that this system as a whole is no longer sustainable. The contribution of both players and players' unions is crucial in the process of reform. Some scholars suggest that collective bargaining agreements are *the* solution for the creation of new regulations.¹⁵⁷ Collective bargaining is essential to protect workers' interests, as it offers greater equality in bargaining power and helps to correct the imbalance between workers and their employers from a labour law standpoint.¹⁵⁸ From a more economic perspective, however, it seems improbable that an employer would jeopardise its position vis-à-vis competitors by improving working conditions, but consequently achieve diminished sales and revenue.¹⁵⁹ Yet, this does not take away the fact that collective bargaining may be useful for the sports industry.

Despite the long-standing presence of collective bargaining agreements in the context of US sports, they have been largely absent so far within the context of EU sports law. The objective of this chapter is therefore to utilise collective bargaining agreements, as demonstrated by a case study, as a policy recommendation to the new framework established in Chapter 4. The European Model of Sport is first examined and then contrasted to the more commercialised US model. This will be followed by a description of the legal framework governing collective bargaining agreements within the context of competition law, with particular attention to the *Albany*-exemption. The difference between collective bargaining in the sports sector compared to other industries is also explored. Finally, the recommendation of collective bargaining agreements will be applied to the novel framework, and its potential efficacy as a means of effecting reform to the transfer system is determined.

5.2. European and US Model of Sport

The way sport is organised differs considerably between Europe and the US, which is illustrated when comparing their sports models. The central element of the European Model is its pyramidal structure, where amateur clubs form the bottom tier, with regional (amateur) associations and professional clubs above them. The next layer comprises national federations (football associations), which have the authority to regulate the actions of the lower levels. The governing body at the top of this structure is responsible for the organisation and overseeing of all sporting activities. UEFA has this role for European football, although it is also overseen

¹⁵⁷ James (n 13) 207.

¹⁵⁸ Heather R Insley, 'Major league umpires association: is collective bargaining the answer to or the problem in the contractual relationships of professional sports today?' (2001) 29 Cap. U. L Rev. 601, 601-602.

¹⁵⁹ Giorgio Monti, 'Collective labour agreements and EU competition law: five configurations' (2021) 17 European Competition Journal 714, 714-715.

by the international federation, FIFA.¹⁶⁰ Such a system can be well-managed by applying a ‘one-federation-per-sport’ principle, and also implies that a certain level of symmetry exists between the different layers.¹⁶¹ In addition, the European Model is based on ‘open competition’: on the basis of its sporting performance in the previous season, a team may be promoted or relegated at a national level, thereby maintaining competitive balance and prioritising sporting merit.¹⁶² Finally, AG Rantos speaks of a ‘financial solidarity regime’: revenue generated by top clubs is redistributed to lower ‘pyramidal’ levels.¹⁶³

In its White Paper on Sport, the Commission highlights that the organisation of sport in Europe is met with the challenge of increasing commercialisation.¹⁶⁴ Here, one can refer back to the ‘specificity of sports’ concept, which places more value on sportive performance and the role of sports in European society, rather than prioritising a profit-maximising approach. The latter is a main characteristic of the US Sports Model that *is* heavily commercialised.¹⁶⁵ Contrary to the European Model, amateur and professional sports are strictly divided in the US. The National Collegiate Athletic Association (‘NCAA’) governs amateur - usually, university - sports. Meanwhile, there are four major ‘professional’ leagues for baseball, American football, basketball and hockey.¹⁶⁶ Moreover, a ‘closed competition’ system is present within the American Model. Leagues are characterised by a predetermined composition, with teams being unable to promote or relegate to a different league. Although profit-oriented, there is a strong sense of solidarity in the US, with team owners accepting limits on power and revenue to maintain competitive balance.¹⁶⁷ After all, exciting matches drive profits, which not only benefits teams but also the owners. While it would be acceptable to add more competition to the more commercial-driven US sports sector, this does not apply to the EU. It has been established that, given the specificity of sport and the fact that regulatory - and not commercial - ancillarity should be applied to the sports sector, one should pay attention to legitimate objectives that may vary from technical objectives (e.g. anti-doping rules) to objectives ‘laid down’ in Article 165 TFEU.¹⁶⁸ In the US, salary caps and the drafting system are perhaps the most well-known examples of measures adopted to maintain a competitive balance, yet collective bargaining agreements have also proven to be effective in this regard. This measure shall therefore be discussed in the remainder of this chapter.

¹⁶⁰ Commission, ‘The European Model of Sports, Consultation Document of DG X’ (September 2008) 2-3.

¹⁶¹ Parliament, ‘Professional Sport in the Internal Market (Project No IP/A/IMCO/ST/2005-004) - Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament’ (September 2005) 28.

¹⁶² Opinion of AG Rantos in *ESL* (n 137), para. 30.

¹⁶³ *ibid.*

¹⁶⁴ Commission, ‘White Paper on Sport’ COM(2007) 391 final, §4.

¹⁶⁵ Parliament (n 161) 30.

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ Opinion of AG Rantos in *ESL* (n 137), paras. 90-91.

5.3. Specificities of employment relationships in the sports industry

As is the case in other industries, the argument can be made for labour relations in sport to include collective bargaining. However, it should be noted that there are also specific features of the sports industry that may have a bearing on employment relationships within. Firstly, it is the joint responsibility of competitors within the industry to produce an ‘entertainment product’, for which a guarantee of integrity is a prerequisite: this requires an agreement between clubs on how this ‘product’ should be shaped, and under what exact rules.¹⁶⁹ Secondly, the monopolistic position of a sports governing body allows it to unilaterally impose changes on employment conditions of athletes.¹⁷⁰ Athletes are then left with no real choice but to accept these terms and fall victim to the governing body’s complete control. Finally, Pannett notes that trade unions in the sports industry are special, as employees - athletes - that form a part are considered noninterchangeable by employers and have different (levels and types of) skills. While unions may be disadvantaged due to the fact that athletes’ skills cannot be transferred to other industries, employers are so too as they want the best athletes under their wings.¹⁷¹ These factors may have the result of reshaping the ‘traditional’ employment relationship through a ‘web’ of contracts. As a result, athletes (e.g. football players) are usually subject to rules from multiple actors; governing bodies, leagues and the club where they are playing, each with different interests.¹⁷²

5.4. Collective bargaining agreements in the realm of competition law

5.4.1. US law: the non-statutory labour exemption

As mentioned earlier, moving towards collective bargaining could create an economic paradox.¹⁷³ The US, and especially its sports sector, has however embraced collective bargaining (agreements) for shaping the working conditions of players. This does not negate the fact that competition law-based conflicts may arise due to the terms of a collective agreement.¹⁷⁴

US courts have recognised a ‘non-statutory labour exemption’ that protects the process of collective bargaining and shields terms of such agreements from antitrust law. However, this exemption is invoked only when certain conditions are met; the term should be “related to wages, hours and working conditions” and should be obtained “through bona fide, arm’s length bargaining in pursuit of own labor union policies”.¹⁷⁵ Effect is given to labour law here, which

¹⁶⁹ Daniel Pannett, ‘Collective Bargaining in Sport: Challenges and Benefits’ (2015) 4 UCL Journal of Law and Jurisprudence 189, 191-192; O’Leary (n 19) 419.

¹⁷⁰ *ibid* 192.

¹⁷¹ *ibid* 192-193.

¹⁷² *ibid* 193.

¹⁷³ Monti (n 159) 714-715.

¹⁷⁴ O’Leary (n 18) 417.

¹⁷⁵ *Meat Cutters v Jewel Tea*, 381 U.S. 676 (1965), p. 380-381; O’Leary (n 18) 418.

‘prevails’ over antitrust law. The sports sector is a breeding place for conflicts between labour and antitrust law, and the exemption has been used on numerous occasions.¹⁷⁶

5.4.2. EU law: Albany

The EU Treaties do *not* provide an explicit legal basis for resolving conflicts between labour and competition law. The solution must instead be found in *Albany*, where it was decided that collective bargaining agreements could fall outside the scope of Article 101 TFEU, provided that they are the result of collective bargaining between employees and employers and that they contribute to improving working conditions.¹⁷⁷ The Court’s decision can be attributed to Treaty provisions that require the EU to balance its pursuit of competition policy with broader social policy objectives, such as promoting employment.¹⁷⁸ Applying Article 101 TFEU to labour would undermine the objectives pursued by collective labour agreements.¹⁷⁹ In subsequent case law, the scope of the *Albany* exemption has been widened. Although the Court held in *FNV Kiem* that self-employed musicians are equal to undertakings and collective agreements entered into by them are subject to Article 101 TFEU, some self-employed workers should be regarded as ‘false self-employed’, meaning “service providers in a situation comparable to that of employees”.¹⁸⁰ Provisions of collective bargaining agreements applying to them therefore also fall outside the scope of Article 101 TFEU: *Albany* thus applies.¹⁸¹ According to O’Leary, the test in *Albany* is “extremely broad and provides a blanket exemption”.¹⁸² The absence of a fixed set of parameters allows for a flexible development of this exemption, which is especially relevant to the sports sector.

5.5. Application of collective bargaining agreements to novel framework

5.5.1. Collective bargaining agreements as restrictions by effect

In *Albany*, the Court held that “certain restrictions of competition are inherent between collective agreements between organisations representing employers and workers”.¹⁸³ It could be concluded rather straightforwardly that this would amount to a restriction of competition by *object* in most instances. Yet, in line with the novel framework for the sports sector in this research that implies that sports governance practices should be treated as restrictions by *effect*, it could be argued that collective bargaining agreements also amount to a by-effect restriction. The Commission has acknowledged that agreements pursuing legitimate public policy goals may fall outside the scope of being classified as ‘anticompetitive by object’, but as a by-effect

¹⁷⁶ See e.g. *Mackey v National Football League*, 542 F.2d 606 (8th Cir. 1976); *Powell v NFL*, 888 F.2d 559 (8th Cir. 1989); *Brown v Pro Football, Inc.*, 518 US 231 (1996).

¹⁷⁷ *Albany* (n 17) paras. 62–63.

¹⁷⁸ *Monti* (n 159) 715.

¹⁷⁹ *Albany* (n 17) para. 59.

¹⁸⁰ Case C-413/13 *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411 (*FNV Kiem*), paras. 29–31.

¹⁸¹ *ibid*, para. 42.

¹⁸² O’Leary (n 18) 421.

¹⁸³ *Albany* (n 17) para. 59.

restriction instead, if at all.¹⁸⁴ As follows from Article 9 TFEU and applying this to the case at hand, football players should be guaranteed “adequate social protection”, which demonstrates how a collective agreement may align with the EU’s core values.¹⁸⁵ With this in mind, it would be erroneous to assume that collective (bargaining) agreements should be regarded as by-object restrictions, allowing for a stringent review only.

5.5.2. Application to the *Wouters/Meca-Medina* doctrine

As outlined in the novel framework, an assessment of the criteria of the *Wouters*-exception is the default route to be followed in instances of restrictions of competition by effect. The ‘terms’ incorporated in a collective bargaining agreement in the sports sector, particularly with regard to the transfer system, must therefore, in any case, consider legitimate objectives and characteristics that follow from the European Sports Model, and must respect the specific characteristics of sport while seeking a balance of interests from all stakeholders involved.

First, besides maintaining a degree of contractual stability, a new transfer system should ensure that players are given rights to move efficiently between clubs.¹⁸⁶ As a result, a competitive environment between clubs can be established. To strike a balance between contractual stability and the mobility of football players, a new rule could be introduced that obliges football players and clubs to enter into contractual agreements for a predetermined duration of at least two years, and a player and club will renew or officially terminate the contract exclusively upon the mutual consent of both parties. While it can be contended that this still affords players little room to terminate a contract mid-term, similar to *Diarra*, it provides all professional players and clubs with a high level of contractual stability over a substantial period, and a chance every two years to step up to a next level for players in specific. In a related argument, Houben, Budzinski and Wathélet have previously proposed the elimination of multiple transfer periods per year.¹⁸⁷ In a scenario like the above, a single transfer period taking place annually during the summer months would contribute to the stability of clubs’ player rosters, and more broadly, it would ensure the regularity of (international) sporting competitions.

Second, attention should be drawn in a collective agreement towards ensuring financial solidarity with so-called ‘development clubs’.¹⁸⁸ A solidarity regime is one of the components on which the European Sports Model is based. From an economic point of view, Hoey, Peeters and Principe have demonstrated that the system that the Court turned its back to in *Diarra* was rather inefficient, as little revenue was redistributed from larger clubs to clubs active in competitions of a lower level. Consequently, not enough solidarity was being created, due to the redistributive effect not being “strong enough for smaller clubs to significantly catch up to

¹⁸⁴ Bergqvist (n 116).

¹⁸⁵ *ibid.*

¹⁸⁶ Houben (n 88) 11.

¹⁸⁷ Houben, Budzinski and Wathélet (n 20) 7.

¹⁸⁸ *ibid.*

large market clubs”.¹⁸⁹ Following on from this, literature often links the aims of encouraging youth development and reducing revenue disparities among clubs, thereby promoting greater competitive balance.¹⁹⁰ Pursuing these objectives all at once seems unrealistic, however. Smaller clubs best support player discovery and development by selling talent to larger clubs, receiving financial compensation in return, while this dynamic limits their ability to compete at the highest level themselves. Commentators have therefore advocated for an obligation for all professional clubs to allocate a (to be determined) percentage of their revenue to previous, often smaller, clubs of their current football players.¹⁹¹ Referring back to the EU Sports Model, smaller clubs that are found at the lower levels of the pyramid model would then benefit from a predictable amount of money coming their way that is generated by their trained players, and these (transfer) revenues in the long term could lead to an increase in competitive balance and sustained rivalry if clubs are able to field a team made up of better players.¹⁹² It is likely that clubs will then be more incentivised to invest more in the development of their youngest players and will therefore contribute to the ‘educational function of sport’, as laid down in Article 165 TFEU. Finally, by maintaining a competitive balance between teams, the proposal mentioned above would then also lead to objectives related to the specific nature of sport, namely preserving a higher degree of equality and greater unpredictability of results.¹⁹³ This proves how the concept of ‘specificity of sport’ and the European Model should be taken into account during an analysis of Article 101 TFEU.

The question to be asked next is whether collective bargaining agreements are inherent and proportionate to achieve the aforementioned legitimate objectives. From *Meca-Medina*, it appears that the criterion of ‘inherency’ is quite easily fulfilled as it does not appear subject to stringent scrutiny by the Court. In fact, the Court has already held in *Wouters* that the requirement of inherency would be fulfilled as long as - in this case, a collective bargaining agreement - could “reasonably be considered to be necessary” to achieve the legitimate objective(s).¹⁹⁴ Regarding the proportionality test under the *Wouters*-exception, Van Rompuy has labelled this test as “open-ended”.¹⁹⁵ It is highly doubtful whether less restrictive measures can be brought forward. A comparison to the Major League Soccer (‘MLS’) in the US, where collective agreements have been successfully used, signifies that a collective bargaining agreement as a solution for transfer system reform is effective.¹⁹⁶ The one implemented within the MLS could serve as an instructive model to emulate the development of the collective bargaining agreement that lies at the heart of this chapter. Therefore, a collective bargaining

¹⁸⁹ Samuel Hoey, Thomas Peeters and Francesco Principe, ‘The transfer system in European football: a pro-competitive no-poaching agreement?’ (2020) Tinbergen Institute Discussion Paper 2020-034/VII, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631763> accessed 18 May 2025.

¹⁹⁰ *ibid* 20-21.

¹⁹¹ Houben, Budzinski and Wathélet (n 20) 8.

¹⁹² Hoey, Peeters and Principe (n 189) 3.

¹⁹³ *Bosman* (n 13) para. 106; Opinion of AG Rantos in *ESL* (n 137) para. 93.

¹⁹⁴ *Wouters* (n 8) para. 107 (emphasis added).

¹⁹⁵ Van Rompuy (n 79).

¹⁹⁶ Bryce Goodwyn, ‘Bargaining Across Borders: The Prevalence of Collective Bargaining Agreements in American Sports and the Potential Implementation of the American Model Into the English Premier League (2025) 32 Jeffrey S. Moorad Sports 155, 158.

agreement in which the (new) transfer rules mentioned above are incorporated would likely fulfill all criteria of the *Wouters*-exception criteria.

5.5.3. Albany in the sports sector

As previously stated, the parameters of the *Albany*-exemption are ambiguous and allow for further development of its scope. From the perspective of the (professional) sports industry, this potentially allows for regulatory provisions concerning employment to be exempted from the purview of Article 101 TFEU when included in a collective bargaining agreement.¹⁹⁷ In the present case, collective bargaining is likely to take place between representative organisations for football players, such as FIFPRO, and organisations for football employers, with the European Club Association ('ECA') being the most prominent example, and leagues. The resulting agreements could then be enforced by them vis-à-vis football governing bodies FIFA and UEFA.

O'Leary notes that the Court has yet to rule on whether a collective bargaining agreement governing professional athletes' employment falls outside the scope of Article 101 TFEU.¹⁹⁸ Neither has the Court had its say on whether collectively agreed regulatory rules related to employment with restrictive effects on competition can be justified under the *Wouters*-exception.¹⁹⁹ It has long been established that football players are considered 'workers' under EU law.²⁰⁰ Therefore, it is likely that collective agreements including rules on the (new) transfer system at EU level reached between stakeholders and through the inclusion of governing bodies will be exempted from Article 101 TFEU. In this regard, AG Szpunar also seems to suggest that a collective bargaining agreement could be *the* solution to reforming the transfer system. According to the AG, the adoption of the RSTP was merely the result of a lack of collective agreements; therefore, *Albany* could not be applied in that case.²⁰¹ Based on this, it could be argued that the *Albany*-exemption then *does* apply to the above-drafted system as it involves a collective agreement between football players, employers and their organisations which incorporates terms of a new transfer system, thus making this agreement exempted from EU competition law. This would indicate an expansion of the parameters of collective agreements to the sports industry as has occurred in the US. Houben even speaks of a possible "Americanization of the European model of football".²⁰² At the same time, this would also mean that the novel framework in this research could be disregarded, as the *Wouters/Meca-Medina* justification route would no longer be relevant. In situations where the Court has not previously ruled on whether an athlete should be considered a 'worker', for example professional athletes in individual sports such as tennis and golf, a successful application of the

¹⁹⁷ O'Leary (n 18) p. 423.

¹⁹⁸ Leanne O'Leary, 'ISU, Royal Antwerp, European Superleague & employment relations in sport' (2023) 23 The International Sports Law Journal 431, 434.

¹⁹⁹ *ibid.*

²⁰⁰ *Bosman* (n 13) para. 73.

²⁰¹ Opinion of AG Szpunar in *Diarra* (n 11) para. 46.

²⁰² Houben (n 88) 13.

Albany-exemption is doubtful. However, justification for the restrictions within the collective agreement would then still be possible under the *Wouters*-exception.

Based on the foregoing, it must be concluded that, despite collective bargaining agreements within the professional sports industry often not needing to be tested against a competition law framework due to the applicability of the *Albany*-exemption, they can still be put forward as a *recommendation* for reforming the transfer system. In Europe, there is still much to be gained from collective action, especially in the sports industry where it is still “in its infancy”.²⁰³ A successful collective bargaining process is reliant on an effective social dialogue, for which a legal basis has been established in Articles 151 to 156 TFEU. It allows for a dialogue to which all relevant stakeholders can contribute at EU level, in order to help bypass national-level barriers that hinder the establishment of collective agreements on working conditions.²⁰⁴ Although a social dialogue committee for football has already been set up, its output so far has been underwhelming, with only one collective agreement adopted - in 2012.²⁰⁵ While there is room for improvement, agreements such as the one signed between FIFPRO and World Leagues Forum (‘WLF’) in 2022 through which the further development of collective bargaining is fostered, contributing to the future growth of the football industry, do represent a positive development towards greater recognition of collective agreements.²⁰⁶

²⁰³ *ibid.*

²⁰⁴ O’Leary (n 198) 434.

²⁰⁵ Houben (n 88) 13.

²⁰⁶ FIFPRO, ‘World Leagues Forum and FIFPRO establish global employment relations structure in professional football’ (*fifpro.org*, 26 September 2022) <<https://fifpro.org/en/who-we-are/what-we-do/foundations-of-work/fifpro-and-world-leagues-forum-establish-global-employment-relations-structure-in-professional-football>> accessed 27 May 2025.

CHAPTER 6: CONCLUSION

The Court's decision in *Diarra* was unequivocal: the current football transfer system must be thoroughly overhauled, as certain of FIFA's RSTP rules violate EU law and were found to restrict competition 'by object'. Why the Court did not meaningfully consider the possibility of a 'by effect' restriction in its reasoning, is, however, unclear. Legitimate (sporting) objectives and specific characteristics of sport are now excluded from the justification analysis based on the framework set by *ESL*. As scholars have suggested collective bargaining agreements as a solution for reform, this research sought to contribute to the academic debate by establishing a novel competition law framework for the sports sector based on Article 101 TFEU and applying collective bargaining agreements thereto.

The new framework consists of two major components. As the Court in *Diarra* incorporates various legitimate objectives such as contractual stability and the regularity of interclub football competitions into its assessment, it effectively conducts a 'by effect' analysis within a 'by object' framework. This reflects a clear blurring of the distinction between the two types of restrictions. The framework therefore firstly proposes a by default designation of a 'by effect' restriction of competition to put an end to the ongoing discussion about the blurred distinction between restrictions 'by object' and 'by effect'. Secondly, the *Wouters*-exception should automatically be applied. Although there are indications that the Court is increasingly receptive to sport-related arguments within Article 101(3) TFEU assessments, this justification route has explicitly been recognised as more stringent than *Wouters/Meca-Medina*. This reinforces the perception of Article 101(3) as a less attractive pathway, and it is therefore left out of the new framework.

Collective bargaining agreements incorporating (new) transfer rules should reflect a range of legitimate objectives. Contractual stability comes to mind, but account should also be taken of sport-related objectives, elements of the European Sports Model, Article 165 TFEU and the specific characteristics that set sport apart from other sectors. As an example, an altered financial solidarity regime where clubs pay a percentage of their revenue to the previous clubs of their current players could lead to a competitive balance, leading to, *inter alia*, more equality between clubs and a certain degree of uncertainty in relation to sporting results. Adding to this the criteria of *inherency* and *proportionality* that are relatively easy to fulfil, it was concluded that collective bargaining agreements would likely pass all criteria of the *Wouters*-exception. However, if the *Albany*-exemption applies to such agreements, which has not been ruled on yet but should be considered likely, the relevance of the competition law framework as outlined would no longer hold as the agreement would be exempted from Article 101 TFEU.

Nevertheless, the relevance and potential of collective bargaining agreements extend beyond the scope of competition law alone. Stakeholders must come together to develop a solution that proves effective both in the short and long term. In this regard, social dialogue *should* and *can* play a central role. I recommend further research into how such a dialogue can be concretely structured within the context of collective bargaining agreements and the transfer system. What is certain, is that social dialogue requires compromise. Yet, if successful, it can produce a

collective bargaining agreement that reflects the interests of all parties; football players' organisations, employers' organisations and finally, the regulator(s). Such a solution would contribute to and support the broader social function that sport holds within the EU legal framework.

I wish to conclude by echoing what the literature agrees upon and also follows from this research: sport is *special*!

BIBLIOGRAPHY

Table of cases

Court of Justice of the European Union

Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 (*STM*)

Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140 (*Walrave and Koch*)

Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others*, ECLI:EU:C:1995:463 (*Bosman*)

Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430 (*Albany*)

Case T-112/99 *Métropole télévision v Commission*, ECLI:EU:T:2001:215 (*Métropole v Commission*)

Case C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98 (*Wouters*)

Case C-519/04 P *Meca Medina and Macjen v Commission*, ECLI:EU:C:2006:492 (*Meca-Medina*)

Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610 (*GlaxoSmithKline*)

Case C-209/07 *Competition Authority v Beef Industry Development Society*, ECLI:EU:C:2008:643 (*BIDS*)

Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI:EU:C:2010:143 (*Bernard*)

Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127 (*OTOC*)

Case C-67/13 P *Groupement des Cartes Bancaires v European Commission*, ECLI:EU:C:2014:2204 (*Cartes Bancaires*)

Case C-413/13 *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411 (*FNV Kiem*)

Case C-228/18 *Budapest Bank Nyrt. and Others*, ECLI:EU:C:2020:265 (*Budapest Bank*)

Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52 (*Generics*)

Case C-124/21 P *International Skating Union v Commission*, ECLI:EU:C:2023:1012 (*ISU*)

Case C-333/21 *European Superleague Company v UEFA, FIFA*, ECLI:EU:C:2023:1011 (*ESL*)

Case C-680/21 *SA Royal Antwerp Football Club v Union royale belge des sociétés des sociétés de football association ASBL*, ECLI:EU:C:2023:1010 (*Royal Antwerp FC*)

Case C-650/22 *Fédération internationale de football association (FIFA) v BZ*, ECLI:EU:C:2024:824 (*Diarra*)

Opinions Advocate General

Joined cases C-56/64 and C-58/64 *Consten and Grundig v Commission of the EEC*, ECLI:EU:C:1966:19 (*Consten and Grundig*), Opinion of AG Roemer

Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others*, ECLI:EU:C:1995:293, Opinion of AG Lenz

Case C-228/18 *Budapest Bank Nyrt. and Others*, ECLI:EU:C:2019:678 (*Budapest Bank*), Opinion of AG Bobek

Case C-333/21 *European Superleague Company v UEFA, FIFA*, ECLI:EU:C:2022:993 (*ESL*), Opinion of AG Rantos

Case C-680/21 *SA Royal Antwerp Football Club v Union royale belge des sociétés des sociétés de football association ASBL*, ECLI:EU:C:2023:188 (*Royal Antwerp FC*), Opinion of AG Szpunar

Case C-650/22 *Fédération internationale de football association (FIFA) v BZ*, ECLI:EU:C:2024:824, Opinion of AG Szpunar

Case C-133/24 *CD Tondela v Autoridade da Concorrência*, ECLI:EU:C:2025:364 (*CD Tondela*), Opinion of AG Emiliou

Commission Decisions

Joint selling of the commercial rights of the UEFA Champions League (Case COMP/C.2.-37.398) Commission Decision 2003/778/EC [2003] OJ L 291/25

International Skating Union's Eligibility Rules (Case AT.40208) Commission Decision 2018/C148/06 [2018] OJ L2018/9

US courts

Meat Cutters v Jewel Tea, 381 U.S. 676 (1965)

Mackey v National Football League, 542 F.2d 606 (8th Cir. 1976)

Powell v NFL, 888 F.2d 559 (8th Cir. 1989)

Brown v Pro Football, Inc., 518 US 231 (1996)

Table of legislation

Commission, ‘White Paper on Sport’ COM(2007) 391 final

Secondary sources

Van den Bogaert S, ‘From Bosman to Bernard C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177’ in Jack Anderson (ed) *Leading cases in Sports Law* (Springer 2013)

Bergqvist C, ‘Collective Bargaining and Platforms’ (*Kluwer Competition Law Blog*, 11 December 2020)

<<https://competitionlawblog.kluwercompetitionlaw.com/2020/12/11/collective-bargaining-and-platforms/>> accessed 6 May 2025

Brewer R, ‘When Sporting Regulators Don’t Play Ball: Rejecting the Sporting Exception in EU Competition Law’ (*Kluwer Competition Law Blog*, 23 August 2023)

<<https://competitionlawblog.kluwercompetitionlaw.com/2023/08/23/when-sporting-regulators-dont-play-ball-rejecting-the-sporting-exception-in-eu-competition-law-2/>> accessed 14 April 2025

Budzinski O, ‘The Institutional Framework for doing Sports Business: Principles of EU Competition Policy in Sports Markets’, (2012) 11 *International Journal of Sport Management and Marketing* 44

Enchelmaier S, ‘Restrictions by object after Generics, Lundbeck and Budapest Bank: are we any wiser now?’ (2023) 11 *Journal of Antitrust Enforcement* 72

Flanagan C, ‘A Tricky European Fixture: An Assessment of UEFA’s Financial Fair Play Regulations and their Comparability with EU Law’ (2013) 13 *The International Sports Law Journal* 148

Goodwyn B, ‘Bargaining Across Borders: The Prevalence of Collective Bargaining Agreements in American Sports and the Potential Implementation of the American Model Into the English Premier League (2025) 32 *Jeffrey S. Moorad Sports* 155

Hoey S, Peeters T and Principe F, 'The transfer system in European football; a pro-competitive no-poaching agreement?' (2020) Tinbergen Institute Discussion Paper 2020-034/VII <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631763> accessed 18 May 2025

Houben R, 'Sports Governance and the Rule of Law' in Annette Greenhow and John Wolohan (eds), *The Routledge Handbook on Sports Law and Governance* (Routledge 2025)

Houben R, 'The Transfer System in Football: A First Case Study of the CJEU's Novel Competition Law Framework (for Sports)' Diarra and What's Next' (*SSRN*, 19 June 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4838909> accessed 16 January 2025

Houben R, Budzinski O and Wathélet M, 'The Transfer System in Football; Diarra and What's Next' (*SSRN*, 20 June 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871477> accessed 30 November 2024

Ianc S and Hömann A, 'Certain FIFA transfer rules contrary to EU law: Case C-650/22 FIFA v BZ' [2025] *Journal of European Competition Law & Practice* 1

Insley HR, 'Major league umpires association: is collective bargaining the answer to or the problem in the contractual relationships of professional sports today?' (2001) 29 *Cap. U. L Rev.* 601

James M, 'The Diarra case' (2024) 24 *The International Sports Law Journal* 205

Janssen C and Kloosterhuis E, 'The Wouters case law, special for a different reason?' (2016) 37 *E.C.L.R.* 335

Meredith J and García B, 'To be or not to be specific? Understanding EU institutions' definition of the specific nature of sport' (2023) 1 *Sports Law, Policy & Diplomacy Journal* 17

Monti G, 'Article 81 and Public Policy (2002) 39 *Common Market Law Review* 1057

Monti G, 'Collective labour agreements and EU competition law: five configurations' (2021) 17 *European Competition Journal* 714

O'Leary L, '*ISU, Royal Antwerp, European Superleague & employment relations in sport*' (2023) 23 *The International Sports Law Journal* 431

O'Leary L, 'Professional team sports and collective labour law in the European Union' in Anderson J and others (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing Limited 2018)

Pannett D, 'Collective Bargaining in Sport: Challenges and Benefits' (2015) 4 UCL Journal of Law and Jurisprudence 189

Parrish R, 'Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law' (2015) 22 Maastricht Journal of European and Comparative Law 256

Parrish R, 'Case C-36/74 Walrave and Koch [1974] ECR 1405' in Jack Anderson (ed) *Leading cases in Sports Law* (Springer 2013)

Parrish R, *Sports law and policy in the European Union* (Manchester University Press 2003)

Pijetlovic K, 'EU Competition Law and Organisational Rules' in Katarina Pijetlovic (ed) *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport* (Springer 2016)

Van Rompuy B, 'EU Court of Justice Delineates the Scope of the Wouters Exception' (*Kluwer Competition Law Blog*, 15 January 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/01/15/eu-court-of-justice-delineates-the-scope-of-the-wouters-exception/>> accessed 21 April 2025

Sternheimer W and others, 'Diarra vs FIFA's RSTP - Bosman 2.0?' (*Morgan Sports Law*, 7 October 2024) <<https://morgansl.com/en/latest/lassana-diarra-fifa-rstp-transfer-system-illegal-cjeu-bosman>> accessed 14 April 2025

Tokić A, 'Wouters Exception for Hardcore Price Fixing?' (*Kluwer Competition Law Blog*, 15 February 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/02/15/wouters-exception-for-hardcore-price-fixing/>> accessed 21 April 2025

Villanueva A, 'Accounting for the specificity of sport in EU law: Old and new directions in the 21 December 2023 judgments', (2023) 23 The International Sports Law Journal 422

Weatherill S, 'Bosman Changed Everything: The Rise of EC Sports Law' in Stephen Weatherill (ed) *European Sports Law* (2nd edn, Springer 2014)

Weatherill S, 'Protecting the Conditional Autonomy of Governing Bodies in Sport From Review 'From a Competition Standpoint': How the Court Should Decide Its Pending Cases on the Transfer System, the Regulation of Agents and Club (Re)Location' (2024) 8 European Competition and Regulatory Law Review 67

Weatherill S, 'The impact of the rulings of 21 December 2023 on the structure of EU sports law (2024) 23 Int Sports Law J 409

Weatherill S, 'The White Paper on Sport as an Exercise in 'Better Regulation' in Stephen Weatherill (ed) *European Sports Law* (2nd edn, Springer 2014)

Whish R and Bailey D, *Competition Law* (8th edn, Oxford University Press 2015)

Whish R and Bailey D, *Competition Law* (10th edn, Oxford University Press 2021)

Zelger B, 'Object Restrictions in Sports after the ECJ's Decisions in *ISU* and *Superleague* (2024) 15 *Journal of European Competition Law & Practice* 90

Other

Commission, 'The European Model of Sports, Consultation Document of DG X' (September 2008)

FIFA, 'Regulations on the Status and Transfer of Players' (July 2014)
<<https://digitalhub.fifa.com/m/.pdf>> accessed 18 April 2025

FIFPRO, 'FIFPRO Statement: Decision of European Court of Justice' (*fifpro.org*, 4 October 2024) <<https://fifpro.org/en/supporting-players/obtaining-justice/governance-and-representation/fifpro-statement-decision-of-european-court-of-justice>> accessed 3 December 2024

FIFPRO, 'World Leagues Forum and FIFPRO establish global employment relations structure in professional football' (*fifpro.org*, 26 September 2022) <<https://fifpro.org/en/who-we-are/what-we-do/foundations-of-work/fifpro-and-world-leagues-forum-establish-global-employment-relations-structure-in-professional-football>> accessed 27 May 2025

Parliament, 'Professional Sport in the Internal Market (Project No IP/A/IMCO/ST/2005-004) - Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament' (September 2005)