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Home Advantage: The Irish Rugby Football Union's Eligibility Restrictions in Light of the *Diarra* Case

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Pursuant to the Irish Rugby Football Union's ('IRFU') rules, players must play for one of four domestic provinces (Leinster, Munster, Ulster or Connacht) to be selected for the national men's team. Rugby differs from other sports (such as football) because international contracts and match fees are more lucrative for players than club contracts. This practice has been agreed upon by the IRFU and the provinces, with the justification being that players benefit from central contracts with the IRFU (who are able to control how many club matches they play). However, while the IRFU's policy has reduced significantly the incentive for Irish players to accept contracts abroad, the salaries being paid in the premier French domestic rugby competition (Top 14) have increased massively. Therefore, the IRFU's restrictive rule is severely limiting the available options for players. In Diarra, the CJEU made two crucial findings in relation to sporting regulators. Firstly, it found that FIFA's transfer rules were inconsistent with the free movement of workers pursuant to Article 45 TFEU (potentially depriving players of contractual opportunities). Secondly, it held that FIFA's rules were a restriction of competition by object pursuant to Article 101(1) TFEU. While the court acknowledged the legitimacy of regulating the conditions for the operation of competitions to ensure stability in the composition of teams, governing bodies were not allowed to impose a 'permanent, drastic and permanent restriction'. The result was an artificial partitioning of national and local markets which disadvantaged players. Further, the rules presented by their very nature a high degree of harm to competition. The article applies the reasoning of the CJEU in Diarra to the IRFU's eligibility rules to assess their compatibility with fundamental principles of EU law, and in particular, whether they constitute a potential restriction of competition by object.

1. INTRODUCTION

The relationship between competition law and sport has always been somewhat complex, with the Court of Justice of the EU ('CJEU') generally content to recognise the idiosyncratic nature of sport in granting sport's governing bodies greater leeway in formulating and applying rules. There has been a general acceptance that separating the purely economic aspects and sporting aspects of professional sport can be difficult, and as a result, a lenient application of the EU's competition provisions has been favoured. However, the CJEU has consistently maintained the stance that EU law does apply to governing bodies, albeit while recognising the special nature of sport, and that they do not enjoy a carte blanche in relation to the Union's competition rules.[1] This position has been reinforced by a number of recent cases which appear to indicate that the zone

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

of deference for sports is decreasing and that sport's governing bodies will find it increasingly difficult to convince the CJEU that a dispute relates to a purely sporting matter, or that the rules being applied can be justified as inherently necessary for the proper functioning of competitions and the administration of a sport. The *European Superleague, Royal Antwerp,* and *International Skating Union* judgments were all handed down on 21 December 2023 and each found potential breaches of the competition provisions.[2] The judgments, read together, appear to water down somewhat the deference granted to sport that was established in *Wouters* and *Meca-Medina*, whereby the CJEU would take account of the specific nature of sport and not apply the competition provisions to rules that were restrictive of competition but inherent in the pursuit of the sporting objective for which they were adopted.[3] This was reinforced recently in the *Diarra* case, where the CJEU found that aspects of FIFA's football transfer system were in breach of the protection for the free movement of workers (Article 45 TFEU) and the prohibition against anti-competitive agreements between undertakings (Article 101 TFEU).[4] As a result, the focus on sport's regulatory bodies in competition law may be increasing, while the scrutiny of their practices intensifies.

Rugby union is a relatively 'young' sport in professional terms, having only turned professional in 1995. Previously, the sport of rugby league was professional, whereas the older sport of rugby union (referred to as 'rugby' for the remainder of this article) clung to its amateur status, even completing two World Cups (in 1987 and 1991) with fully amateur players. Therefore, there has been very limited interaction between the sport and the EU's laws, which will likely continue given that three of the foremost international European teams (England, Wales and Scotland) are no longer part of the EU. However, due to the extent of the recent commercialisation of the sport, the potential for a case being taken by a player or club is a live one.[5]

The Irish Rugby Football Union ('IRFU') has introduced a policy over the course of the last 10-15 years whereby it refuses to select players for the men's national team if they are playing for a club based outside of Ireland. There are only four professional clubs (referred to as 'provinces' because they are drawn around the borders of the four Irish provinces, namely, Leinster, Munster, Ulster and Connacht), each of which is closely associated and inter-connected. In light of the recent *Diarra* judgment, the policy appears to be on a questionable legal foundation in terms of restricting the free movement of players, while also potentially constituting a decision by an association of undertakings or an anti-competitive agreement between the IRFU and the provinces resulting in lower salaries for players. The purpose of this article is to assess the

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2 Case C-333/21 *European Superleague Company SL v FIFA, UEFA*, ECLI:EU:C:2023:1011 ('*European Superleague*'); Case C-680/21 UL, *SA Royal Antwerp Football Club v URBSFA, UEFA*, ECLI:EU:C:2023:1010 ('*Royal Antwerp*'); and Case C-124/21 P *International Skating Union v Commission*, ECLI:EU:C:2023:1012 ('*International Skating Union*').

3 Stephen Weatherill, 'The impact of the rulings of 21 December 2023 on the structure of EU sports law' (2023) 23 The International Sports Law Journal 409.

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

5 For example, the IRFU's revenue for the 2023/24 season was €79.2 million. See IRFU Annual Report 2023/24.

potential case against the IRFU under EU law, with particular emphasis on Articles 45 and 101 TFEU.

2. THE *DIARRA* CASE

i. Background to the proceedings

Lassana Diarra is a former French professional footballer who had enjoyed a successful club career playing in France, England and Spain before he moved to the Russian club Lokomotiv Moscow in 2013. In 2014, a contractual dispute arose relating to Diarra's salary, with Diarra alleging that the club reduced his salary in breach of contract. When Diarra refused to train, Lokomotiv Moscow unilaterally decided that his behaviour amounted to a breach of contract and terminated it. Lokomotiv Moscow brought a case to FIFA's Dispute Resolution Chamber ('DRC') alleging that Diarra had breached FIFA's Regulations on the Status and Transfer of Players ('RSTP') by terminating his contract 'without due cause'. Diarra filed a counterclaim at the DRC for compensation equivalent to the remainder of what he would have earned under the contract if it had been concluded according to its original terms.

Under the RSTP, a player who terminated their contract without just cause was liable to pay compensation to the former club. Further, a club that attempted to sign such a player would be held jointly and severally liable for the compensation, while also potentially being banned from registering new players for two consecutive transfer windows because they were presumed to have induced the breach of contract unless proven otherwise. Finally, an International Transfer Certificate (which a player needs to transfer from one national football association's domestic league to another) could not be issued while a contractual dispute was ongoing between a player and their former club (as was the case here, with Lokomotiv Moscow and Diarra engaged in a dispute before the DRC).

What is evident when one analyses the rules under the RSTP is how they could become extremely imbalanced against a player. This is because players in a dispute with a former club became very significant potential liabilities for new clubs interested in signing them due to the potential joint and several liability for compensation due to the old club (with a presumption that they incited a breach of contract acting as a further dissuasion from signing the player). In addition, there was the compounding penalty of a ban on signing other players for two transfer windows if found liable. This level of risk proved intolerable for most clubs who would prefer to sign a player without such complications, with the result being that the rules acted as a very significant impediment to such a player's employment opportunities. Further, professional football careers are by their nature short, meaning that a 1-2 year dispute would be far more impactful on the earnings and career progression of a professional player than, for example, the equivalent penalty being incurred by a lawyer or accountant. This timeline played inevitably into the hands of clubs who were aware of the constantly diminishing playing window for professional footballers.

As regards the specifics of the *Diarra* case, the player received an offer from the Belgian club Sporting Charleroi during the period of the dispute before the DRC. However, Sporting Charleroi's offer was conditional on; (i) Diarra being duly registered and eligible to play for its first team and participate in any competition organised by FIFA, UEFA or the Belgian football association (URBSFA); and (ii) that the club be provided with an unconditional confirmation that it would not be held jointly and severally liable for any compensation payable by the player to Lokomotiv Moscow.[6] This offer was subsequently withdrawn when FIFA and the URBSFA refused to clear his registration on the basis that his former association (the Russian football association) refused to issue the necessary International Transfer Certificate pursuant to Article 9 of the RSTP because there was no mutual agreement between Diarra and Lokomotiv Moscow regarding the early termination of his contract.

In May 2015 the DRC upheld Lokomotiv Moscow's claim in part and ordered Diarra to pay the club compensation of €10.5 million, but also ordered that any club that employed him would not be jointly and severally liable for the compensation, thereby disapplying Article 17(2) of the RSTP from that point onwards (he signed for Olympique de Marseille in July 2015).[7] On 9 December 2015, Diarra brought proceedings before the tribunal de commerce du Hainaut (division de Charleroi) seeking an order that FIFA and the URBSFA pay him compensation of €6 million for the harm suffered as a result of their alleged wrongful conduct in refusing to register his transfer. In January 2017, that court found Diarra's claim to be well-founded and ordered FIFA and the URBSFA jointly and severally to pay a provisional sum to the player and, for the remainder, adjourned the proceedings indefinitely to allow the parties to reach agreement on quantum for the harm suffered. FIFA appealed the decision to the cour d'appel de Mons (Court of Appeal, Mons, Belgium) seeking an order that the court of first instance had lacked jurisdiction since the case came within the exclusive jurisdiction of the Court of Arbitration for Sport, or that the claim was unfounded.[8] Diarra lodged a cross-appeal seeking an order that FIFA's transfer regulations infringed Articles 45 and 101 TFEU. The particular provisions being challenged were Article 17,[9] Article 9(1),[10] and Article 8.2.7 of Annexe 3 of the RSTP

6 *Diarra* (n 4) para 25.

7 ibid para 27.

8 ibid para 32.

9 Article 17 of the RSTP, entitled 'Consequences of terminating a contract without just cause', provides: 'The following provisions apply if a contract is terminated without just cause: 1. In all cases, the party in breach shall pay compensation… 2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment… 4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.'

10 Article 9 of the RSTP, entitled 'International Transfer Certificate', states, in paragraph 1: 'Players registered at one association may only be registered at a new association once the latter has received an [ITC] from the former association … The association issuing the ITC shall lodge a copy with FIFA. The administrative procedures for issuing the ITC are contained in Annexe 3, Article 8 … of these regulations.'

(together the 'Disputed FIFA Regulations').[11] The cour d'appel de Mons used the preliminary reference procedure pursuant to Article 267 TFEU to refer questions related to whether the Disputed FIFA Regulations were compatible with EU law, and in particular, Articles 45 and 101 TFEU.

ii. Ruling on Article 45 TFEU

Regarding Article 45 TFEU, the CJEU found that the Disputed FIFA Regulations restrict the free movement of workers in the EU, namely, professional footballers. They did so by imposing very significant financial penalties (in the form of joint and several liability for the compensation owed by the player found to have terminated their contract without due cause) and through penal restrictions on registering players (through the ban for two transfer windows on the new club) which had the effect of deterring clubs from signing players who had ended contracts before their termination dates. The impact of the financial and transfer penalties on prospective clubs acted to dissuade potential employers from taking the risk of signing players in such circumstances. Further, by restricting the football association where the dispute arose from issuing an International Transfer Certificate while a contract dispute was ongoing, it significantly restricted the mobility of players by depriving them 'of the prospect of receiving firm and unconditional offers of employment from clubs established in other Member States, acceptance of which would cause him or her to leave his or her Member State of origin in the exercise of his or her freedom of movement.'[12] Therefore, the rules were found to be a restriction on the free movement of workers.

iii. Ruling on Article 101 TFEU

Regarding Article 101 TFEU, the CJEU found that the Disputed FIFA Regulations were in breach of EU Law. It held that they were a decision by an association of undertakings capable of restricting or distorting trade within the internal market, and that the objective of the rules was to restrict competition. The rules did so by hindering the recruitment of players by rival clubs (through the risk of financial and transfer penalties), meaning that competition between these clubs was impeded because the recruitment of players in professional sport and the composition of teams was 'one of the essential parameters of competition',[13] and players represented 'resources essential for [clubs'] success'.[14] As the rules were deemed to have an anti-competitive object, the CJEU was not required to assess whether their effect was restrictive of competition in

[11] Annexe 3 to RSTP, 8.3. states: 'Upon receipt of the ITC request, the former association shall immediately request the former club and the professional player to confirm whether the professional player's contract has expired, whether early termination was mutually agreed or whether there is a contractual dispute.

4. Within seven days of the date of the ITC request, the former association shall …:

(a) deliver the ITC in favour of the new association and enter the deregistration date of the player; or

(b) reject the ITC request and indicate … the reason for rejection, which may be either that the contract between the former club and the professional player has not expired or that there has been no mutual agreement regarding its early termination.'

[12] *Diarra* (n 4) para 92.

[13] ibid para 81.

[14] ibid para 148.

practice,[15] and neither could the rules be justified on the basis of pursuing other legitimate objectives because they were 'object' (as opposed to 'effect') restrictions.

3. THE IRFU'S RESTRICTIVE RULES ON ELIGIBILITY FOR THE MEN'S NATIONAL TEAM

i. Role of the IRFU

The IRFU's role is to administer the game of rugby in Ireland at professional and amateur levels. According to its own Laws, its objectives include administering the sport 'as its governing body, in accordance with the Union's core values, recognising diversity, inclusivity, gender, race and a multicultural society, and to promote, foster, develop and sustain the Game in all its forms'.[16] It has a Rugby Committee that is responsible for considering and agreeing the strategy for the development of the club game, the school game and the general amateur game in all its formats in Ireland.[17] Much like the position of football associations (such as the URBSFA) which are members of and subject to the rules of FIFA, the IRFU is a member of World Rugby and is bound by the World Rugby Regulations.[18] Therefore, there are relatively similar organisational and administrative structures between football and rugby, albeit that the scale and popularity of football is far beyond that of rugby.

ii. The IRFU's restrictive rules on eligibility for the men's national team

Pursuant to the IRFU's current rules, players must play for one of the four domestic provinces (Leinster, Munster, Ulster or Connacht) in order to be considered for selection for the national men's team. Rugby differs from other sports (such as football) because international contracts and match fees are more lucrative for players than club contracts. Therefore, there is a significant financial incentive to play for the Irish international team (which is bolstered by marketing and promotional opportunities associated with being an international-level player). However, in order to do so, players must be contracted to one of the Irish provinces (which are separate to, but connected with, the IRFU). This practice has been agreed upon by the IRFU and the provinces (albeit it remains an unwritten rule),[19] with the justification being that players benefit from being centrally contracted to the IRFU who are able to control how many matches they play for their domestic club teams, whereas they would have no capacity to limit their playing time if they were to play for a French or English club, for example. The benefits to the players are said to be a reduced workload, better medical care, longer recovery periods after injuries, and greater injury-prevention due to playing fewer matches. There is a further organisational complication in this regard as the IRFU pays for 'centrally contracted' players (in other words, players under contract

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[15] ibid para 125; *European Superleague* (n 2) para 159.

[16] Laws of the Irish Rugby Football Union (revised July 2023), Art. 3(a).

[17] ibid Art. 19(c).

[18] Regulations of the Irish Rugby Football Union (Updated July 2024), Art. 1.2.

[19] Ronan O'Gara, 'Easing the 'Sexton Rule' can be a positive for Irish rugby', Irish Examiner, 23 October 2020 <https://www.irishexaminer.com/sport-columnists-rugby/arid-40069637.html> accessed 25 March 2025.

directly with the IRFU rather than a province) to play both for the national team and their respective province. In the upcoming 2025/26 season, there will be 14 centrally contracted players, 11 of whom play for Leinster, while two play for Connacht and one plays for Munster. This model of the IRFU paying directly for the most critical resource of a professional sports team (namely, the players) creates another layer of complexity when assessing its policies from a competition law perspective. It also creates a potential relationship of dependence between the provinces and the IRFU, particularly in the case of Leinster.

Interestingly, the policy is a relatively new one (existing for the last 12-15 years) as Ireland traditionally benefitted from a culture of players leaving Ireland to play in the English Premiership in particular. Former internationals such as Keith Wood and Conor O'Shea are notable examples of players who pursued almost all of their professional careers at English clubs, while Tommy Bowe and Simon Easterby played for Welsh regions during their international careers. This culture of applying an international perspective that embraces a tradition of playing abroad is evident in the IRFU's own Laws. In its stated objects, it notes that it is obliged to administer the sport 'within Ireland *and beyond the shores of Ireland* if it is considered in the interests of the Game nationally to do so'.[20] Similarly, the Rugby Committee responsible for creating the strategy to develop the sport must include 'the Exiles' in this regard (the Exiles are players playing outside of Ireland, in recognition of the strong history of this tradition including the creation of the club London Irish which used to play in the English Premiership).[21] Further, the membership of the Rugby Committee must include a representative of the Exiles.[22] Therefore, there appears to be somewhat of a contradiction between the IRFU's recognition of the importance of supporting Irish players outside the country, whilst at the same time prohibiting any such player from being included in the national team. That policy seems to go against the ethos of the Exiles and the strong tradition of Irish players playing abroad. In addition, while there was one exception made to the rule for Jonathan Sexton, one of Ireland's most important players over the last two decades, it is significant that he is the only example and there have been no exemptions granted in the last decade. Indeed, Tadgh Beirne was selected for an Irish tour while still technically contracted to the Llanelli Scarlets (a Welsh club) in May 2018, but he had signed a contract to play with Munster the following season. Thus, while the IRFU may point to the informal or unwritten nature of the rule in its defence, it's clear that it operates strictly in practice and as a severe deterrence against international-calibre players considering offers from clubs based abroad. Lastly, it must be observed that the eligibility rules are not applied to the Ireland women's rugby team, and several of its players play for clubs in England. Such a divergence in approach appears to indicate that the rule may be less motivated by player welfare (as is often the argument put forward), and more so by retaining the

20 Laws of the IRFU (n 16), Art. 3(a) (emphasis added).

21 ibid Art. 19(c). The Laws define an 'Exile' as 'a member of the association of players and administrators beyond the shores of Ireland and specifically in England, Scotland and Wales, known as the Exiles, governed by Regulations made by the Committee'.

22 ibid Art. 19(d).

competitiveness of the provincial teams in the United Rugby Championship and the European Rugby Champions Cup (the two primary competitions in which they compete, the former involving Scottish, Welsh, Italian and South African clubs, while the latter also includes English and French clubs).

In terms of how players move between clubs based in different countries, the mechanics are similar to the system operated in football, while it is based on a framework created by the WRU to be applied by all national Unions. If a player is moving from an Irish province to, for example, a French club, the IRFU provides a 'Clearance', which involves the completion of a WRU 'Clearance form' (somewhat similar to the International Transfer Certificate under dispute in *Diarra*).[23] The IRFU is entitled to refuse to consent if the player has not fulfilled any of his obligations under the terms of his contract with the IRFU or one of the provinces.[24] The significant difference from the Diarra dispute and impugned FIFA RSTP is the fact that there is not a potential financial or transfer penalty that can be imposed on another club that employs a player who is in a contractual dispute with a Union or former club. However, it appears that the outcome is similar for a player who is the subject of a dispute as they will be unable to obtain the necessary Clearance form for the new club to acquire their services. In any case, this is not part of the rules that this article deems problematic from an EU law perspective; it is instead the international eligibility restrictions that the author chooses to analyse.

While the IRFU's policy has reduced significantly the incentive for Irish players to accept contracts abroad, the salaries being paid in the premier French domestic rugby competition (Top 14) have increased massively as a result of a lucrative television rights contract between the Top 14 and Canal+. Indeed, the IRFU and provinces appear to acknowledge that a motivation for the rule is an acceptance that the Irish provinces would not be able to compete effectively for the services of international-level players without it being in place (as ordinary market forces would result in players moving abroad to clubs able to pay higher salaries), and as a result, there is an inherently protective aspect to the rule that is argued as being necessary to protect the competitiveness of Irish club teams.[25]

The effect of the IRFU's rule regarding not selecting players contracted outside Ireland is to restrict the available options to players. Further, it is eliminating an important competitor from the market for players' services, thereby potentially enabling the IRFU to exert monopsony power. This is exacerbated by the centralised nature of the IRFU's organisation, to which the provinces are subservient. Thus, due to the policy in place, the IRFU enters negotiations with players aware of its position as the only viable option if a player has aspirations of playing internationally. As a result, there is arguably a complete lack of competition in this regard, with the IRFU potentially in a position of

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23 Regulations of the IRFU (n 18) Art. 4.

24 ibid.

25 Rober Kitson, 'Jonathan Sexton's deal at Racing Métro dismays Ireland and Leinster', The Guardian, 25 January 2013 <https://www.theguardian.com/sport/2013/jan/25/jonathan-sexton-racing-metro-ireland-leinster> accessed 25 March 2025.

market dominance in the acquisition of players' services, while there are also issues of horizontal cooperation between the provinces and the IRFU in reaching an agreement to exclude players from international consideration if they are contracted outside of the domestic clubs. Further, this agreement between the IRFU and the provinces (or decision by the IRFU and provinces as an 'association of undertakings') restricts the ability of competitors outside Ireland to acquire essential resources to compete effectively, namely, international-level players.

4. GENERAL FINDINGS FROM *DIARRA* AND APPLICATION TO THE IRFU

i. Rules of sports federations generally subject to review under EU law

In the *Diarra* case, FIFA and the URBSFA made the argument that the transfer rules should generally be understood in the light of the specificity of sport, which is recognised under the Treaty on the Functioning of the European Union.[26] In particular, Article 165 TFEU states that 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.'[27] In essence, the argument made was that even if the rules involved a restriction on the free movement of workers or competition, they were justified in light of the inherent sporting objectives relating to contractual stability, the stability of sports teams' rosters, and the proper conduct of sporting competitions.[28]

The CJEU was willing to accept that the sporting context of rules 'may potentially be taken into account'.[29] However, importantly the Court added that this was particularly the case in relation to *amateur sport*, as opposed to the pursuit of sport as an economic activity.[30] This interpretation is consistent with Article 165 TFEU which is clearly written in a general manner and is based on the beneficial nature of sports to society (emphasised through the focus on voluntary activity and sport's educational function), rather than with highly commercialised sporting activities being what was contemplated. The judgment in *European Superleague* is significant in this regard. This judgment also emphasised that the sporting context was principally related to amateur sport and that how professionalised the sport is would be relevant to this assessment.[31]

Therefore, while a rule of a sporting association that impedes free movement of workers or constitutes an anticompetitive agreement must be assessed in the sporting context in which it is implemented,[32] this author argues that the distinction made by the CJEU between amateur and professional sport is intended to dilute significantly this

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26 *Diarra* (n 4) para 43.

27 Consolidated version on the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art. 165.

28 *Diarra* (n 4) para 43.

29 ibid para 84.

30 ibid (emphasis added).

31 *European Superleague* (n 2) paras 103-105.

32 *Diarra* (n 4) para 85.

obligation. Thus, if the IFRU's eligibility rules were to be challenged, it is suggested that little weight would be granted to the perceived sporting context of the restrictions on players because it relates to professional contractual arrangements.

ii. Economic activity of sport

Following on from the clear demonstration that the sporting nature of the IRFU's role would not exclude it from the full rigours of EU law, it would also appear evident that the IRFU is engaged in an economic activity, thereby triggering the Union's rules on the free movement of workers and competition provisions. As the CJEU has pointed out, in so far as sport constitutes an economic activity, it will be subject to EU law.[33] The rules relating to eligibility to play for the Irish rugby team (which involves appearance fees and win bonuses, both of which are worth several thousand euros) clearly govern paid work and the performance of services by players.[34] As the composition of teams constitutes an essential parameter of competition, and the IRFU's rules restrict players' incentive to transfer from a province to a foreign club, the rules could be regarded as having a direct impact on the conditions for engaging in an economic activity by players and on competition between the professional clubs the players could play for (because they limit the possibility for clubs outside Ireland to include these players in their squads and field them in matches against Irish provinces).[35] As the composition of teams is one of the essential parameters of competition on which professional rugby teams compete, and the tournaments they play in give rise to economic activity, the IRFU's restrictive rules must be regarded as having a direct impact on the conditions for engaging in that economic activity and on competition between the professional teams.[36] Thus, there seems to be a clear and direct impact on economic activities. Further, the IRFU would struggle to make an argument that is not engaged in an economic activity when its annual revenues are close to €80 million, the majority of which are associated with the men's national team. Therefore, the eligibility rules seem to clearly fall within the scope of Articles 45 and 101 TFEU.[37]

It must be noted that there is an exception for rules governing the selection of players for international teams. In particular, sporting regulators are entitled to prevent foreign players representing national sporting teams that they are unconnected to (for example, an English player representing France despite having no connection to the latter through citizenship, residency or familial heritage). This was recognised in both *Diarra* and *European Superleague* as a specific rule adopted solely on non-economic grounds, which is inherently required to protect the integrity of sporting competitions and thus extraneous to any economic activity, rendering the provisions of EU law inapplicable.[38]

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33 ibid para 79; *European Superleague* (n 2) para 83.

34 *Diarra* (n 4) para 77.

35 ibid para 81; *Royal Antwerp* (n 2) paras 59-60.

36 *Royal Antwerp* (n 2) para 61.

37 *Diarra* (n 4) para 82.

38 ibid para 76; *European Superleague* (n 2) para 84. This position has its origins in the earlier decision of Case 36/74 *Walrave and Koch*, EU:C:1974:140, para 8.

However, as with the *Diarra* case, it seems clear that the (narrowly drawn) exception would not apply to the IRFU.[39] While its rules regarding eligibility for selection to the national team can be considered tangential to sporting rules relating to the integrity of international sporting competitions, it is clear that the IRFU's restrictive practices are not extraneous to the economic activity in question, but rather, are core to it. As the exception is drawn narrowly and is, in essence, a rule to prevent against the manipulation of international competitions by countries 'buying in' better foreign national players, it is highly unlikely that the IRFU could rely on it to justify restricting the free movement of players in this manner. As such, it is not a non-economic ground that can be objectively justified as a purely sporting rule, but rather, one designed to protect elements of the economic foundations of the sport in Ireland.

iii. Diverging interests between players and administrators

As with *Diarra*, the IRFU rule on eligibility clearly has a direct impact on players as workers.[40] The rule is, in essence, a means of governing the employment and working conditions of players (by restricting their ability to play for a club abroad while continuing to be contracted to play matches for the national team). It has a direct impact on their work in restricting the viability and extensiveness of options available to them in terms of the teams they can play for and competitions they can participate in, which is the essential purpose of their economic activity.[41] Further, it is evident how the interests of sporting regulatory bodies and players can easily diverge. In this regard, it is notable that in *Diarra* FIFPro, FIFPro Europe and the Union nationale des footballeurs professionnels (three associations which represent the interests of professional footballers) lodged submissions to the CJEU which FIFA sought to have declared inadmissible.[42] The underlying dispute demonstrates how the interests of regulators or national associations can run counter to the interests of players through limiting players' economic returns.

In the case of Irish rugby, it seems clear that while the policy of the IRFU serves its interests and those of the provinces (by deflating salaries through artificially restricting the buyers of players' services and increasing the competitiveness of Irish teams), this directly serves to act against the economic interests of players (through reducing the incentive to play professionally outside of Ireland by disallowing them from doing so while also playing for the national team). Therefore, it would appear that the interests of the IRFU and players are diverging quite notably and that this is something which could be observed by Rugby Players Ireland (a de facto union for players) in challenging the IRFU's eligibility rules. Rugby Players Ireland is mandated by its members to act in their collective best interest in relation to player welfare and issues affecting the game in Ireland, which would seem to include the economic interests of players (indeed, part of its role incorporates providing financial advice and financial

39 *Diarra* (n 4) para 79.

40 ibid para 80.

41 ibid.

42 ibid paras 46-51.

support for players who suffer injuries and are forced to retire).[43] In fulfilling this role, this author argues that the eligibility rules are ripe for challenge, and the purpose of Rugby Players Ireland would seem to encourage it to take a stance against the IRFU.

iv. Cross-border element

The free movement provisions do not apply in wholly domestic situations that are confined to a single Member State. In *Diarra*, the cross-border requirement was satisfied by the fact that the player was resident in Paris at the time when the harm occurred (after terminating his contract with Lokomotiv Moscow), while the club he was prevented from signing for was based in Belgium.[44] Thus, a clear cross-border impact of the transfer rules was established. Similarly, while the IRFU's eligibility rules may appear to be an issue that is wholly domestic, they can be demonstrated clearly to have a cross-border impact. As referenced in the introduction, the most lucrative league to play professional rugby in Europe is based in France (the Top 14). Therefore, by impeding players' ability to transfer from Irish provinces to French clubs (in particular), the effect of the rule extends beyond Ireland. This argument would have been even stronger prior to the UK's exit from the EU given that the English Premiership offered another prominent alternative league for professional Irish players. However, even in the absence of this option in assessing the cross-border impact of the rules, the importance of the French league in professional rugby is sufficient to ensure that free movement principles would be generally applicable as a preliminary matter in any case involving the IRFU, and that it would be impossible for it to establish that the effects are purely domestic (even if they may appear so on first glance).

5. ARTICLE 45 TFEU AND THE IRFU

i. Applicability of Article 45 TFEU

Article 45 TFEU ensures the free movement of workers in the EU and has direct effect in each Member State. It prohibits any rules which could place EU nationals at a disadvantage when they wish to pursue an economic activity outside their Member State of origin by deterring them from leaving such Member State.[45] Immediately, this would appear applicable to the rules of the IRFU which place players who play in another Member State at a disadvantage when compared to those who play with one of the Irish provinces and thus remain eligible for the national team. It directly affects Irish international players who, for example, want to pursue an opportunity in the lucrative Top 14 French league by creating an inherent penalty (ineligibility) for doing so. This appears to be the quintessential case of a disadvantage for pursuing an economic activity outside of one's Member State, meaning Article 45 TFEU is applicable.

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43 Rugby Players Ireland, 'Represent' <https://www.rugbyplayersireland.ie/about/> accessed 27 March 2025.

44 *Diarra* (n 4) paras 70-72.

45 ibid para 86; *Royal Antwerp* (n 2) para 136; C-415/93 *Bosman*, EU:C:1995:463, paras 93-96; C-325/08 *Olympique Lyonnais*, EU:C:2010:143, paras 33-34.

There are some relevant distinctions between *Diarra* and the rules of the IRFU. Firstly, there are no penalties involved for clubs that sign Irish players, either in terms of being liable for compensation payable by the players or transfer restrictions. Thus, clubs in Member States are not deterred from signing players in the manner that Sporting Charleroi was (where there existed a presumption that the new club had incited the breach of contract under FIFA's RSTP, which the CJEU found created very high legal, financial and sporting risks).[46] Instead, the disadvantage is borne solely by the Irish rugby player involved. Secondly, players are not at risk of being found liable for breach of contract nor refused a transfer authentication from their former sporting union in the same manner as *Diarra*, with the risk of very significant compensation being payable.[47] However, the rules of the IRFU do involve inherent financial penalties in the inability to obtain match fees, as well as lost commercial opportunities associated with being an international player. Therefore, while the disadvantages may not be as harsh as those found in *Diarra*, nor do they extend to the potential new club, they are clearly present and have the effect of deterring Irish players from availing of economic opportunities outside of their Member State of origin and restricting their free movement. In addition, although the CJEU placed emphasis on the impact of FIFA's rules in dissuading new clubs from signing players involved in a contractual dispute in *Diarra*, this was not essential to the finding of a restriction on players' free movement. Therefore, while relevant, it is not a strictly necessary factor for such a finding under Article 45 TFEU.

ii. Potential justifications

A measure that restricts the free movement of workers can be justified if it pursues a legitimate objective in the public interest (which cannot be of a purely economic nature) and is proportionate.[48] These are cumulative conditions, the latter of which has been interpreted strictly throughout the case law under Article 45 TFEU, with measures only being deemed proportionate if they genuinely reflect a concern to attain the underlying legitimate objective in a consistent and systematic manner.[49] In addition, the burden falls on the party who introduced the measures (in the present case, the IRFU) to demonstrate that the cumulative conditions are met.[50]

FIFA sought to justify the RSTP rules on the basis of (i) maintaining contractual stability and the stability of professional football clubs; (ii) preserving the integrity and proper conduct of interclub sporting competitions; and (iii) protecting workers.[51] In addition to these potential justifications, the IRFU may also put forward that it is protecting the competitiveness of the Irish national team (which seems to be the

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46 *Diarra* (n 4) para 92.

47 ibid para 93.

48 ibid para 95.

49 ibid; *European Superleague* (n 2) para 251; *Royal Antwerp* (n 2) para 141; C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International*, EU:C:2009:519, para 61.

50 *Diarra* (n 4) para 96; *European Superleague* (n 2) para 252; *Royal Antwerp* (n 2) para 142.

51 *Diarra* (n 4) para 98.

primary objective of the eligibility rules) and the structure of professional rugby in Ireland (which is tied to the first justification put forward by FIFA).

The player protection justification was immediately rejected by the CJEU on the basis that protecting players does not fall within FIFA's objectives.[52] While the IRFU would stand on firmer ground in proposing this justification as it has a role in ensuring player welfare, its stance is significantly weakened by the fact that players will still be playing professional rugby and thereby risking injury under its model. While the central contracting model does reduce the number of minutes a player is required to play, the stringent eligibility rules that essentially force players to remain in Ireland (even if there is a welfare element) is too paternalistic to be justifiable. Players are engaged in a physically dangerous sport and it should be for them to decide the levels of risk and safety they require. In terms of protecting players from a contractual or exploitation risk, again, this appears highly paternalistic as players are represented by agents and lawyers in almost all contractual negotiations. Therefore, the player protection justification would be similarly rejected if put forward by the IRFU.

The CJEU accepted that both ensuring the regularity of sporting competitions and protecting the stability of team rosters were legitimate objectives in the public interest that may be pursued by a sporting association.[53] Regarding the regularity of sporting competitions, it gave the example of transfer deadlines to avoid late transfers that drastically change the sporting strength of a team as a legitimate means of ensuring the proper conduct of the overall competition. However, such an element cannot be said to apply to the IRFU's eligibility rules which are merely intended to disincentivise player movement as opposed to being a means of protecting the framework of player transfers and the underlying competitions (which, in any case, is a more appropriate goal for the administrators of the international game or individual competition organisers, such as World Rugby or the body organising the European Rugby Champions Cup itself). The CJEU found that ensuring the stability of rosters fed into this broader legitimate objective of protecting the composition of teams and ensuring the integrity of the sporting competitions, rather than it being a legitimate objective in the public interest in its own right.[54] Thus, it seems that the IRFU would need to propose an alternative legitimate objective.

As referenced, the primary purpose of the eligibility rules relates to the IRFU's ability to control the minutes played by a player which is said to contribute to the success of the national team. In fact, this centralised model has been criticised as giving the Irish team an unfair advantage in 6 Nations matches as their players are enabled to spend more time preparing together in advance of the tournament and are deemed to be better rested. However, protecting the success of a national team in competitions is highly unlikely to be considered a legitimate objective in the public interest. Instead, it is argued that the CJEU would rule that such aims cannot be used to justify such a restriction on the individual rights of players as this sort of objective, while having a

[52] ibid para 99.

[53] ibid paras 100-102.

[54] ibid para 102.

sporting merit, could not be perceived as being in the public interest. Therefore, it is argued that the IRFU's eligibility rules could not be objectively justified under Article 45 TFEU.

iii. Proportionality

As established in the previous section, it is very unlikely that any possible justifications by the IRFU would be accepted as legitimate objectives under Article 45 TFEU. However, even if the protection of the professional structure of rugby in Ireland or the protection of players' welfare were to be accepted as legitimate objectives, they would still need to satisfy a proportionality test. As the *Diarra* judgment makes clear (in finding that the sanctions on players and clubs were disproportionate in pursuit of the objective of ensuring the regularity of interclub football competitions), this is a high bar for sporting administrators to overcome.[55]

In particular, it is notable that the CJEU took note of the short nature of careers of professional athletes, implying that any interference which prevents them carrying out their profession during this window would require a high level of justification, demonstrating that it was the only means by which to pursue the legitimate objective. This is even more pertinent to the sport of rugby where the average length of a career is even shorter (only 7 years),[56] meaning any interference would require a well-reasoned justification and clear evidence it was the only means of ensuring, for example, the protection of the professional playing structure in Ireland. While a relaxation of the eligibility rules may lead to the departure of a handful of players to French or English clubs, this would hardly undermine the whole structure of the professional game. In fact, given the bottleneck formed from only having four professional teams, this may in fact encourage greater scope for players receiving limited playing opportunities.

It should be noted that there is a distinction between the severity of the interference under the restrictions at issue in *Diarra* and the IRFU eligibility rules. The RSTP banned a player from being granted an International Transfer Certificate for two years which essentially prevented them from playing professional football in any country. In contrast, the eligibility rules of the IRFU merely prevent Irish rugby players from playing for the *national team*, meaning they can still perform their professional activity outside of Ireland (which was not the case for Diarra, who spent two years without a club).[57] This outright prohibition in *Diarra* was manifestly disproportionate as it resulted in an inability for the player to play professionally for any club during his short window as professional footballer. However, even though the restriction is less onerous in Irish rugby, it is argued that it would still be found disproportionate as it goes beyond what is necessary to achieve the objectives that would be put forward. Contractual arrangements could be negotiated with foreign clubs to protect players'

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55 ibid paras 103-112.

56 'Financial Planning and Management', Rugby Players Ireland <https://www.rugbyplayersireland.ie/develop/#:~:text=FINANCIAL%20MANAGEMENT%20AND%20PLANNING,financial%20management%20and%20planning%20advice.> accessed 31 March 2025.

57 *Diarra* (n 4) para 112.

welfare, while the professional game would not collapse simply because a handful of players decided to pursue their profession outside of Ireland (as was previously encouraged when the IRFU had lesser finances to compensate its marquee players).

As a result of the above analysis, it is asserted that the IRFU's eligibility rules interfere with the free movement rights of players. Further, the rule cannot be said to pursue any legitimate objective, and even if it did, the means of achieving it is disproportionate due to the level of interference with players' economic rights.

6. ARTICLE 101 TFEU AND THE IRFU

i. Is the IRFU an undertaking or association of undertakings?

Article 101 TFEU prohibits all *agreements* between undertakings, *decisions by associations of undertakings* and *concerted practices* which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[58] In *Diarra*, the CJEU was satisfied that FIFA constitutes an 'association of undertakings' for the purpose of Article 101 TFEU.[59] As recognised throughout the case law on the provision, an 'undertaking' may be characterised as such regardless of its legal form and the means by which it is financed as long as it is engaged in an economic activity. Thus, despite the somewhat unusual legal form of sporting regulatory bodies and the fact that their primary purpose may be the organisation and control of a given sport, so long as they also pursue an economic activity in relation to the sport they will constitute undertakings under EU law.[60] Further, a sports regulatory body, even if not found to be an undertaking in its own right, may be categorised as an 'association of undertakings' with its constituent national governing bodies.[61] In FIFA's case, the CJEU stated that it was made up of members, namely, the national football associations which could themselves be categorised as 'undertakings'.[62] The benefit of such a categorisation is that there is no need to prove any form of agreement or concerted practice by relevant undertakings involved, and instead, the more easily established 'decision by an association of undertakings' is required. In particular, a 'decision' can be found where the association adopts or implements rules that have a direct impact on the economic activity exercised by the undertakings that are directly or indirectly members of the association of undertakings.[63] The CJEU held that FIFA's rules, so far as they affect employment contracts and transfer of players, constituted decisions by associations of undertakings that fell within Article 101 TFEU.[64]

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58 Consolidated version on the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art. 101 (Treaty on the Functioning of the European Union).

59 *Diarra* (n 4) para 117.

60 ibid para 117; C-680/21 *Royal Antwerp* (n 2) paras 76-77; C-49/07 *MOTOE*, EU:C:2008:376, paras 22, 23 and 26.

61 *Diarra* (n 4) para 117; *Royal Antwerp* (n 2) para 78;

62 *Diarra* (n 4) para 118.

63 ibid (n 4) para 119; *European Superleague* (n 2) para 118.

64 *Diarra* (n 4) paras 120-121.

The role of the IRFU appears somewhat different to that of FIFA. Its position may be more akin to an undertaking (equivalent to the Belgian football association) that is a member of an association of undertakings (namely, World Rugby, which performs a role more equivalent to FIFA). However, when considered alongside the four provinces, taken together they may constitute an 'association of undertakings'. It seems clear that each of the four provinces would qualify as undertakings as they are in pursuit of an economic activity related to participation in professional rugby competitions, in addition to the marketing and commercial activities related to this. Thus, they would clearly qualify as undertakings under EU law. Similarly, the IRFU is responsible for economic activity related to the marketing and organisation of its international teams, as well as responsibilities connected to the men's 6 Nations tournament (commercially, the second biggest rugby competition after the Rugby World Cup). It too would be deemed an undertaking. Therefore, the question is whether the IRFU and provinces, taken together, constitute an association of undertakings.

This author suggests there is a strong argument that they would be found to be an association of undertakings, and the eligibility rules would constitute a decision by them. This is because of the highly centralised nature of the organisation of rugby in Ireland. As mentioned, the IRFU centrally contracts a number of players who are then permitted to play for the provinces (until 2024 the IRFU paid the entire amount of the contracts, whereas it was recently agreed that the provinces would pay 30% of the contracts in future if the player plays with said province).[65] Further, they contribute towards what are known as 'PONI' (player of national interest) contracts, whereby the provinces are subsidised in granting a better paying contract to a player who is at risk of being convinced to join a foreign club and, as a result, become ineligible for the national team. Attention was brought to these contractual arrangements by the situation of Jack Crowley, a player that the IRFU desired to remain at Munster but who was offered more than double his salary by the Leicester Tigers club in England to join them.[66] The example of Crowley is useful in highlighting both the potential economic impact for players of the IRFU's rules and the interconnected nature of the national regulatory body and the provinces. In addition, it is generally accepted that all aspects of rugby (including the provincial teams) are expected to serve the primary objective of the international team. Thus, it is argued strongly that, taken together, the IRFU and provinces are an association of undertakings under Article 101 TFEU and that the creation of the eligibility rules is a decision by the association which was intended restrict competition to serve the interests of the constituent undertakings.

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[65] Michael Glennon, 'IRFU announces details of new funding model, including change to central contracts', RTE News, 22 May 2024 <https://www.rte.ie/sport/rugby/2024/0522/1450607-irfu-announces-details-of-new-funding-model/> accessed 28 March 2025. It was recently announced that this will increase to 40%, but only from 1 August 2026. See Editor, 'IRFU Announces Change To Funding Model And Initiation Of An Efficiency Review', Irish Rugby, 15 April 2025 <https://www.irishrugby.ie/2025/04/15/irfu-announces-change-to-funding-model-and-initiation-of-an-efficiency-review/> accessed 22 April 2025.

[66] Cian Tracey, 'Jack Crowley's Munster future remains in limbo amid links with big-money move to Leicester', The Irish Independent, 25 March 2025 <https://www.independent.ie/sport/rugby/jack-crowleys-munster-future-remains-in-limbo-amid-links-with-big-money-move-to-leicester/a1036404864.html> accessed 28 March 2025.

In the unlikely event that the IRFU and the provinces were not deemed to be an association of undertakings, it could be argued that the creation of the eligibility rules involved an agreement or concerted practice between the same parties. In this regard, it is irrelevant that the rule has not been reduced to writing as long as it is recognised as binding upon the IRFU and the provinces. Given the evidence over the last decade (with no player contracted outside of the provinces selected for a squad, never mind being picked for the team), it is suggested that the situation would be held to constitute a concerted practice at the very least, and potentially even an agreement between the IRFU and the provinces depending on the evidence adduced. Therefore, whether deemed an undertaking or a member of an association of undertakings, the IRFU appears to certainly fall within Article 101 TFEU.

ii. Effect on trade between Member States

In order to invoke the application of Article 101 TFEU, a measure must be shown to have an effect on trade between Member States. This was satisfied easily in the *Diarra* case given the inherently international nature of FIFA's transfer system, whose geographic scope was intended to be 'global'. As such, it was found that the system was capable of hindering the attainment of the functioning of the internal market.[67] Further, as established in *Royal Antwerp*, this condition is satisfied if the measure covers the entire territory of a Member State.[68] In the case of the IRFU's rule, this would also appear to be satisfied given that the rule covers the entirety of the body of Irish-qualified rugby players, whilst also interfering with players moving between Member States thereby having an effect on trade. Thus, given the relatively low bar set for this limb of the test, it is asserted that it would be satisfied in this case.

iii. Whether the eligibility rules have as their 'object' or 'effect' the restriction of competition

Finally, for a measure to be in contravention of Article 101 TFEU, it must *either* have its object or effect the restriction of competition. Thus, the first step is to assess whether the measure's object is the restriction of competition, because as long as this is established there is no need to establish anti-competitive effects.[69] Given the significance of finding a restriction by object (which severely limits the ability for the undertakings to justify the measure), the notion is interpreted strictly.[70]

It is asserted that Article 101(1)(a) and (c) TFEU, which relate to the fixing of purchase or selling prices and the sharing of markets or sources of supply, are those most likely to apply to the IRFU's eligibility rules.[71] The *Diarra* ruling states clearly that these

67 *Diarra* (n 4) paras 122-123.

68 *Royal Antwerp* (n 2) para 43.

69 *Diarra* (n 4) para 125.

70 ibid 126.

71 'The following shall be prohibited as incompatible … and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; … (c) share markets or sources of supply'. Treaty on the Functioning of the European Union, Art. 101(1)(a) and (c).

specific forms of restrictions may concern not only the underlying good or service marketed by the undertakings concerned, but also the resources which the undertakings need to produce those goods and services.[72] In particular, this can extend to using collective power to fix input prices or control the essential parameter of competition in certain sectors, namely, highly skilled workers.[73] In professional sport, the key resource and parameter of competition are the players (already in receipt of extensive professional training), who are highly skilled workers and the essential input for all competing undertakings.[74] Thus, the IRFU's rules, which have a clear impact on the cross-border movement of players, clearly restricts access to the supply of the most important resource in professional rugby.

The CJEU stated in *Diarra* that in assessing 'whether a decision by an association of undertakings or a concerted practice reveals, by its very nature, a sufficient degree of harm to competition that it may be considered as having as its object the prevention, restriction or distortion thereof', it is necessary to take into account a number of factors.[75] In particular, one need examine the content of the agreement or practice in question, the economic and legal context to which it forms part, and its objectives.[76] In carrying out this examination, it was reiterated that it is not necessary to prove the effects of the measure on competition (as this is not required for an object restriction).[77] In the case of the IRFU, the practice between the undertakings appears to be strictly applied, while the economic context is characterised by a relatively nascent professional sport with less commercial opportunities, a shorter career window, and a higher level of danger for players, as well as less competition due to the limited number of professional teams playing the sport. As a result, the inputs (in other words, the players) become even more significant as there are fewer teams fighting to obtain the most valuable players to gain a competitive advantage. In terms of the objectives pursued by the IRFU and the provinces, the fact that they acted without a subjective intent to prevent, restrict or distort competition and the fact they pursued certain legitimate objectives would not be decisive under Article 101 TFEU.[78]

Regarding the differences between FIFA's RSTP regulations and the IRFU's eligibility rules, it is notable that the CJEU emphasised that Diarra was deprived of any possibility of participating in organised football,[79] whereas Irish rugby players retain (more limited) opportunities to play professionally. Further, the CJEU emphasised the compensation payable by the new club (which was presumed to have induced the breach of contract) on a joint and several liability basis, as well as being banned from signing players for a

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72 *Diarra* (n 4) para 129.

73 ibid 129.

74 Royal Antwerp (n 2) paras 107, 109 and 110.

75 *Diarra* (n 4) para 130.

76 ibid; *European Superleague* (n 2) para 165.

77 *Diarra* (n 4) para 131.

78 ibid para 132; *European Superleague* (n 2) para 167; Case C-209/07 *Beef Industry Development Society and Barry Brothers*, EU:C:2008:643, para 21.

79 *Diarra* (n 4) para 136.

period.[80] With the IRFU's restrictive rules there is no liability risk or potential ban for the new club, meaning they are not disincentivised from signing Irish players in a comparable way. However, despite these differences, it is argued that there are sufficient similarities between the restrictive nature of FIFA's RSTP and the IRFU's eligibility rules that it may be found to be a restriction of competition by object.

In particular, it is argued that the IRFU's measures constitute a 'generalised and drastic restriction, from a substantive viewpoint' of competition which, in their absence, could pit any European professional rugby club against the IRFU itself or the Irish provinces as regards the recruitment of players contracted centrally or to one of the provinces.[81] The players in question constitute, in numerical terms, an essential part of the population of already trained professional players who might be the subject of cross-border recruitment, and as stated above, the possibility of recruiting high-level players is an essential parameter of competition in professional club sports.[82] Thus, the central reasoning for finding an object restriction in *Diarra* can be applied to the IRFU's rules.

The CJEU noted that, in order to ensure stability of squads during the course of a competition and the underlying integrity of said competition by preventing transfers during the course of it, certain restrictions may be legitimate.[83] However, this does not apply to the IRFU's eligibility rules, which are not motivated by the stability of player rosters or protecting competitions being manipulated by transfers mid-tournament. Further, in *Diarra* it was made clear that the 'specificity of sport' could not justify measures designed to prevent cross-border competition by restricting the recruitment of players.[84] In the case, the CJEU compared the rule to a no-poach agreement between clubs that prevented more aggressive recruitment and led to the artificial partitioning of national and local markets. Again, this reasoning can be logically applied to the IRFU's eligibility rules. While not quite reaching the level of the equivalent to a no-poach agreement, the measures applied by the IRFU and Irish provinces very obviously limit what would otherwise be more aggressive recruitment by foreign clubs, who are aware of the IRFU's eligibility rules and are likely dissuaded from even attempting to sign international-level Irish players. Similarly, the IRFU's rule partitions the Irish market for professional players from the rest of the EU. This operates to the benefit of the IRFU and the provinces who do not face ordinary competition to sign players by foreign clubs, which has a deflationary effect on salaries. As a result, this creates advantages for clubs (who are enabled to field artificially strong teams against non-Irish opponents), while the consequences are 'borne by all the workers, consisting of the players.'[85] Thus, this manifest restriction on competition results in the perpetuation of sharing of resources between the IRFU and the Irish provinces to the exclusion of European competitions, thereby partitioning the market to their

80 ibid para 137.

81 ibid para 138.

82 ibid.

83 ibid para 144.

84 ibid para 145.

85 ibid para 146.

advantage. The inability for French clubs, for example, to access such high level players restricts their access to essential resources and restricts competition. As emphasised throughout the *Diarra* judgment, this is the case regardless of the subjective intent that motivated the measure.[86] Therefore, on the basis of the above analysis, it is asserted that the IRFU's eligibility rules constitute an object restriction. As such, it is not proposed to analyse the likely competitive effects that would be necessary to prove a restriction by effect.

Under the case law on Article 101(1) TFEU an anticompetitive agreement, decision by an association of undertakings, or concerted practice can be saved where it can be shown that it is justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature, the specific means used to pursue those objectives are genuinely necessary for that purpose, and the means do not go beyond what is necessary by eliminating all competition.[87] This exception applies particularly to cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives.[88] However, the exception only applies to 'effect' restrictions, and not restrictions by object (due to the perceived harm to competition, meaning it cannot be regarded as justified and proportionate in any instance).[89] Thus, it would be inapplicable to the IRFU's eligibility rules.

Finally, the exemption under Article 101(3) TFEU may apply but this has proved to be extremely difficult to establish in relation to 'object' restrictions. In the IRFU's case, it is argued that it would fall at the first hurdle as it would be unable to demonstrate that the eligibility rules achieve efficiency gains through improving the production or distribution of the products or services concerned, or promote technical or economic progress. A fair share of the proposed efficiency gains must also be enjoyed by the users of the products or services (presumably viewers of professional rugby in this case) which cannot be said to be the case here, as the benefits are reserved to the undertakings. Similarly, the measure must be indispensable to enable the efficiency gains, but, as discussed, there are other means available such as allowing players to play abroad and promoting younger players in their place. Finally, the measure must not give the participating undertakings (the provinces) the opportunity to eliminate all effective competition for a substantial part of the products or services concerned (professional Irish rugby players). As described, competition for these players' services is effectively eliminated through the restrictive rules. Thus, it appears highly unlikely that the IRFU would be able to satisfy even a single one of the four cumulative steps.[90]

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86 ibid para 147.

87 ibid para 149.

88 *European Superleague* (n 2) para 183; Case C-309/99 *Wouters and Others*, EU:C:2002:98, para 98; *Meca-Medina* (n 1) paras 43-55.

89 *Diarra* (n 4) para 150; *European Superleague* (n 2) para 186.

90 *Diarra* (n 4) para 155.

7. CONCLUSION

The numerous recent cases involving sport (or tangential to it) have brought renewed attention to the relationship it has with the EU's laws, and competition law in particular. In each of the cases it has been emphasised that the special nature of sport does not grant it immunity from the Union's legal provisions. Taken as a whole, the cases can be interpreted as a tightening of the net around sporting administrators and an increasing scepticism towards restrictive rules which they enact that could be perceived as interfering unduly with the economic interests of players. The *Diarra* case is especially relevant in this regard as the CJEU was willing to disturb the entire framework for international football transfers in order to vindicate the economic rights of players and the competitive opportunities of all clubs.

As a result of the *Diarra* ruling, players across all sports may begin to assess their sporting regulator's rules and examine whether they are interfering unduly with their interests. In this regard, it has been argued that the IRFU's eligibility rules are especially vulnerable to challenge by an Irish international player who wants to explore playing opportunities abroad or has been prevented from doing so by the restrictive policy adopted. It has been asserted that the rules are likely to be considered a restriction on players' free movement rights as workers, while also constituting either an anti-competitive agreement or decision by an association of undertakings in breach of Article 101 TFEU. Therefore, the IRFU should be wary of this potential of being 'mauled' before the CJEU and 'kick its eligibility rules to touch' to ensure players are able to enjoy the economic opportunities protected by EU law, and that competition does not become distorted through restrictive practices.