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The Regulation of Football Agents by FIFA: A Complicated Affair

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☞ keywords to be inserted by the indexer

1. Introduction

The regulation of football agents by FIFA is not new. Its origins derive from the ever-increasing commercialisation of the game, and it gives rise to a controversial and, sometimes, complicated evaluation of all issues pertinent to the matter. Consequently, the reader may conclude that such regulation is the subject matter of a perennial battle between two of the larger stakeholders in the industry.

The present work critically examines the recent decision in the matter of an arbitration under *Rule K* of *The Football Association* rules in *CAA Base Ltd; Key Sports Management Ltd (t/a Wasserman); Stellar Football Ltd; Arete Management Ltd v The Football Association Ltd and Federation International de Football Association (FIFA)*. The case concerns the challenge brought forward by a team of football agents, against the *FIFA* regulations on football agents (*FFAR*), that came into force in January 2023. Although said regulations were also challenged in other national jurisdictions (i.e. Germany and the Court of Arbitration for Sport[1]), the present paper solely and purely deals with the challenge in the English jurisdiction. At the time of writing, a decision is awaited from the European Court of Justice (ECJ) in relation to a joint reference made by the German High Court (Bundesgerichtshof)[2] seeking clarification of the application of the Meca Medina principles and compatibility of the FFAR with art.101(1) of the Treaty on the Functioning of the European Union (TFEU).[3] Interim measures (an injunction) prevent the FFAR from being implemented by the German Football Association pending the ECJ's ruling.

The Claimants in this matter were agents operating in the UK and abroad representing football players, pursuant to the regulatory frameworks of *FIFA* and the *FA*. The Respondents were the national (England) and international football governing bodies respectively. It is worth stating at the outset that all parties in these proceedings respected and followed the general premise that all disputes between football stakeholders should be submitted to arbitration, and recourse to national courts must be avoided. Hence, the Claimants challenged the FIFA football agents' regulations (October 2023 edition) before the FA's *Rule K Arbitration* Tribunal. The *FA*, as first respondent, is obliged to implement and apply *FIFA*'s regulatory framework. *FIFA*'s regulatory framework, therefore, applies nationally and internationally, and, as a result, national and international transactions are influenced by the way such framework is interpreted and applied.

In the premises, the reader should note that although national member associations have certain latitude in creating and implementing their own regulations, such regulations can only be applied in the general spirit of the *FIFA* regulations. Also of note is that the tri-partite relationship, between a national association, members of the association and the international federation, does not only have its roots in the law of association, but predominantly finds application in the law of contract, which heavily influences the creation, application, and interpretation of such regulatory framework. Lastly, the reader should also note that European and national competition law, as well as employment law, may influence the application of *FIFA*'s regulatory framework.

Having considered the above, the Claimants' challenge may be summarised as follows:

a. The agents' objection to the *FFAR* provisions which cap their fees (the so called "Fee Cap");
b. The agents' objection to the *FFAR* provisions which require payment to be made over the life of the player's contract (the *"Pro Rata Payment Rules"*);
c. The agents' objection to the *FFAR* provisions which prohibit payment of agents' fees on behalf of the player (the *"Client Pays Rules"*); and
d. The agents' objection to the *FFAR* provisions which prohibit dual or multiple representation (the *"Dual Representation"* or the *"Multiple Representation"* rule).

Consequently, the football agents Claim states that:

a. The national football agents' regulations (*NFAR*), collectively, is an anti-competitive agreement and/or decision by an association of undertakings;

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[1] See Court of Arbitration for Sport: *Professional Football Agents Association (PROFAA) v FIFA* CAS 2023/O/9370.
[2] *Fußballspieler Vermittler v FIFA*, Bundesgerichtshof Case KZR 71/21 (13 June 2023).
[3] *Fußballspieler Vermittler* Case KZR 71/21 (13 June 2023).

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b. The *NFAR* are an abuse of a dominant position by *The FA*;

c. The *NFAR* are in breach of s.2 (the Chapter I prohibition) and 18 (the Chapter II prohibition) of the Competition Act 1998 (the 1998 Act); and

d. The *NFAR* are unlawful as being in unreasonable restraint of trade at common law.

2. Analysis

I. The issues

Before a critical analysis of the issues can be presented, it is important to alert the reader to two significant, for the discipline of sports law, procedural aspects that were central to the final determination of the Tribunal in this matter.

Firstly, it is worth stating that almost all the authorities cited by the parties in this matter were *EU* authorities that were decided both pre and post-Brexit. This is extremely significant for the final determination of the Tribunal for two reasons: (a) given the direct applicability of Brexit, the Tribunal was not obliged to consider *EU* law and, therefore, not obliged to follow the jurisprudence of the European Court of Justice (ECJ); and (b) because this is an arbitration matter, the Tribunal's determination is binding upon the parties, but not binding upon future Tribunals, including *FIFA*'s Football Tribunal. The Tribunal's decision, however, to consider *EU* authorities (and its decision to apply them), as well as those of *CAS*, demonstrates to a very great extent, the influence of the common law traditions, particularly those that relate to the principles of judicial precedent.[4] In a remarkable display of judicial supremacy, but without stretching the boundaries of judicial creativity, the Tribunal implicitly demonstrated the importance of the international nature of the discipline of sports law. It is highly likely that the Tribunal's determination will be seriously considered in the future (even only as obiter dicta) by other adjudicating panels and fora.

Secondly, it is also important to note the parties' explicit adherence to the general procedural principle of sports law that all disputes in football law must be resolved with reference to arbitration (as opposed to having recourse to the national courts). This jurisdictional and procedural aspect is important for many reasons, not least because all parties to this matter indicated their trust in sporting justice and demonstrated their adherence to the procedural obligations of the regulatory framework.

3. Issues for the Tribunal

As stated previously (and the reader must note), the Tribunal identified the important consideration that almost all the authorities cited by the parties were *EU* authorities. The Tribunal identified five different issues for consideration, in a very similar approach taken by Rantos A-G in the matter of *International Skating Union v European Commission* (C-124/21 P). In this matter, Mr Rantos extensively dealt with the order of the issues, stating at p.41:

> *"It must be stated in that regard that the analysis of ancillary restraints and the question whether particular conduct falls outside the scope of Article 101(1) TFEU on the ground that it is proportionate to the legitimate objective pursued is separate from the question whether that conduct has as its object or effect the restriction of competition. As is clear from the case-law of the Court, it is only after finding, in the first stage, that a measure is capable of restricting competition within the meaning of Article 101(1) TFEU—but without necessarily reaching an express finding of a restriction of competition by object or effect—that the Court will examine, in the second stage, whether the effects restrictive of competition are inherent in the pursuit of legitimate and proportionate objectives and therefore fall outside the scope of Article 101(1) TFEU. See judgments of 19 February 2002, Wouters and Others* (C-309/99, EU:C:2002:98, *paragraph 110); of 4 September 2014, API and Others* (C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, *paragraphs 43 and 49); and of 23 November 2017, CHEZ Elektro Bulgaria and FrontEx International* (C-427/16 and C-428/16, EU:C:2017:890*, paragraphs 51 and 57)*."

In summary the Tribunal, with the Parties' agreement, stated it would consider the following issues:

1. Whether the Proposed Rules by *FIFA* infringe competition law (Chapters I and II of the Competition Act 1998);
2. If so, whether the Proposed Rules escape the application of Competition Law and the specific principles established in the matters of *Wouters*[5] and *Meca-Medina*;[6]
3. If not, whether a breach of Competition Law has been made out;
4. Whether the Proposed Rules are exempt pursuant to art.9 of the Competition Act 1998, and/or objectively justified; and
5. Whether the Proposed Rules are an unreasonable restraint of trade at common law.

[4] For further analysis on the applicability of judicial precedent in sport arbitration please see the author's work: "How a system of judicial precedent may help the rights of athletes before the Court of Arbitration for Sport (CAS) 1" in the *Routledge Handbook of the Olympic and Paralympic Games* (London: Routledge, 2020), see *https://www.taylorfrancis.com/chapters/edit/10.4324/9780429440311-4/system-judicial-precedent-may-help-rights-athletes-court-arbitration-sport-cas-1-gregory-ioannidis*.

[5] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) EU:C:2002:98; [2002] 4 C.M.L.R. 27.

[6] *Meca-Medina v Commission of the European Communities* (C-519/04 P) EU:C:2006:49; [2006] 5 C.M.L.R. 18.

The Tribunal also delved deep into procedural matters, as it had to examine whether the application of Brexit was going to create anomalies and prohibitions in terms of the application of the *EU* law. At para.159 of its Decision, the Tribunal referred to s.60A(2), (7) of the Competition Act 1998 which states:

> "(2) *[A tribunal] must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between—*
>
> (a) *the principles that it applies, and the decision that it reaches, in determining the question, and*
>
> (b) *the principles laid down by the Treaty on the Functioning of the European Union and the European Court before [December 31, 2020], and any relevant decision made by that Court before [December 31, 2020], so far as applicable immediately before [December 31, 2020] in determining any corresponding question arising in EU law, …*
>
> …
>
> (7) *Subsection (2) does not apply if the [tribunal] thinks that it is appropriate to act otherwise in the light of one or more of the following—*
>
> …
>
> (b) *differences between markets in the United Kingdom and markets in the European Union;*
>
> …
>
> (e) *a principle laid down, or decision made, by the European Court on or after [December 31, 2020];*
>
> (f) *the particular circumstances under consideration."*

The Parties agreed that the Tribunal should apply *EU* authorities, and on this basis, the Tribunal proceeded with the consideration of the issues it identified.

As a preliminary issue, the Tribunal cited *Bosman* and *Piau* in establishing the relevant sport governing bodies are an "*association of undertakings*", and that the adoption of the Proposed Rules constitutes a "*decision*". As a result, "*decisions*" (on rules) by sport governing bodies also constitute "*agreements*" for the purposes of national (and European) legislation on competition law and, therefore, bind the relevant parties.[7] This is an important consideration, as without it, the Chapter I prohibition cannot be applied. The Tribunal, therefore, concluded that the adoption of the Proposed Rules constitutes a "*decision*" by an association of undertakings, and as a result the implementation of such rules gives rise to a contractual relationship between the parties. This is in line with what we argued at the outset of this work, in that the adoption and implementation of a regulatory framework tends to give rise to a contractual relationship between the members of a sport governing body and the sport governing body itself. As a result, such contract is binding upon the parties, whether it is accepted unilaterally or bilaterally.

Further, the Tribunal went on to examine whether sport governing bodies have a margin of discretion, and if they do, to what extent. The Tribunal cited three important authorities that each dealt with the application of *Wouters*/*MecaMedina*, and every single one of them concluded that regulatory authorities have and need to be afforded a margin of discretion.[8] The Tribunal explained that, following the European Court's decision in *Wouters*, it is up to the national court to decide whether the rule in question is necessary in order for the sport governing body to achieve the legitimate aim pursued and/or the objective sought. This is in line with Rantos A-G's opinion in *International Skating Union v Commission*[9] where it was stated: *"… where the restrictive effects which follow from a sports federation's contested regulation can reasonably be regarded as necessary to guarantee a legitimate 'sporting' objective and if those effects do not go beyond what is necessary to ensure the pursuit of that objective, those measures do not fall within the scope of Article 101(1) TFEU. See judgment in Meca-Medina (paragraph 42 and the case-law cited and paragraph 45)."*

Consequently, the Tribunal argued that sport governing bodies in the present matter do not have a margin of discretion as they are not public bodies. However, the Tribunal also argued, because a national court or tribunal may not have expertise in sport, it must consider whether a governing body ought to reasonably have considered that a sporting rule is necessary, subject to the identification of compelling evidence, which will support the necessity of the application of such sporting rule creating the restriction.

Finally, the Tribunal looked at whether the principle in *Wouters*/*Meca-Medina* applied to the present matter, that is whether the Proposed Rules and the limitations/restrictions they offer are necessary for the proper conduct of the sport. At para.194, the Tribunal stated that *"…Although the Governing Bodies relied on those principles in their Written Submissions, and in their oral submissions, they do not explain how each of the Proposed rules can be reconciled with them."* The Tribunal accepted that the proposed rules by the sport governing bodies do not attempt to regulate a pure sporting activity but instead they attempt to regulate economic activity, particularly with the *Pro Rata Payment* rule and the *Fee Cap Rule* rule. As a result, the Tribunal concluded at para.202 of its Decision: *"…If, however,*

[7] See FA Rule K Arbitration Tribunal's Decision (November 2023) at paras 161–164.
[8] *Queens Park Rangers English Football League, Premier Rugby Ltd v Saracens Ltd* and *PROFAA v FIFA* CAS 2023/O/9370 .
[9] Opinion in the Case *International Skating Union v European Commission* (C-124/21 P) EU:C:2022:988 at [39].

contrary to the conclusion reached by the Tribunal, the Proposed Rules, in terms of subject matter, fall within the Wouters/Meca-Medina principle, the Tribunal needs to consider whether the Proposed Rules can be regarded as being reasonably necessary to address the market failures and abuses that the Governing Bodies claim to exist in the player/transfer system."

I. The Fee Cap

This was one of the most contentious issues in the Proposed Rules by *FIFA* and one that has remained at the forefront of the regulatory framework for many years. *FIFA* was aware that such a proposed rule was going to create enormous legal complications and likely to be challenged. In fact, the Tribunal expressly stated at para.222 of its Decision that: *"…(2) from the outset FIFA knew that EU competition law might present a problem if a fee cap were to be introduced; and (3) in order to deal with the legal problem, FIFA recognised that it would have to find a legal justification to support it."*

Notwithstanding the above reference from the Tribunal, the author had warned in 2018, that it was likely the creation of a mandatory rule on a *fee-cap* would be challenged in the courts. The author presented his objections to the introduction of a mandatory rule on a *fee-cap* in October 2018 at the International Sports Law Conference in The Hague. The author further published such objections in 2019, in research which explained how and why *FIFA*'s regulatory framework on agents needs to be revised.[10] In this publication the author explained:

> *"Another notable recommendation (as opposed to a mandatory provision) relates to the remuneration of agents, which states that agents should not receive more than 3% of the player's basic gross income for the duration of the contract (3% of the transfer fee when the agent has been engaged on behalf of the club). In practice, it is hardly ever the case that an agent would claim a 3% fee in relation to a transaction. (From the author's experience, fees may range from 5% to 18%.) In addition, it is the author's opinion that if such a recommendation were to receive a mandatory nature, it would highly likely be challenged before courts and it is almost certain that it would fall foul of Articles 101 and 102 on distortion of competition and abuse of a dominant market position".*[11] *[Emphasis added].*

Consequently, the Tribunal concluded that sport governing bodies are seeking to regulate prices, as opposed to sporting activity, and this takes place in a purely economic context.[12] As a result, the Proposed Rules cannot fall within the established principle of *Wouters/Meca-Medina*. The Tribunal, therefore, appeared to agree with our proposal, published back in 2019, that imposing a mandatory *fee-cap* on football agents' payments, may violate European Union law and national competition law, as is the case with Great Britain.[13]

Further, the Tribunal did not accept the arguments produced by the sport governing bodies that there are abuses and market failures caused by the conduct of agents. At para.221 of its Decision the Tribunal argues: *"But, third and critically, whether or not the rationale was simply an ex post facto justification for a policy which had been decided upon, or whether or not the alleged abuses and market failures do take place on a scale large enough to cause concern, the overriding point is that the Tribunal has not been able to discern any justifiable connection between the Fee Cap and the claimed abuses and market failures or with the avowed reasons to apply it."*

The Tribunal, on this point, was not convinced with the arguments produced by the sport governing bodies. After examining the evidence, including the testimonies of witnesses,[14] the Tribunal concluded that the real and actual reason behind the creation of a *fee-cap*, was not abuse of the market and/or protection of the contractual stability premise; but rather that the prevailing premise that fees were simply too excessive.[15] The Tribunal concluded that this cannot be a compelling justification for restricting agents' fees, and, therefore, the *Fee Cap* is not justified by a legitimate objective and hence it is not reasonably necessary for any such objective.[16]

On the issue of evidence regarding abuses and market failures, the Tribunal accepted that such abuses and failures may exist but on the limited materials presented to it, it could not conclude how prevalent they are. This, of course, does not mean that they do not exist, simply they were not presented nor argued in an appropriate manner. As it was argued previously, our work clearly identified abuses by unscrupulous agents and suggested appropriate solutions. At p.155 of our work in 2019, we submitted that:

> *"There are, however, other situations that may lead football agents to proceed with unethical and illegal practices and such situations remain secret, unless there is media exposure.*[17] *It is these situations that, when exposed, create an environment of distrust among the stakeholders and particularly among the public. Our research indicates that a large segment of practicing football agents wishes such illegal and*

[10] G. Ioannidis, "Football intermediaries and self-regulation: the need for greater transparency through disciplinary law, sanctioning and qualifying criteria" (2019) 19 *The International Sports Law Journal* 154–170.
[11] Treaty on the Functioning of the European Union 2012/C-326/01.
[12] FA Rule K Arbitration Tribunal proceedings: *CAA v FA and FIFA* Final award (November 2023) at para.200.
[13] Arbitration Tribunal Rule K *CAA v FA and FIFA* at para.286: "*The Tribunal rejects the Governing Bodies' submission that the price cap in the present case is not an object restriction.*"
[14] See, for example, para.225 of the Tribunal's Decision.
[15] Tribunal's Decision at para.219.
[16] Tribunal's Decision at para.250.
[17] See, for example, the inquiry by Smith & Lord Stevens: *http://www.theguardian.com/football/2007/jun/15/newsstory.boltonwanderers* and the BBC Panorama investigation: *http://news.bbc.co.uk/2/hi/ programmes/panorama/5363702.stm*.

unethical practices to be eradicated, whereas the public feel that unscrupulous (unlicensed and unregulated) agents damage the image of sport. The author represented several football agents before disciplinary hearings, either before The FA's Rule K Arbitration, or at other jurisdictions, where allegations of tapping up, contractual breaches and/or incitement to commit such breaches were presented. It is remarkable that in almost half of the cases the author had the opportunity to deal with, the allegations concerned football agents who were unlicensed (or unauthorised to deal with specific players) and in one-third of them, the agents concerned did not really understand the professional responsibility that applied to them. In some of those cases, it was clear that the advice offered by those agents to players was damaging, as basic principles of contract law and/or employment law were ignored, with the result to cause the players to be bound by an employment contract of a considerable duration, which contained several provisions that were not beneficial to the player. In the same number of cases, it was also evident that the concerned agents did not really understand or appreciate professional ethics, nor did they have an intention of applying such ethics. In some other cases, several players were approached by third-party agents and were persuaded to breach their existing player-agent mandate of representation. The damage and the loss to the complainant agent (or player) in such situations were irreversible and contributed to the argument that unregulated and unscrupulous agents have no place in this discipline. In one of our interviews conducted with one of the current Premier League managers, the comment was: 'I do not like dealing with any of them (agents). They are parasites, vermin of the worse kind and I have no time for them. Go no further, this is the Wild West.'[18] *Another Premier League manager declared: 'I have dealt with over 50 agents in the last three years and I am still waiting to meet a decent one. Many of them, if not all of them, have their own interests at heart, not their clients.' They seek a quick profit and in order for them to get it, they will step on bodies. They are all mafiosos.' In addition (and further to the evidence in Footnote 1), there are several other situations that give rise to allegations of tapping up, bungs, tax evasion and many more activities that centre around the practices of football agents. All these situations have the potential of damaging the image of sport and creating a reputational risk for the different stakeholders in the sport."*[19]

It follows, therefore, that evidence of abuse and market failure does exist, and it is regrettable that it was not presented to the Tribunal. If anything, an argument could have been made that such is the importance of this area of regulation for society, that it would be in the public interest if such restrictions of financial elements were to be declared lawful. In this light, it can be suggested that evidence to this effect exists and could only help one to appreciate the level of dissatisfaction expressed by many stakeholders in this area. Whether this is a legal problem or an ethical one (or both), it can be submitted that the damage the sport suffers must be measured against the socio-economic impact of sport on society. This cannot and should not be underestimated, nor can it be dismissed at face value. This significance is understood by self-regulation, but more often than not, it is governance that fails its participants and other stakeholders. This is true in the actual regulation of football agents, which, at the moment, appears to be at its lowest since its inception.

These considerations were part of *FIFA*'s attempt to set a so-called *fee-cap* for agents, but, regrettably, it was not incepted or applied with the appropriate supporting evidence. With the lack of appropriate evidence, the Tribunal in the present matter, therefore, concluded the *Fee Cap* is not justified by a legitimate objective and hence not reasonably necessary for any such objective.[20] A lesson learned and to be considered in the event of future rules' implementations and challenges.

II. The Pro Rata Payment Rule

The Tribunal states at para.252 of its Decision that: *"The purpose of the Pro Rata Payment Rules is said to be directed at agents encouraging their clients to leave clubs before the end of the contractual period."* On this point, the Tribunal again concluded that there was insufficient evidence before it to demonstrate that agents "encourage players" to terminate their contracts and/or agents usually attempt to "engineer transfers".

As the Tribunal states at paras 257–258 of its Decision: *"In the view of the Tribunal, this is not an adequate or proportional response to the perceived threat of agents engineering transfers. An early move to another club may be in the player's interests, and there may therefore be no question of "encouraging a player" or "engineering of transfers."*

There may, as the Governing Bodies say, be cases in which agents have a financial incentive to destabilise a player's contract where it is not in the player's interest to move from a club, but there is no evidence before the Tribunal that abuse of this kind is so common that it is necessary to make agents' fees contingent on the subsistence of the player's contract."

[18] Interviews with current premier league managers were conducted in May–July 2018.
[19] G. Ioannidis, "Football intermediaries and self-regulation: the need for greater transparency through disciplinary law, sanctioning and qualifying criteria" (2019) 19 *The International Sports Law Journal* 154–170.
[20] See the Tribunal's Decision at para.250.

III. Dual Representation and Client Pays Rule

The Dual Representation rule is another important rule in *FIFA*'s regulatory framework and was enacted with a view to restricting and eliminating possible conflicts of interest arising from players' transfers. It is a simple, yet effective rule, but, regrettably, it is not always followed by football agents. The rule (in the previous 2015 set of regulations and in the new 2022 version of the regulations),[21] makes it clear that dual representation is only permitted if the agent has obtained prior written consent of all parties in the transaction. This is a mandatory provision and *FIFA* instructs national federations to implement this rule into their regulatory frameworks.[22]

This is an important rule for the avoidance of possible conflicts of interest and its mandatory nature binds agents in the creation of representation agreements with players and clubs. This rule also promotes transparency, as multiple representation of parties in one transaction may create several financial and contractual complications. The Tribunal in the present matter, concluded in its Decision, that the Dual Representation Rule (and the Client Pays Rule) are not restrictive of competition: "*As to whether these two Rules can be considered to be reasonably necessary to tackle the market failures and abuses identified by FIFA, the Tribunal can be brief. This is because the Tribunal finds that neither rule is in any event restrictive of competition by object or effect. The Tribunal's assessment is that the Dual Representation Rules and the Client Pays Rule can be regarded as reasonably necessary for, respectively, the avoidance of conflicts of interest and the promotion of transparency*".[23]

IV. The Tribunal's View on the Proposed Rules Distorting Competition

The Tribunal went on to rule on whether the Proposed Rules may distort competition by object and effect. We remind the reader that we had warned the sport governing bodies in 2019, that the Proposed Rules may fall foul of European Union law, as they may distort competition and, in the event the *FA* is considered dominant in one or more of the relevant markets, the Proposed Rules may amount to an abuse of that dominant position in the market. The Tribunal's findings were as follows:

- On the *Fee Cap*: The Tribunal disagreed with the *CAS* Award in CAS 2023/O/9370 *PROFAA v FIFA* in that no consideration was given (in the *CAS* Award) to the point that the price cap operates as a buyer's cartel. The Tribunal, however, went on to state that the *CAS* Panel did not have the benefit of the evidence of the genesis of the *Fee Cap*, hence it may not have been possible for *CAS* to reach the same conclusion as the Tribunal.[24] Regardless, the Tribunal concluded that the *Fee Cap* is likely to have an appreciable effect on competition and as a result, capable of restricting competition.
- On the *Pro Rata Payment* Rules: The Tribunal concluded on this point that the *Pro Rata Payment* Rules are an object of restriction, as their purpose is to distort the structure of the market and reduce economic activity by agents. As the Tribunal states at para.316 of its Decision: *"The terms of those Rules are therefore clearly intended to interfere with, and reduce, the payments actually made by engaging clubs to agents for services provided by the agents. In the words of the CMA Guidance this amounts to "fixing or coordinating ... aspects of purchase prices." Indeed their avowed objective is to change the structure of the market not only by changing the method of remuneration of agents but also to disincentivise and reduce economic activity by the agents."*
- On the proposed *Dual Representation* rule, the Tribunal concluded it does not restrict competition. Without going into an analysis of the necessity of this rule and/or referring to the *"sporting exemption"* principle, that may justify the legitimate aim pursued by the regulator, the Tribunal stated at para.353 of its Decision: *"In the view of the Tribunal, the Claimants have not established that the prohibition of multiple representation is an object restriction. They have not made out a case that the rule "reveals a sufficient degree of harm to competition that it can be regarded as being, by its very nature, harmful to the proper functioning of normal competition" for the purposes of the Cartes Bancaires v Commission test. This is a rule of a very different character to that of the Fee Cap and the Pro Rata Payment Rules which limit the remuneration of agents in respect of permitted transactions."*
- On similar grounds, the Tribunal concluded the proposed *Client Pays Rule* did not constitute a restriction of competition whether by object or effect pursuant to the

[21] FIFA Working With Intermediaries Regulations 2015 and FIFA Football Agent Regulations, December 2022, respectively.
[22] The present work does not deal with the question of whether violation of the dual representation rule may invalidate the representation agreement between an agent and a player. The author has recently challenged a violation of the dual representation rule before *CAS*, and he will have the opportunity to fully analyse such legal challenge in another publication soon.
[23] See para.259 of the Tribunal's Decision.
[24] See para.287 of the Tribunal's Decision.

1988 Act, citing at para.370: *"...the Tribunal is satisfied that the Claimants have not shown that the Rule reveals sufficient, or indeed any, degree of harm to competition that it can be regarded as being by its very nature, harmful to the proper functioning of normal competition. Once again, this is a rule of a very different character to that of the Fee Cap and the Pro Rata Payment Rules which limit the remuneration of agents in respect of permitted transactions."*

Determining whether such infringements would benefit from an exemption if certain conditions under s.9 of the Competition Act 1998 Act are met, the Tribunal referred to the Competition and Markets Act Guidance which states: *"Cogent and empirical evidence is needed to carry out the required evaluation of any claimed efficiencies for the purposes of fulfilling the conditions of the section 9 exemption."*

In the Tribunal's view at para.379, the Governing Bodies' evidence "…goes *nowhere near enough meeting the test to satisfy the first condition of section 9, as explained in the Exemption Guidelines and the CMA Guidance."*

The Tribunal gave a clear indication of the type of evidence to be adduced for an exemption under s.9 to be considered. This is significant because it provides a steer to future Governing Bodies towards conducting a robust ex-ante economic analysis when seeking to implement rules with the potential to affect economic activity in a specific sports market. It remains to be seen whether this will indeed be the direction of travel.

The Tribunal's View on FIFA's Dominant Position

As stated previously, at para.160, the Tribunal agreed with the parties' position that EU authorities should be applied to the present matter. As a result, the Tribunal in the present matter, applied and agreed with the test used by the Court of First Instance in the matter of *Piau v Commission of the European Communities* (T-193/02)[25] where the Court stated at paras 112, 115–116:

"112. *In the present case, the market affected by the rules in question is a market for the provision of services where the buyers are players and clubs and the sellers are agents. In this market FIFA can be regarded as acting on behalf of football clubs since, as has already been stated, it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs…*

115. *It seems unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players' agents in the present case does not hold a collective dominant position on the market for players' agents' services on the ground that is not an actor on that market.*

116. *The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players' agents, is irrelevant as regards the application of Art.82 EC , since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members."*

Consequently, the Tribunal concluded *FIFA* (and *the FA*) holds a dominant position in the market for agents' services in England, as it has the power to control and regulate agents' services in such market. The Tribunal made it clear that the fact that *FIFA* is not, itself, an economic operator in such services is irrelevant. The fact that *FIFA* has the power to restrict/control the economic activity of agents in the market, gives rise to a dominant position in the market. As a result, the Tribunal concluded at para.398 of its Decision that the *Fee Cap* and the *Pro Rata Payment* Rules would give rise to an abuse of a dominant position in the relevant market.

V. Tribunal's View on the Common Law Doctrine of Restraint of Trade

Having concluded its finding that the pro rata payment rules and the fee cap are "object" restrictions to competition, the Tribunal considered the application of the common law doctrine of restraint of trade in respect of the dual representation rule and the client pays rule. The Tribunal, after referring the Parties to the common law doctrine of restraint of trade and to the relevant academic authority,[26] concluded that the *Dual Representation* Rule and the *Client Pays* Rule do not give rise to a restraint of trade. This is because the former is a necessary mechanism for reducing the risk of conflicts of interest (and it is a reasonable restriction), whereas the latter "*serves a reasonable purpose of ensuring that the player/coach is aware of the fees being charged by the agent and is therefore not unreasonable*".[27]

[25] *Piau v Commission of the European Communities* (T-193/02) EU:T:2005:22; [2005] 5 C.M.L.R. 2.
[26] H.G. Beale (ed.), *Chitty on Contracts*, 34th edn (London: Sweet & Maxwell, 2021) at para.18–123.
[27] See para.402 of the Tribunal's Decision.

At para.406 of its decision, the Tribunal observed that in seeking to displace the claimant's restraint of trade argument, the Governing Bodies had relied upon the *Days Medical* decision,[28] which established the supremacy of EU law such that, once EU competition law had been engaged, the common law restraint of trade doctrine is excluded.

However, the Tribunal confirmed post-Brexit, this was no longer of application: the restraint of trade doctrine is no longer superseded by claims brought pursuant to the 1998 Act and can be run alongside.

Conclusion

We have examined the procedural and jurisprudential elements of this matter, and we critically analysed the Tribunal's decision on the challenge brought forward by football agents, against the proposed rules by *FIFA*. We also reminded the reader of our work published in 2019, when we had submitted that some of *FIFA*'s proposed rules may fall foul of *EU* law. This does not mean, however, that we disagree with the entirety of the new rules. As a matter of fact, we had encouraged *FIFA*, with our work on football agents in 2019, to ensure that stricter criteria on qualification, licensing, representation, and sanctioning are applied. We are pleased that *FIFA*, to a certain extent, followed such recommendations. Although the rules on the *fee cap* and *pro rata payment* are now deemed to be unlawful, there are other ways of ensuring that the perceived aim of such rules is applied in a properly thought-out regulatory framework.

Consequently, it is important to submit that stakeholders in the sport of football must continue to support *FIFA* in its attempt to regulate football agents worldwide, so it can achieve its aims on contractual stability and financial transparency with respect to football agents and their activities. As a result, it is the authors' submission that in line with the legal developments emanating from the European Court, *FIFA* must also work closely with state authorities, to ensure its regulatory framework is supported in areas that require a public response and assistance. It is true that in certain circumstances a private regulatory body such as FIFA must comply with national legislation (and where European countries are concerned, with *EU* law), particularly where employment and agency laws are concerned. As stated above, several countries are now commencing the creation of sport specific legislation for the activities of football agents, by taking into consideration corresponding provisions from employment law and agency law (as they are incorporated into their national Statutes). Countries without such national legislation are encouraged to follow such example, to ensure that there is harmonisation, worldwide, in the activities of football agents. This point was also addressed in the *Piau* case (as stated above) where it was acknowledged by the European Court that lack of specific national regulation/legislation, may create a necessity of qualitative restrictions in *FIFA*'s regulatory framework of football agents.

Similarly, an argument can be made that *FIFA* has a unique opportunity to re-gain effective regulatory control over the activities of football agents, with the required degree of legality and order. Although there are several competent and able football agents, there are also, regrettably, several unskilled and untrained agents, who enter the market with the sole intention of making a quick profit. The European Commission may feel that entry restrictions to individuals have the potential of violating *EU* competition law; however, the European Commission has also acknowledged in the *Piau* case (as stated above) that it is important for a regulator to have some control over those who operate in this market, particularly when there is absence of national legislation and/or regulation. This is an important point which offers probity to our proposal for closer cooperation between external regulation and self-regulation, regarding the activities of football agents.

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[28] *Days Healthcare UK Ltd (formerly Days Medical Aids Ltd) v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB); [2007] C.P. Rep. 1.