



Analysis of the new FIFA Football Agent
Regulations from a European
competition law perspective

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Abstract

In December 2022, FIFA adopted new regulations on agents, which have led to massive protests from agents in numerous countries. Specifically, agents are denouncing that these regulations breach several provisions of European and national law, including competition law (Arts. 101 and 102 TFEU), the freedom to provide services (Art. 56 TFEU) or data protection law (such as the GDPR).

This paper aims to examine whether and to what extent the provisions of these new regulations infringe European competition law, hence Arts. 101 and 102 TFEU. In this regard, clauses relating to the limitation of agents' service fees, the obligation to disclose information on their activities, the admissibility of the licensing system, or the prohibition of multiple representation will be discussed.

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	III
1. INTRODUCTION _____	1
1.1 Object and scope of the paper	1
1.2 Historical background to FIFA's regulations on agents	2
2. ECONOMIC ISSUES OF THE FFAR _____	5
2.1 The identification of the relevant market.....	5
2.2 The market players' positions on the relevant market	6
2.3 Competition concerns of FIFA's market power	7
3. LEGAL ASSESSMENT OF THE FFAR _____	8
3.1 Prohibition of agreements between undertakings (Art. 101 TFEU)	10
3.1.1 Applicability of Art. 101 TFEU	10
3.1.1.1 Legal conditions of Art. 101(1) TFEU.....	10
3.1.1.2 The individual exemption under Art. 101(3) TFEU	11
3.1.1.3 The situation of the FFAR.....	12
3.1.2 Service fee provisions	12
3.1.2.1 Service fee cap (Art. 15(2) FFAR).....	12
3.1.2.2 Service fee calculation provisions (Art. 14(7), 15(1) and 16(3) lit. e FFAR).....	13
3.1.2.3 Other service fee provisions.....	13
3.1.2.4 The individual exemption under Art. 101(3) TFEU	15
3.1.3 Information disclosure and publication.....	15
3.1.3.1 Assessment under Art. 101(1) TFEU.....	16
3.1.3.2 The individual exemption under Art. 101(3) TFEU	17
3.1.4 Licensing system and submission to FIFA regulations	18
3.1.4.1 Overview	18
3.1.4.2 Assessment of the licensing system and the submission to FIFA regulations as restrictions by object.....	19
3.1.4.3 The legitimate objectives escape route.....	20

3.1.4.3.1	Absence of elimination of competition	20
3.1.4.3.2	Legitimate objectives.....	21
3.1.4.3.3	Proportionality	21
3.1.4.3.4	Admissibility of the submission to FIFA regulations specifically	23
3.1.4.3.5	FIFA’s ability to regulate the market for agent services in football.....	24
3.1.4.4	The individual exemption under Art. 101(3) TFEU	24
3.1.4.4.1	Efficiency gains	25
3.1.4.4.2	Indispensability	25
3.1.4.4.3	Absence of elimination of competition	25
3.1.4.4.4	Fair share to the benefits of consumers	25
3.1.4.5	Summary	26
3.1.5	Other types of FFAR disputed provisions.....	27
3.1.5.1	Prohibition of multiple representation (Art. 12(8), (9) and (10) FFAR).....	27
3.1.5.2	Limitation on the representation agreement's duration (Art. 12(3) FFAR).....	28
3.1.5.3	Prohibition on “poaching” clients bound by an exclusive agent agreement (Art. 16(1) lit. b and c FFAR).....	29
3.2	Abuse of a dominant position (Art. 102 TFEU)	30
3.2.1	Applicability of Art. 102 TFEU	30
3.2.2	Service fee provisions	32
3.2.3	Information disclosure and publication.....	33
3.2.4	Licensing system and submission to FIFA regulations	35
3.2.5	Other types of FFAR disputed provisions.....	36
3.2.5.1	Prohibition of multiple representation (Art. 12(8), (9) and (10) FFAR).....	36
3.2.5.2	Limitation on the representation agreement's duration (Art. 12(3) FFAR).....	36
3.2.5.3	Prohibition on “poaching” clients bound by an exclusive agent agreement (Art. 16(1) lit. b and c FFAR).....	37
4.	CONCLUSIONS	38
4.1	Key takeaways from this paper	38
4.2	Concluding remarks	39
BIBLIOGRAPHY	41

LIST OF ABBREVIATIONS

AFBJ	Association de football Berne/Jura (Bern/Jura Regional Football Association)
Art(s).	Article(s)
CAS	Court of Arbitration for Sport
CFI	Court of First Instance of the European Union
Ch.	Chapter(s)
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COMCO	Commission de la concurrence (Swiss Competition Commission)
DFB	Deutscher Fussball-Bund (German Football Association)
Dr	Doctor
DTF	Decision of the Swiss Federal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EC Merger Regulation	Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings
ECtHR	European Court of Human Rights
ed	edition(s)
edit	editor(s)
e.g.	<i>exempli gratia</i> (for example)
et al.	<i>et alii</i> (= and others)
etc.	<i>et cetera</i>

EU	European Union
FA	Football Association of England
f./ff.	and the following
FFAR	FIFA Football Agent Regulations, version of 16 December 2022
FFF	Fédération française de football (French Football Federation)
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
FIFPRO	Fédération Internationale des Associations de Footballeurs Professionnels (International Federation of Professional Footballers)
fn.	footnote
GDPR	Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
Guidance on restrictions of competition “by object”	Commission Staff Working Document - Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, revised version of 3 June 2015.
Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty	Communication from the Commission (2009/C 45/02) — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings
Horizontal Guidelines	Communication from the Commission (2023/C 259/01) – Notice – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements
i.e.	<i>id est</i> (that is)
Iss.	issue

ISU	International Skating Union
LG	Landgericht (German regional court)
lit.	<i>litera</i> (letter)
Mr.	Mister
No(s).	number(s)
p.	page(s)
par.	paragraph(s)
RFEF	Real Federación Española de Fútbol (Royal Spanish Football Federation)
RSTP	FIFA Regulations on the Status and Transfer of Players, June 2024 ed
RWWI	FIFA Regulations on Working with Intermediaries, version of 13 August 2014
SpuRt	Zeitschrift für Sport und Recht
TFEU	Treaty on the Functioning of the European Union
UCI	Union Cycliste Internationale (International Cycling Union)
UEFA	Union of European Football Associations
USD	United States dollar
v	<i>versus</i>
Vol.	volume
§	paragraph(s)

1. INTRODUCTION

1.1 Object and scope of the paper

The CJEU has long held that sport, as an economic activity, is subject to European Union law and has confirmed this in numerous decisions¹. Since the 1970s, various cases have been brought before the CJEU questioning the legality of sports federations' regulations and decisions in the light of European law, and notably freedom of movement for workers (Art. 45 TFEU), freedom to provide services (Art. 56 TFEU) and competition law (Arts. 101 and 102 TFEU)². Naturally, the world of football has also been affected by some of the CJEU's decisions³, leading indeed to one of the CJEU's best-known judgments, the Bosman decision⁴.

The 21st century witnessed absolutely no shift in this trend, to the contrary. It can even be said that in recent years an increasing number of sporting decisions have been challenged before the CJEU. This was certainly the case in both ISU⁵ and Superleague⁶ cases, in which the question of monopolisation of a sport was raised. Similar cases include the pending case Diarra challenging the legality of FIFA's RSTP⁷, and the case of the Portuguese League's no poaching agreements between clubs⁸.

In addition to its RSTP regulation, FIFA's Football Agent Regulations (FFAR), adopted in December 2022, are also being challenged by football agents in several EU Member States⁹.

¹ See, e.g., Case 36-74, Walrave and Koch v UCI, § 4; Case 13-76, Donà v Mantero, § 12 and 13; see also: Girsberger, D., & Voser, N. (2024), § 2360; Hafner, Y. (2012), p. 223; Zen-Ruffinen, P. (2002), § 866.

² See, e.g., Case C-415/93, Union royale belge des sociétés de football association ASBL v Bosman, Royal club liégeois SA v. Bosman and Others and Union des associations européennes de football (UEFA) v Bosman, § 87; Joined Cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97), § 48; Case C-519/04 P, Meca-Medina and Majcen v Commission, § 23.

³ See, e.g., Case T-193/02, Piau v Commission; Case C-333/21, European Superleague Company v FIFA and UEFA.

⁴ Case C-415/93, Union royale belge des sociétés de football association ASBL v Bosman, Royal club liégeois SA v. Bosman and Others and Union des associations européennes de football (UEFA) v Bosman.

⁵ Case C-124/21 P, International Skating Union (ISU) v Commission.

⁶ Case C-333/21, European Superleague Company v FIFA and UEFA.

⁷ Case C-650/22, Fédération internationale de football association (FIFA) v BZ.

⁸ Case C-133/24, CD Tondela – Futebol, SAD and Others v Autoridade da Concorrência.

⁹ Boyce, A., & Hirst, N. (2022), available at < <https://mlexmarketinsight.com/news/insight/fifa-faces-cartel-claims-over-plans-to-regulate-football-players-agents> >, last visited on 27 August 2024; Winter, D. (2023), available at < <https://wdassocies.com/en/fifa-football-agents-regulations-legal-or-illegal> >, last visited on 27 August 2024.

The object of this paper is thus to analyse critically the FFAR adopted in 2022 in the light of European competition law, i.e. Arts. 101 and 102 TFEU, determining particularly which of its clauses seem to be problematic or not under European competition law.

Following a brief introduction outlining the historical background to FIFA's regulations on agents¹⁰, this paper will be divided into two main chapters. The first main chapter will focus on the possible consequences of the FFAR on the market for agent services from an economic perspective¹¹. The second main chapter will be the core of this work and will be devoted to the legal assessment of the FFAR with regard to European competition law¹². Lastly, the conclusion will recall the key findings of this research and the future of the regulation of football agents¹³.

It is important to emphasise that this work will focus on European competition law and that a detailed analysis of the FFAR with respect to the free movement of workers or the freedom to provide services will not be the object of the present paper.

1.2 Historical background to FIFA's regulations on agents

In the early 90s, following the increase of the number of transfers and transfer fees, FIFA started to reflect on the possibility of regulating the transfer market and its participants, including agents¹⁴. For FIFA, it was imperative to introduce professionalism and ethics into the transfer market in order to protect players¹⁵. Thus, FIFA adopted the Players' Agents Regulations on 20 May 1994¹⁶. These Players' Agents Regulations have been repeatedly amended before being abandoned in 2015¹⁷.

Back then, the Players' Agents Regulations were already a source of controversy and gave rise to several complaints at European level¹⁸. A French agent, Laurent Piau, challenged the 1994 FIFA Regulations on agents before the European Commission and then the CFI¹⁹. Some of the disputed clauses of the 1994 Players' Agents Regulations are actually quite similar to those of the FFAR, such as the compulsory FIFA licencing system, submission to FIFA Statutes and

¹⁰ 1.2.

¹¹ Ch. 2.

¹² Ch. 3.

¹³ Ch. 4.

¹⁴ Bourg, J.-F., & Gougnet, J.-J. (2023), p. 92; Bull, W., & Faure, M. (2022), p. 23 ff.

¹⁵ Papaloukas, M. (2007), p. 53.

¹⁶ Case T-193/02, Piau v Commission, § 5.

¹⁷ Bourg, J.-F., & Gougnet, J.-J. (2023), p. 96; Bull, W., & Faure, M. (2022), p. 26 f.

¹⁸ E.g., Case T-193/02, Piau v Commission; complaint lodged on 20 February 1996 by Multiplayers International Denmark with the Commission (Case T-193/02, Piau v Commission, § 9).

¹⁹ Case T-193/02, Piau v Commission.

regulations or clauses concerning agents' service fees. In its decision, the CFI upheld most of the Commission's findings, which had considered that there was insufficient Community interest in pursuing the proceedings against FIFA²⁰.

In 2015, FIFA decided to replace its regulations on agents by regulations on intermediaries (RWWI), which in fact regulated certain activities of agents but differed from its predecessor on several points, the most notable being the absence of the licence requirement in favour of the simple registration of agents following a transaction²¹.

In view of the soaring agents' service fees, FIFA considered the re-introduction of more stringent regulations of the agent profession, going back to certain principles of the 1994 regulations, such as the compulsory licence, and even going further on some issues by introducing a service fee cap for agents²². On 16 December 2022, FIFA adopted its new regulations on agents, the FIFA Football Agent Regulations (FFAR). Immediately after the publication of these new regulations, a large number of agents expressed their dissatisfaction and procedures were introduced throughout the world, particularly in the EU²³:

- It is in **Germany** that the proceedings have been dealt with the quickest by the courts. The Dortmund Regional Court provisionally prohibited FIFA and the German Football Association (DBF) from applying several provisions of the FFAR relating not only to service fees, but also to the publication of certain information and the obligation to comply with FIFA's Statutes and regulations, taking the view that these were restrictions by object²⁴. The Mainz Regional Court opted for a different approach and instead submitted a request for a preliminary ruling to the ECJ on the question whether the FFAR complies with Art. 56, 101 and 102 TFEU, and Art. 6 of the GDPR²⁵.

²⁰ Case T-193/02, Piau v Commission, § 22.

²¹ Bourg, J.-F., & Gouguet, J.-J. (2023), p. 96.

²² It is interesting to note that the reasons which led to the introduction of the FFAR are quite similar to those which led to the adoption of the Players' Agents Regulations in 1994, including above all rendering the transfer and agent services markets more ethical and protecting clubs and players against speculation whilst erecting contractual stability and solidarity as guiding principles (see FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 4 f.; see also: LG Dortmund, 8 O 1/23 (Kart), § 56 ff.).

²³ Mavroidis, P.C./Neven, D.J. (2024), p. 25.

²⁴ LG Dortmund, 8 O 1/23 (Kart).

²⁵ Case C-209/23, FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA).

- In **Spain**, the Commercial Court of Madrid enacted provisional measures requesting FIFA and the RFEF (Royal Spanish Football Federation) to refrain from implementing Art. 15(1) and (2) FFAR on agents' service fees²⁶.
- Shortly afterwards, the FA Rule K Tribunal in **England** decided that the service fee cap would breach the Competition Act 1998²⁷.
- The situation in **France** is particular, given that the French Sports Code already requires sports agents to hold a licence, prohibits the dual representation²⁸ and the French Football Agents Regulations provide for a service fee cap set at 10% of the player's remuneration²⁹. According to the Commission Fédérale des Agents Sportifs, the caps provided for in the FFAR (5% or 3% of the player's remuneration) are not proportionate³⁰.
- In **Italy** and **Switzerland**, no decision has yet been taken by an authority³¹, although the Swiss Competition Commission (COMCO) has initiated a preliminary investigation to examine the FFAR in relation to Swiss competition law³².

Meanwhile, the Court of Arbitration for Sport (CAS) validated the FFAR, considering that it was compatible with EU competition law³³.

Following the massive worldwide protest and the court decisions declaring the FFAR to be incompatible with competition law, FIFA decided on 30 December 2023 to suspend temporarily the worldwide application of the FFAR³⁴.

²⁶ Commercial Court No. 3 of Madrid, request for provisional measures in Case No. 321/2023.

²⁷ Case Rev 12/12/23 of the FA Rule K Tribunal, CAA and Others v FA and FIFA, § 250.

²⁸ Arts. L222-7 and R222-14 ff. of the French Sports Code.

²⁹ Art. L222-17 of the French Sports Code; Art. 6.2.2 of the French Football Agents Regulations 2023-2024.

³⁰ Le Roux, M. (2023), available at < <https://www.jurisportiva.fr/actualite/le-reglement-des-agents-de-la-fifa-devant-les-tribunaux/> >, last visited on 27 August 2024; FFF Executive Committee minutes of 19 October 2023, p. 6, available at < https://media.fff.fr/uploads/document/3c68493a83dc7b4ba1255aa60a89f8e3.pdf?trk=article-ssr-frontend-pulse_little-text-block >, last visited on 27 August 2024.

³¹ Derungs, V. (2023), available at < <https://www.linkedin.com/pulse/status-implementation-fifa-football-agent-regulations-vitus-derungs-kzwme> >, last visited on 27 August 2024.

³² Annual Report 2023 of the Swiss Competition Commission (COMCO), p. 14.

³³ CAS 2023/O/9370.

³⁴ FIFA Circular No. 1873 of 30 December 2023.

2. ECONOMIC ISSUES OF THE FFAR

This chapter covers the economic aspects of the agent services market and how FIFA may affect competition on this market. Accordingly, the first step will be to briefly define the relevant market, i.e. the market for football agent services³⁵. Next, the market players and their respective positions should be established³⁶. Finally, it will be important to determine whether the market position of certain players might raise competition concerns, and what the consequences of these concerns might be for other market players³⁷.

2.1 *The identification of the relevant market*

The product or service market is determined according to whether a product or service meets a specific need and is interchangeable³⁸. The main relevant market concerned by the FFAR is undoubtedly the market for football agent services, on which football agents offer their agent services (such as negotiating or concluding contracts on behalf of a third party, etc.) to players, coaches and clubs who are the clients of the services (demand side)³⁹. However, the FFAR applies primarily to agent services relating to employment contracts between a player or a coach and a club or player transfer agreements between clubs, but it does not apply directly to ancillary activities such as sponsorship contracts, fiscal consultancy, image management, or even organising a house move or a pleasure trip⁴⁰.

The geographic market represents the area in which the relevant services are offered under relatively homogeneous conditions of competition and which is distinguished from other

³⁵ 2.1.

³⁶ 2.2.

³⁷ 2.3.

³⁸ Bishop, S., & Walker, M. (2021), § 4-006; Magg, C. (2012), § 216.

³⁹ Magg, C. (2012), § 216. It is true that suppliers (agents) and certain clubs could be active in several sports, although this is not the case for football players and coaches. In fact, the market for agent services for each sport is specific and is not interchangeable with agent services for other sports, as many of the market players (players, coaches and clubs) are only active in one sport.

⁴⁰ Art. 11(1) FFAR; Demazière, D., & Jouvenet, M. (2013), p. 34. In the Definitions, the FFAR distinguishes Football Agent Services from Other Services: Football Agent Services are described as “football-related services performed for or on behalf of a Client, including any negotiation, communication relating or preparatory to the same, or other related activity, with the purpose, objective and/or intention of concluding a Transaction”, whereas Other Services are defined as “any services performed by a Football Agent for or on behalf of a Client other than Football Agent Services, including but not limited to, providing legal advice, financial planning, scouting, consultancy, management of image rights and negotiating commercial contracts”. In this paper, when referring to agent services, it should be understood as Football Agent Services within the meaning of the FFAR, whereas other services should be understood as Other Services within the meaning of the FFAR.

territories by appreciably different market conditions⁴¹. Geographically, the agent services market is widely recognised as being global, involving agents, players and clubs from all over the world⁴².

2.2 The market players' positions on the relevant market

As stated earlier, the market players for agent services are agents (suppliers) and players, coaches and football clubs (customers)⁴³. It is well known that there is a multitude of market players on the agent side, and although associations of football agents exist, it cannot be assumed that agents hold a dominant position on the supply side⁴⁴.

On the demand side, however, the situation is far more complex. While players are organised within the FIFPRO World Players' Union⁴⁵, they do not individually hold a dominant position nor are they likely to impose market conditions on their market partners⁴⁶. As for clubs, the issue is difficult. FIFA has occasionally argued that clubs do not have a dominant position on the agent services market and has denied that it is an association of clubs⁴⁷. Nevertheless, the EU Courts have repeatedly held that FIFA, which brings together the national football associations and are themselves made up of the national clubs, is indeed an association of clubs⁴⁸. It has even been argued that FIFA is acting as a monopsony, by representing indirectly the interests of all buyers⁴⁹.

Furthermore, because of its regulatory power in football, FIFA is effectively a market player capable of influencing the competitive conditions on the relevant market by virtue of its regulatory power⁵⁰.

⁴¹ See Art. 9(7) EC Merger Regulation; see also: Heinemann, A., & Kellerhals, A. (2023), p. 63 f.; Martenet, V., & Heinemann, A. (2021), p. 116.

⁴² Magg, C. (2012), § 216.

⁴³ Case T-193/02, Piau v Commission, § 112; Bourg, J.-F., & Gouguet, J.-J. (2023), p. 94.

⁴⁴ This was already the case in the Case T-193/02, Piau v Commission, § 118.

⁴⁵ For further information on FIFPRO, see < <https://fifpro.org/en/who-we-are/what-we-do> >, last visited on 27 August 2024.

⁴⁶ Case T-193/02, Piau v Commission, § 63.

⁴⁷ See, e.g., Case T-193/02, Piau v Commission, § 67.

⁴⁸ Case T-193/02, Piau v Commission, § 72; Case C-333/21, European Superleague Company v FIFA and UEFA, § 115.

⁴⁹ Case T-193/02, Piau v Commission, § 57; Papaloukas, M. (2007), p. 48. It is a fact that all buyers (players, coaches and clubs) are affiliated to a national federation, which in turn is a member of FIFA.

⁵⁰ Papaloukas, M. (2007), p. 48.

2.3 Competition concerns of FIFA's market power

The primary concern in the market for football agent services is the risk that certain market participants, in this case demanders, will impose certain conditions on the market or coordinate their behaviours so as to distort, eliminate or restrict competition⁵¹. In general, the ability to impose conditions on a market stems from the market power of undertakings that are either in a dominant position, or several companies that coordinate their behaviour in such a way as to behave like one dominant company⁵². In sport, and in football particularly, the imposition of conditions on the market stems not only from the dominant position that football clubs hold by being grouped together under FIFA, but above all from the regulatory power that FIFA enjoys over football and related activities⁵³. This power to adopt certain constraining regulations, combined with the fact that the clubs it represents are essential market participants in football agent services, means that FIFA is in a position to impose conditions on the football agent services market, without it being possible for agents to deal with football clubs or players who would not be subject to FIFA's authority⁵⁴.

Concretely, several clauses of the FFAR might lead to a restriction of competition on the football agent services market, from an economic standpoint⁵⁵. These include imposing a service fee cap, requiring suppliers to obtain a licence to access the market, the disclosure and publication of information on agent transactions, as well as restricting multiple representation or limiting the duration of contracts between agents and players to two years⁵⁶. The introduction of the licensing system hinders access to the market for suppliers and constitutes a hurdle to entry for suppliers⁵⁷. The publication of data relating to agent transactions increases market transparency and facilitates the alignment of behaviour and therefore cooperation on the market, particularly for clubs⁵⁸. Finally, the service fee cap allows agents' fees to be controlled, thereby reducing suppliers' welfare⁵⁹.

⁵¹ See, e.g., LG Dortmund, 8 O 1/23 (Kart), § 99.

⁵² See Bishop, S., & Walker, M. (2021), § 3-002.

⁵³ Papaloukas, M. (2007), p. 48.

⁵⁴ See also: LG Dortmund, 8 O 1/23 (Kart), § 39.

⁵⁵ Wauters, J., & Papaconstantinou, G. (2020), p. 4, available at < <https://www.whitecase.com/sites/default/files/2020-03/fifa-reform-proposal-player-agents-client-briefing.pdf> >, last visited on 27 August 2024.

⁵⁶ See the request for a preliminary ruling from the Landgericht Mainz (Germany), Case C-209/23, FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA).

⁵⁷ Papaloukas, M. (2007), p. 47.

⁵⁸ See also: LG Dortmund, 8 O 1/23 (Kart), § 148 f.

⁵⁹ Papaloukas, M. (2007), p. 47.

3. LEGAL ASSESSMENT OF THE FFAR

The core of this paper and the focus of this chapter aim to provide a legal assessment of the FFAR in the light of European competition law.

The FFAR might infringe Art. 101 TFEU, which prohibits agreements between undertakings which restrict competition either by object or by effect, and Art. 102 TFEU, which prohibits the abuse of a dominant position. Consequently, this chapter is divided into two parts: one dedicated to the legal assessment of the FFAR under Art. 101 TFEU⁶⁰, and the other to the legal assessment of the FFAR under Art. 102 TFEU⁶¹.

Thus, the following clauses of the FFAR might possibly violate Arts. 101 and 102 TFEU⁶²:

1. The service fee cap calculated as a percentage of the transfer fee or the annual remuneration of that player⁶³;
2. The prohibition for third parties to pay service fees due under a representation agreement in respect of the players' agent's contracting partner⁶⁴;
3. The prohibition for clubs from paying more than 50% of the agent's total service fee in cases where an agent acts on behalf of the engaging club and the player⁶⁵;
4. The requirement to calculate agents' service fees solely on the basis of the player's remuneration (actually received by the player) or the transfer fee⁶⁶;
5. The presumption that other services provided by an agent in the 24 months prior to or following the provision of agent services is deemed to form part of the service fee paid for the agent service⁶⁷;
6. The prohibition for clubs from agreeing on or paying fees or elements of fees to agents for which the calculation basis also depends on a future transfer compensation⁶⁸;
7. The submission of the agent's payment to certain conditions⁶⁹;

⁶⁰ 3.1.

⁶¹ 3.2.

⁶² See, e.g., the request for a preliminary ruling from the Landgericht Mainz (Germany), Case C-209/23, FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA); LG Dortmund, 8 O 1/23 (Kart), § 115 ff.

⁶³ Art. 15(2) FFAR.

⁶⁴ Art. 14(2) and (3) FFAR.

⁶⁵ Art. 14(10) of the FFAR.

⁶⁶ Art. 14(7) and 15(1) FFAR.

⁶⁷ Art. 15(3) and (4) FFAR.

⁶⁸ Art. 16(3) lit. e FFAR and 18^{ter}(1) FIFA RSTP.

⁶⁹ Art. 14(4), (5) and (12) FFAR.

8. The determination of the timing of the payment of a service fee to an agent, such as staggered payments every three months, a single payment upon expiry of the employment contract or upon receipt by the departing club of each payment of the transfer fee⁷⁰;
9. The upload to a FIFA platform for agents to FIFA of certain information, such as any agreement with a client other than a representation agreement, and other information requested on the FIFA platform⁷¹;
10. The disclosure and availability to clubs, players and other agents of information regarding agents and their transactions, such as their names, the clients whom they represent or the details of all transactions, including the amount of the agents' fees⁷²;
11. The requirement that the applicants to an agent licence submit to the internal regulations of FIFA and to its jurisdiction⁷³;
12. The requirement to hold a licence before operating as an agent and the imposition of conditions on the granting, the withdrawal or the suspension of the licence, e.g. no convictions or settlements in criminal proceedings, no suspension of two years or more, examination, periodic courses, etc., without the possibility of the licence being granted at a later date⁷⁴;
13. The prohibition for agents, in connection with the conclusion of a transfer agreement and/or a contract of employment, together with a connected players' agent or not, from providing services to the releasing club and the engaging club, the releasing club and the player, or all parties involved⁷⁵;
14. The prohibition for agents from approaching or entering into a representation agreement with a client (club, player, etc.) who has entered into an exclusive agreement with another agent, except in the final two months of that exclusive representation agreement⁷⁶;

⁷⁰ Art. 14(6), (8) and (11) FFAR.

⁷¹ Art. 16(2) lit. j and k FFAR.

⁷² Art. 19 FFAR.

⁷³ Art. 4(2), 16(2) lit. b and 20 FFAR, in conjunction with Art. 8(3), 57(1) and 58(1) and (2) of the FIFA Statutes (May 2024 ed), Art. 5(a), 49 and 53(3) of the FIFA Disciplinary Code (2023 ed), and Art. 4(2) and 82(1) of the Code of Ethics (2023 ed).

⁷⁴ Art. 5(1) lit. a par. ii and iii FFAR.

⁷⁵ Art. 12(8), (9) and (10) FFAR.

⁷⁶ Art. 16(1) lit. b and c FFAR.

15. The limitation of the duration of a representation agreement between an individual and an agent to two years, renewable⁷⁷.

For the sake of simplicity and to improve the systematic presentation of this paper, it is proposed to classify these clauses into four main categories. The first category relates to clauses concerning agents' service fees, i.e. clauses numbered 1 to 8⁷⁸. The second covers clauses relating to the obligation to disclose and publish certain information about agents and their operations, i.e. clauses numbered 9 and 10⁷⁹. The third concerns clauses dealing with the licensing system and submission to FIFA regulations, i.e. clauses numbered 11 and 12⁸⁰. The fourth category includes the remaining problematic clauses, i.e. clauses numbered 13 to 15⁸¹.

3.1 Prohibition of agreements between undertakings (Art. 101 TFEU)

Following a brief discussion on the applicability of Art. 101 TFEU to the FFAR⁸², the four categories of problematic clauses will be presented⁸³.

3.1.1 Applicability of Art. 101 TFEU

An agreement is a restriction of competition within the meaning of Art. 101 TFEU when the conditions of its paragraph 1 are fulfilled and the cumulative conditions of its paragraph 3 are not met. After reviewing the legal conditions of Art. 101(1)⁸⁴ and the exception of Art. 101(3) TFEU⁸⁵, the applicability of these provisions to the FFAR will then be quickly examined⁸⁶.

3.1.1.1 Legal conditions of Art. 101(1) TFEU

To begin with, it seems essential to recall the functioning of Art. 101 TFEU and its conditions in order to determine when an infringement of competition law may be found. The conditions set out in Art. 101(1) TFEU are the following:

- i. An agreement between undertakings, a decision by associations of undertakings or concerted practices;

⁷⁷ Art. 12(3) FFAR.

⁷⁸ 3.1.2 and 3.2.2.

⁷⁹ 3.1.3 and 3.2.3.

⁸⁰ 3.1.4 and 3.2.4.

⁸¹ 3.1.5 and 3.2.5.

⁸² 3.1.1.

⁸³ 3.1.2 to 3.1.5.

⁸⁴ 3.1.1.1.

⁸⁵ 3.1.1.2.

⁸⁶ 3.1.1.3.

- ii. The agreement, decision or concerted practices have the object or effect to prevent, restrict or distort competition;
- iii. The restriction of competition occurs within the internal market and;
- iv. The agreement, decision or concerted practices may affect trade between Member States.

According to the established case-law of the Court, not every agreement between undertakings or decision of an association of undertakings that restricts the freedom of action of the undertakings party to that agreement or subject to that decision necessarily falls within the prohibition laid down in Art. 101(1) TFEU⁸⁷. Where the provision at issue pursues a legitimate objective, the consequential anti-competitive effects are inherent in the pursuit of those objectives and the principle of proportionality is respected, this provision falls short of Art. 101(1) TFEU⁸⁸. However, this case law is not applicable where the restriction of competition is by object⁸⁹.

3.1.1.2 The individual exemption under Art. 101(3) TFEU

Once the harm to competition under Art. 101(1) TFEU is established, an undertaking may justify its conduct thanks to a Block Exemption Regulation or an individual assessment of Art. 101(3) TFEU's four conditions. The four conditions which may justify a harm to competition are⁹⁰:

- i. Efficiency gains, i.e. that the agreement must contribute to an improvement in production, distribution or promotion of technical or economic progress⁹¹;
- ii. The restriction must be indispensable to the achievement of the efficiency gains⁹²;
- iii. A fair share of the benefits of the agreement must be passed on to consumers⁹³, and;
- iv. The agreement must not allow the parties to eliminate competition for a substantial part of the products/services in question⁹⁴.

⁸⁷ Case C-519/04 P, *Meca-Medina and Majcen v Commission*, § 42; Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 183.

⁸⁸ Case C-519/04 P, *Meca-Medina and Majcen v Commission*, § 42; Case C-309/99, *Wouters and Others*, § 97.

⁸⁹ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 185 f.

⁹⁰ Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 102; Van de Gronden, J.W., & Rusu, C.S. (2021), p. 90.

⁹¹ Guidelines on the application of Article 81(3) of the Treaty, § 48 ff.

⁹² Guidelines on the application of Article 81(3) of the Treaty, § 73 ff.

⁹³ Guidelines on the application of Article 81(3) of the Treaty, § 83 ff.

⁹⁴ Guidelines on the application of Article 81(3) of the Treaty, §105 ff.

3.1.1.3 The situation of the FFAR

In the present instance, it has clearly been established that the regulations of sports federations such as the FFAR are decisions of associations of undertakings, since FIFA comprises the national associations which have themselves clubs as their members, which are undertakings given that they have an economic activity⁹⁵. Moreover, the FFAR may harm competition as they impose access conditions to the agent services market for suppliers and regulates their activity, such as their fees, the duration of representation agreements or the ability to represent multiple parties⁹⁶. The qualification of each FFAR clause as a restriction by object or by effect will be carried out in the following sections⁹⁷. Insofar as certain agents, players and clubs operating on the agent services market are established and active in the European Union and given that this market is broadly cross-border (involving agents operating in various Member States and who may represent players or clubs from other Member States), the restriction of competition occurs within the internal market and is likely to affect trade between Member States.

The assessment of Art. 101(3) TFEU will be conducted specifically for each problematic clause in the following 3.1.2 to 3.1.5 sections.

3.1.2 Service fee provisions

The FFAR clauses relating to agents' service fees are set out in Art. 14, 15(1) to (4), and 16(3) lit. e FFAR. These articles address the identity of the payer, the time of payment, payment conditions, the calculation of the service fee and the service fee cap.

3.1.2.1 Service fee cap (Art. 15(2) FFAR)

Art. 15(2) FFAR provides that when an agent represents an individual (e.g. player or coach) or the engaging entity (e.g. arriving club), the cap is set at a maximum of 3% of the individual's annual remuneration (which may rise to 6% in the event of permitted dual representation), or respectively 5% and 10% when the individual receives a modest annual remuneration (less than USD 200,000 per year). If the agent acts for the releasing entity (departing club), the cap is set at a maximum of 10% of the transfer fee.

⁹⁵ Case T-193/02, Piau v Commission, § 72; Case C-333/21, European Superleague Company v FIFA and UEFA, § 115.

⁹⁶ LG Dortmund, 8 O 1/23 (Kart), § 99.

⁹⁷ 3.1.2 to 3.1.5.

In my view, it is quite clear that setting a service fee cap amounts to setting a maximum price, which is deemed to be price fixing in the context of horizontal agreements, in accordance with the Commission's practice⁹⁸ and CJEU's case law⁹⁹. Moreover, price-fixing is clearly a restriction by object, being particularly harmful to competition by its very nature¹⁰⁰.

3.1.2.2 Service fee calculation provisions (Art. 14(7), 15(1) and 16(3) lit. e FFAR)

Similarly to the service fee cap, provisions relating to the calculation of service fees might be regarded as indirect price-fixing clauses, especially when combined with the service fee cap¹⁰¹. In fact, the prohibition on accepting any payment reliant on a future transfer payment or training reward¹⁰² and the limitation of the calculation of the service fee to the remuneration actually received by an individual¹⁰³ reduce the parties' discretion to freely set agents' fees and enable clubs to agree on price components, especially when linked to the service fee cap¹⁰⁴.

In the light of the foregoing considerations, it is evident that the service fee cap and the service fee calculation clauses represent a price-fixing practice to be qualified as a restriction by object in the context of a horizontal agreement¹⁰⁵.

3.1.2.3 Other service fee provisions

With respect to the other provisions relating to service fees, which outline the identity of the payer¹⁰⁶, the timing of payment¹⁰⁷ and the payment conditions¹⁰⁸, it is less intuitive to assess whether or not they constitute a restriction by object. A restriction by object is deemed to exist when an agreement (or a decision of an association of undertakings in the case of the FFAR) reveals, by its very nature, a sufficient degree of harm to competition¹⁰⁹. The sufficient degree

⁹⁸ Guidance on restrictions of competition "by object", Ch. 2.1.1.

⁹⁹ E.g., Case C-8/08, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, § 37; Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 163.

¹⁰⁰ Guidance on restrictions of competition "by object", Ch. 2.1.1; *LG Dortmund*, 8 O 1/23 (Kart), § 118.

¹⁰¹ Guidance on restrictions of competition "by object", Ch. 2.1.1.

¹⁰² Art. 16(3) lit. e FFAR.

¹⁰³ Art. 14(7) FFAR.

¹⁰⁴ Guidance on restrictions of competition "by object", Ch. 2.1.1; *LG Dortmund*, 8 O 1/23 (Kart), § 121.

¹⁰⁵ Same opinion: *LG Dortmund*, 8 O 1/23 (Kart), § 121.

¹⁰⁶ Art. 14(2), (3) and (10) FFAR.

¹⁰⁷ Art. 14(6), (8) and (11) FFAR.

¹⁰⁸ Art. 14(4), (5) and (12) FFAR.

¹⁰⁹ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 165. Case C-211/22, *Super Bock Bebidas SA and Others v Autoridade da Concorrência*, § 34.

of harm to competition is to be assessed in light of the content of the agreement/decision in question, its economic and legal context and its objective aims¹¹⁰.

Turning to the content of the FFAR, it has been demonstrated that it contains certain clauses, such as the service fee cap, which must be qualified as a restriction by object. Given the concentration of the agent services market on the demand side¹¹¹, the economic and legal context of the market also supports the finding of a restriction by object. Finally, the objective aim of the provisions on the identity, timing and conditions of payment appears to be primarily the limitation of agents' service fees¹¹².

In this way, these clauses somehow ensure compliance with the service fee cap and contribute to limiting agents' service fees. Accordingly, in view of the content of the FFAR, its economic and legal context and its objectives, it should be concluded that the provisions relating to the identity, timing and conditions of payment also represent restrictions by object¹¹³.

The presumption that other services provided by an agent in the 24 months prior to or following the provision of agent services is deemed to form part of the service fee paid for the agent service¹¹⁴ may also be contested under Art. 101 TFEU. This clause appears to restrict competition by its very nature and as there is already uncertainty about FIFA's ability to regulate the agent services market, it is even more debatable whether FIFA is entitled to rule on all types of agreements concluded between an individual or a club and an agent¹¹⁵. Similarly to the other service fee provisions, I consider that this clause constitutes a restriction of competition by object.

Since these are restrictions by object, the pursuit of legitimate objectives defence cannot be supported for these service fee provisions, and Art. 101(1) TFEU is applicable¹¹⁶. Nonetheless, it is still to be determined whether Art. 101(3) TFEU is fulfilled.

¹¹⁰ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 165; Case C-211/22, *Super Bock Bebidas SA and Others v Autoridade da Concorrência*, § 35; Van de Gronden, J.W., & Rusu, C.S. (2021), p. 69.

¹¹¹ Case T-193/02, *Piau v Commission*, § 57; Papaloukas, M. (2007), p. 48.

¹¹² Case Rev 12/12/23 of the FA Rule K Tribunal, *CAA and Others v FA and FIFA*, § 316.

¹¹³ Same opinion: *LG Dortmund*, 8 O 1/23 (Kart), § 121; Case Rev 12/12/23 of the FA Rule K Tribunal, *CAA and Others v FA and FIFA*, § 316.

¹¹⁴ Art. 15(3) and (4) FFAR.

¹¹⁵ Case T-193/02, *Piau v Commission*, § 77; Papaloukas, M. (2007), p. 53.

¹¹⁶ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 185 f.

3.1.2.4 The individual exemption under Art. 101(3) TFEU

It may be considered that service fee clauses do not in fact necessarily eliminate competition as such, since competition remains possible, for example, within the limits of the service fee cap. However, it is hard to see what efficiency gains are attained by a service fee cap or other service fee provisions, other than making agents' service fees more socially acceptable and lower. Although this might be a noble objective, I believe that this is not the role of a private sports association, but rather that of public authorities¹¹⁷. All the more so as this capping could lead to adverse effects: instead of encouraging the development of young players and contractual stability, an agent whose service fee is capped and linked to a player's salary or transfer fee could be tempted to transfer the player more frequently or to transfer the player to a club offering a better salary, even though the player's interest might be to stay with his former club, accumulate playing time and develop in a familiar environment. Thus, it seems that the service fee clauses do not improve the situation of agents and even of football players and that the negative effects are not outweighed by the efficiency gains¹¹⁸.

In addition, there are other ways of ensuring contractual stability and the development of young talent than restricting agents' service fees, such as the prohibition of transfers of minors or the imposition of fixed-term contracts that can only be terminated under strict conditions, as provided for in the RSTP. I also have some doubts about the percentages set for the service fee cap, especially as these are lower than, for example, French law, which already applies service fee caps¹¹⁹.

For all these reasons, I consider that Art. 101(3) TFEU does not apply in relation to the clauses of the FFAR which deal with agents' service fees¹²⁰ and, consequently, these clauses do not appear to be compatible with Art. 101 TFEU¹²¹.

3.1.3 Information disclosure and publication

This section relates to the disclosure by agents to FIFA of various information about their activities as well as the uploading onto a FIFA platform available to clubs, players and other

¹¹⁷ LG Dortmund, 8 O 1/23 (Kart), § 187; Case T-193/02, Piau v Commission, § 77; Mavroidis, P.C./Neven, D.J. (2024), p. 4 and fn. 9.

¹¹⁸ Case Rev 12/12/23 of the FA Rule K Tribunal, CAA and Others v FA and FIFA, § 381 ff.

¹¹⁹ The French service fee cap is set at 10% of the player's remuneration (Art. 6.2.2 of the French Football Agents Regulations 2023-2024).

¹²⁰ Same opinion: Case Rev 12/12/23 of the FA Rule K Tribunal, CAA and Others v FA and FIFA, § 381 ff.

¹²¹ LG Dortmund, 8 O 1/23 (Kart), § 117, 121, 125 and 127.

agents of information relating to agents and their transactions, such as their names, the clients they represent or details of their transactions, including the amount of service fees¹²². The exchange of information in this context is indirect, in that the information is shared by the agents, but not directly between the clubs or players¹²³.

3.1.3.1 Assessment under Art. 101(1) TFEU

Requiring certain market players to disclose information about the price of their services or about their customers might amount to an exchange of sensitive commercial information¹²⁴. Notably, this exchange of information ordered by FIFA may allow clubs (and individuals) to coordinate their market behaviour by facilitating market transparency, which may induce collusive behaviour on the part of clubs in particular¹²⁵. CJEU's case law has held that in certain circumstances, an exchange of commercially sensitive information may constitute a hardcore cartel where the objective of the undertakings involved is to coordinate their conduct on a given market and lead to higher prices, a reduction in quantities or innovation, or market sharing¹²⁶.

There are three main criteria for determining whether an exchange of information constitutes a restriction of competition, specified by the Commission in its Horizontal Guidelines¹²⁷:

- i. The first one concerns whether the information is commercially sensitive, non-sensitive or genuinely public¹²⁸. Certain information, such as information on prices, costs, market shares, customers, etc., can normally never be exchanged¹²⁹.
- ii. The second factor is whether the information exchanged is detailed and individualised, facilitating the parties' understanding of the market and the adoption of collusive behaviour¹³⁰. This is less the case if the information exchanged is aggregated, although this might also be of concern¹³¹.
- iii. The third criterion is the age of the information¹³². Old or historical information that has become obsolete should not lead to competition law concerns. When the information is

¹²² Art. 16(2) lit. j and k and 19 FFAR.

¹²³ Horizontal Guidelines, § 401 ff.

¹²⁴ Case T-180/15, Icap plc and Others v Commission, § 50.

¹²⁵ Horizontal Guidelines, § 401; Case T-180/15, Icap plc and Others v Commission, § 50.

¹²⁶ Case C-883/19 P, HSBC Holdings plc and Others v Commission, § 203; Case C-8/08, T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit, § 35 and 43.

¹²⁷ Horizontal Guidelines, Ch. 6.

¹²⁸ Horizontal Guidelines, § 384 ff.

¹²⁹ Horizontal Guidelines, § 385.

¹³⁰ Horizontal Guidelines, § 390 ff.

¹³¹ Horizontal Guidelines, § 391.

¹³² Horizontal Guidelines, § 393 ff.

recent, or relates to a company's current or future commercial strategy, a restriction of competition should be recognised¹³³.

The exchange of information between competitors of individualised data regarding intended future prices or quantities is even considered as a restriction by object (e.g. exchanging information on current or future prices, quantities or innovations)¹³⁴.

With regard to these clauses, the main issue is the fact of requiring the publication of certain information and its accessibility to the different market players (clubs, agents, players, etc.) that is likely to give rise to competition law concerns. It is worth noting that the information to be disclosed or published is not of equal importance. Information concerning the agent's fee¹³⁵, the structure of his company¹³⁶, his clients and mandates¹³⁷, or the existence of any agreement between an agent and his client or between agents¹³⁸ are individualised commercially sensitive information in that they result in a more transparent market subject to collusion as they involve the price, customers, the capacity and the quantity of services offered on the market¹³⁹. Going further, I believe that this is a restriction by object, because the information to be disclosed is commercially sensitive, largely individualised and concerns the actual market conditions (current prices and quantities, etc.)¹⁴⁰.

3.1.3.2 The individual exemption under Art. 101(3) TFEU

FIFA's main argument for the disclosure is to enforce its service fee cap and supervise the activity of agents¹⁴¹. Yet it has been held above¹⁴² that the service fee cap and the service fee provisions were to be classified as restrictions of competition by object and that the exemption of Art. 101(3) TFEU should be excluded¹⁴³. Accordingly, the efficiency gains of information disclosure are to accommodate clauses that are themselves contrary to Art. 101 TFEU.

¹³³ Horizontal Guidelines, § 394 and 414.

¹³⁴ Guidance on restrictions of competition “by object”, Ch. 2.6; Horizontal Guidelines, § 413 ff.

¹³⁵ Art. 16(2) lit. j par. iii and iv, 19(1) lit. e FFAR.

¹³⁶ Art. 16(2) lit. k FFAR.

¹³⁷ Art. 19(1) lit. a to c FFAR.

¹³⁸ Art. 16(2) lit. j par. i, ii, v and vii FFAR.

¹³⁹ Horizontal Guidelines, § 385.

¹⁴⁰ Guidance on restrictions of competition “by object”, p. 11; Horizontal Guidelines, § 413 ff.

¹⁴¹ FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 9 f.

¹⁴² 3.1.2.4.

¹⁴³ See 3.1.2.1 et 3.1.2.2.

Moreover, given the volume of information to be disclosed, such as the names of the employees of an agency company, the condition of indispensability would not be met either, as they are not necessary for FIFA to achieve its objectives¹⁴⁴.

It should not be forgotten that, in addition to competition law, data protection rules may also apply. It is worth recalling that the GDPR contains specific conditions for allowing the disclosure and publication of data relating to individuals¹⁴⁵.

3.1.4 Licensing system and submission to FIFA regulations

Another issue arising from the FFAR concerns the provisions for the requirement to hold a licence before operating as an agent and the imposition of conditions on the granting, the withdrawal or the suspension of the licence¹⁴⁶, but also the submission of the applicant to a licence to the internal regulations of FIFA and to its jurisdiction¹⁴⁷.

3.1.4.1 Overview

In more detail, Art. 4 ff. FFAR set out the necessary procedure to become a FIFA-licensed agent and prohibit the provision of Football Agent Services¹⁴⁸ to any individual who does not hold a FIFA or equivalent licence¹⁴⁹. The requirements for becoming an agent include satisfying the eligibility requirements¹⁵⁰, successfully passing an exam conducted by FIFA¹⁵¹, paying an annual fee¹⁵² and attending continuing professional development programmes¹⁵³. As for Art. 4(2) and 16(2) lit. b, these stipulate that the applicant agent has to respect and adhere to the statutes, regulations, directives and decisions of FIFA, the confederations and the member associations. Finally, Art. 20 and 21 FFAR provide that disputes concerning representation agreements are subject to the jurisdiction of the Agents Chamber of the Football Tribunal¹⁵⁴

¹⁴⁴ See also: LG Dortmund, 8 O 1/23 (Kart), § 185 ff., on the applicability of Art. 101(3) TFEU to the FFAR as a whole.

¹⁴⁵ See, e.g., Art. 12 ff. GDPR on the rights of the data subject, or controller and processor obligations in Art. 24 ff. GDPR.

¹⁴⁶ Art. 5(1) lit. a par. ii and iii FFAR.

¹⁴⁷ Art. 4(2), 16(2) lit. b and 20 FFAR, in conjunction with Art. 8(3), 57(1) and 58(1) and (2) of the FIFA Statutes (May 2024 ed), Art. 5 lit. a, 49 and 53(3) of the FIFA Disciplinary Code (2023 ed), and Art. 4(2) and 82(1) of the Code of Ethics (2023 ed).

¹⁴⁸ I.e. agent services on the football employment and transfer market as defined in the Definitions section of the FFAR; see fn. 40.

¹⁴⁹ Art. 11(1) FFAR.

¹⁵⁰ Art. 5 FFAR.

¹⁵¹ Art. 6 FFAR.

¹⁵² Art. 7 FFAR.

¹⁵³ Art. 9 FFAR.

¹⁵⁴ Art. 20 FFAR.

and that disciplinary sanctions may be imposed on agents (or their clients) if they do not comply with FIFA regulations¹⁵⁵.

Throughout this paper, when referring to submission to FIFA's jurisdiction or regulations, this includes compliance with FIFA regulations, submission to the Agents Chamber of the Football Tribunal for any disputes and the imposition of disciplinary sanctions.

Requiring a licence to provide agent services is a barrier to entry on the market for agent services¹⁵⁶. The same applies to the conditions for granting a licence and submission to FIFA regulations¹⁵⁷. The establishment of barriers to entry on a market is usually a restriction of competition¹⁵⁸. The next step is to determine whether the licensing system and submission to FIFA's jurisdiction are restrictions of competition by object.

3.1.4.2 Assessment of the licensing system and the submission to FIFA regulations as restrictions by object

A restriction by object must be assessed in the light of the content of the agreement or decision in question, its economic and legal context and its objectives¹⁵⁹. While it is true that FIFA has a highly dominant position on the market and that the FFAR may contain other clauses which are restrictions by object¹⁶⁰, the objectives pursued by the licensing system seem to be non-economical and virtuous¹⁶¹. The very aim of the licensing system seems to be the protection of individuals and clubs from unprofessional agents or those who are unfamiliar with the regulations they are required to apply and to which their clients are subject¹⁶². Unlike service fee or information disclosure clauses, the introduction of a licensing system does not enable FIFA to achieve an economic advantage for itself, the clubs or the players. Although it is true that an agent has to pay an annual licence fee (USD 600¹⁶³), this would enable FIFA to finance the licensing system but not to make a large profit. It is even conceivable that implementing a

¹⁵⁵ Art. 21 FFAR.

¹⁵⁶ Papaloukas, M. (2007), p. 47 and 52.

¹⁵⁷ LG Dortmund, 8 O 1/23 (Kart), § 151.

¹⁵⁸ Papaloukas, M. (2007), p. 52.

¹⁵⁹ Case C-211/22, Super Bock Bebidas SA and Others v Autoridade da Concorrência, § 35.

¹⁶⁰ See Case T-193/02, Piau v Commission, § 57; Papaloukas, M. (2007), p. 48; see also: 3.1.2 Service fee provisions and 3.1.3 Information disclosure and publication.

¹⁶¹ Case C-519/04 P, Meca-Medina and Majcen v Commission, § 42; Case 13-76, Donà v Mantero, § 14 f.

¹⁶² FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 20 f.

¹⁶³ See Enclosure 2 to the FFAR, Information Concerning the Application of the FIFA Football Agent Regulations (Timeline, exams, licence, CPD and legacy agents), p. 6.

licence system, including exams and continuing professional development programmes, may cost FIFA more than it earns.

Likewise, submission to FIFA's jurisdiction has not been introduced for economic reasons, but rather with the same objectives of protecting players and clubs against unethical agents, fighting against abusive practices and reinforcing contractual stability¹⁶⁴. Moreover, submission to FIFA's jurisdiction and regulations will enable the harmonisation of procedures and sanctions against agents, as well as offering greater protection to agents against bad-paying individuals or clubs.

Thus, even if the content of the agreement might imply that the licensing system is a restriction by object, the economic context of Art. 4 ff. FFAR and its objective seems to be purely linked to the protection of the stakeholders on the market and seeks only to guarantee the quality of the services offered, without FIFA seeking any financial interest¹⁶⁵. As opposed to service fee or information disclosure provisions, I do not consider that, taken individually, the licensing system and the submission to FIFA's jurisdiction constitute restrictions by object¹⁶⁶. Consequently, it must be ascertained whether those clauses pursue a legitimate objective and avoid the application of Art. 101(1) TFEU.

3.1.4.3 The legitimate objectives escape route

The endorsement of the legitimate objectives escape route requires that there are legitimate objectives to the implementation of the licensing system and the submission to FIFA regulations and that these measures are proportionate to the objectives, without eliminating competition¹⁶⁷.

3.1.4.3.1 Absence of elimination of competition

It seems evident that the licensing system does not eliminate competition between agents, as any person is entitled to apply for the exam subject to the fulfillment of certain conditions. This would not be the case if FIFA had established more stringent requirements such as a *numerus clausus* for the number of agents or discretionary licensing of agents.

¹⁶⁴ Art. 1(2) FFAR; FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 20 f.

¹⁶⁵ Similar conclusion: Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 68. See also: Case C-680/21, *Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL*, § 141.

¹⁶⁶ Similarly, Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 68 f.

¹⁶⁷ Case C-519/04 P, *Meca-Medina and Majcen v Commission*, § 42; Case C-309/99, *Wouters and Others*, § 97.

3.1.4.3.2 *Legitimate objectives*

As stated in section 3.1.4.2, the provisions on the licensing system and submission to FIFA regulations pursue legitimate objectives, which is, on the one hand, the protection of clubs and individuals from unethical agents and, on the other hand, the establishment of uniform and effective enforcement of the licensing system and the proper performance of representation agreements¹⁶⁸. It therefore remains to be established whether these clauses are proportionate to the objectives pursued.

3.1.4.3.3 *Proportionality*

Overall, a measure is deemed to be proportionate when it does not go beyond what is necessary to ensure the pursuit of the objectives¹⁶⁹. The CJEU held that the principle of proportionality implies notably that measures restricting access to a market should be transparent, objective and non-discriminatory¹⁷⁰. In the Superleague case, the CJEU stated that these criteria were not met because effective access to the market was not ensured, in particular by establishing rules on market entry that were impossible or excessively difficult to satisfy¹⁷¹. However, the situation seems different under the FFAR.

Firstly, FIFA does not appear to have a significant discretion to arbitrarily exclude agents from the licensing system should they meet the required conditions and successfully pass the exam. The exam, which consists of a multiple-choice questionnaire¹⁷², also avoids open-ended questions and subjectivity.

Secondly, the eligibility criteria are clearly expressed, and they are similar to the eligibility criteria for FIFA officials¹⁷³ or to the French law requirements¹⁷⁴. Therefore, they are not unexpected or unusual. Indeed, an agent applicant must never have been convicted of certain serious criminal offences, must never have been the subject of a severe sanction by a regulatory authority or a sports governing body for failure to comply with the rules relating to ethics and

¹⁶⁸ FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 5, 21 and 23.

¹⁶⁹ Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 96.

¹⁷⁰ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 45. Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 99. See also, by analogy, Case C-390/99, *Canal Satélite Digital SL v Administración General del Estado*, § 35 and 43(2).

¹⁷¹ Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 151.

¹⁷² Art. 6(4) FFAR; Enclosure 2 to the FFAR, Information Concerning the Application of the FIFA Football Agent Regulations (Timeline, exams, licence, CPD and legacy agents), p. 4.

¹⁷³ See Art. 70 of FIFA Governance Regulations and Art. 2.3 and 3 of its Annexe 1 (16 December 2022 ed).

¹⁷⁴ Art. L222-9 ff. of the French Sports Code.

professional conduct, must not be an official, employee or have any interest in FIFA or its member organisations, clubs, betting companies, etc., and must never have been declared bankrupt¹⁷⁵. These criteria seem to me to be justified in that they ensure the solvency of agents, their integrity and the absence of conflicts of interest in order to represent their clients in the best possible way. Moreover, not any criminal sanction or other sanction imposed by a sports organisation would exclude agents from being granted a licence, but only the most serious ones and those linked to the agents' activities¹⁷⁶. Thus, it seems that the criteria for granting a licence are transparent, objective, non-discriminatory and do not prevent access to the agent services market.

One issue that may arise is the absence of a time limit (such as the 5-year limitation for bankruptcy in Art. 5(1) lit. c FFAR), which might be seen as disproportionate¹⁷⁷ and might violate fundamental rights, for example if an agent had been sanctioned for unethical conduct 25 years ago but has not adopted any unethical behaviour since then.

More controversial are the conditions of continuing professional development programmes. While the requirement for such courses may be justified and necessary to maintain the quality of agent services¹⁷⁸, requiring all agents to undertake yearly continuing professional development programmes and to pass an exam on certain modules may be deemed excessive¹⁷⁹. I think that this requirement may be acceptable as it is similar to what applies to football referees who are subject to annual tests on the laws of the game¹⁸⁰, but it may be difficult to argue that less restrictive measures are not available, such as simply attending such continuing professional development courses and taking an exam only every 3-5 years. In my opinion, this would ensure an almost equivalent quality of services compared to the current FFAR scenario but with less restrictive requirements for agents.

¹⁷⁵ Art. 5 FFAR.

¹⁷⁶ Art. 5(1) lit. a par. ii FFAR.

¹⁷⁷ For a case where a measure has been deemed disproportionate, see Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 100.

¹⁷⁸ See Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 96 ff., in which the CJEU ruled that the compulsory training appeared to go beyond what is necessary to guarantee the quality of the services.

¹⁷⁹ See, by analogy, Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 96 ff.

¹⁸⁰ E.g., Art. 3 of the AFBJ Referee Course Guidelines of 20 June 2017, available at < https://www.fvbj-afbj.ch/fr/Portaldata/6/Resourcenes/dokumentationen___reglemente/Weisungen_Kurswesen_01.07.2017_F.pdf >, last visited on 28 August 2024, which is applicable for referees in the Bern/Jura region in Switzerland.

3.1.4.3.4 Admissibility of the submission to FIFA regulations specifically

Requiring agents to comply with FIFA regulations is essential for the implementation of these regulations, including the FFAR¹⁸¹. Furthermore, Art. 20 FFAR offers an alternative to state courts for submitting disputes arising from representation agreements. Not to mention that proceedings before the Agents Chamber of the Football Tribunal are free of charge and that agents would benefit from an effective and rapid enforcement mechanism to recover their fees¹⁸². This does not restrict the rights of agents and indeed provides an additional option for agents to enforce their rights before an internal body of the association¹⁸³. Accordingly, if FIFA should be entitled to adopt a licensing system, it should also be permitted to introduce certain provisions to implement this¹⁸⁴.

Apart from competition law, agents may consider submitting to FIFA's jurisdiction to be a compulsory consent to submit to association rules or an arbitration clause in favour of CAS¹⁸⁵. This issue has already been raised in several judgments, most of which have accepted compulsory consent to private dispute resolution mechanisms in the field of sport because of the specific nature of sports law, where arbitral tribunals offer equivalent procedural guarantees to state courts¹⁸⁶. Nevertheless, this case law relates rather to the participation of athletes in competitions, i.e. disputes that are specific to sport, which is not comparable to the situation of agents who only have a very indirect influence on the running of competitions and are not, not even indirect, members of FIFA¹⁸⁷.

Given that disputes between an agent and a client do not mandatorily have to be submitted to the Agents Chamber of the Football Tribunal and are not totally exempt from state jurisdiction, Art. 20 FFAR and Art. 56(1) FIFA Statutes do not, from my perspective, violate the fundamental rights of agents¹⁸⁸.

¹⁸¹ See also: Case T-193/02, Piau v Commission, § 92.

¹⁸² Enclosure 1 to the FFAR, Explanatory notes on the FIFA Football Agent Regulations (Football agent, football agent services, representation agreements, representation/remuneration limitations, enforcement and disputes), p. 5.

¹⁸³ A similar provision is contained in Art. 22(1) RSTP.

¹⁸⁴ Case T-193/02, Piau v Commission, § 92.

¹⁸⁵ Art. 16(2) lit. b and 20 FFAR and Art. 56(1) FIFA Statutes (May 2024 ed).

¹⁸⁶ E.g., ECtHR Judgment, Mutu and Pechstein v. Switzerland, Nos. 40575/10 and 67474/10, § 95 and 115; see also: DTF 1333 III 235, reason 4.3.2.3 (Cañas case).

¹⁸⁷ Branco Martins, R. (2007), especially p. 45.

¹⁸⁸ E.g., Art. 47 Charter or Art. 6 ECHR. In this respect, the FFAR appears to meet the requirements of Art. 6 § 1 ECHR, as set out in the ECtHR Judgment, Mutu and Pechstein v. Switzerland, Nos. 40575/10 and 67474/10, § 95 and 115.

3.1.4.3.5 FIFA's ability to regulate the market for agent services in football

The question also arises as to whether FIFA is entitled to regulate the market for the services of agents in football and to pursue legitimate objectives, or whether this should rather be a state responsibility¹⁸⁹. In my view, this question is not clear-cut.

It seems that the EU Courts acknowledge that sports organisations may regulate issues that strictly concern sport and the organisation of competitions, which would include not only the laws of the game but also anti-doping or disciplinary regulations, but not necessarily any matter that relates very indirectly to sport¹⁹⁰. In this respect, I feel it would be wise to consider whether the sports organisation is better placed to take decisions and introduce binding rules than the state. In this context, it is important to distinguish between service fee provisions and licensing clauses.

Considering that FIFA has an indirect economic interest as a representative of clubs in reducing agents' service fee, the State seems to be in a more appropriate position to regulate (or not) this issue. Nonetheless, it appears that when it comes to implementing an agent licensing system, FIFA and its member associations seem to be in a more suitable position to introduce and enforce such a system, as they have a much more detailed understanding of their regulations, and as they already deal with some aspects of transactions carried out by agents, for example through the RSTP¹⁹¹. In this way, FIFA is more able to conduct exams and examine questions that are relevant to agents, as well as offering continuing professional development programmes on recent key developments in FIFA regulations and related case law (from CAS, Swiss Federal Tribunal, CJEU, etc.).

My opinion is that the licensing system for the football agent services market may fit in with the sporting autonomy of sports associations¹⁹², in that it ensures that agents dealing with individuals and clubs fulfil certain qualities that are necessary and specific to the football employment and transfer market.

3.1.4.4 The individual exemption under Art. 101(3) TFEU

For the sake of completeness, I would point out that even if the provisions on the licensing system and on submission to FIFA's jurisdiction were to be interpreted as restrictions of

¹⁸⁹ This question has been stressed by the CFI but remained unanswered in the Piau Case (T-193/02), § 77 f.

¹⁹⁰ Case C-519/04 P, Meca-Medina and Majcen v Commission, § 43; Case T-193/02, Piau v Commission, § 77 f.

¹⁹¹ On FIFA's competence to impose a licensing system, see Branco Martins, R. (2007), especially p. 49 f.

¹⁹² Branco Martins, R. (2007), especially p. 49 f.

competition by object (or by effect) and the doctrine of the pursuit of legitimate objectives were not to apply, Art. 101(3) TFEU might still be complied with¹⁹³.

3.1.4.4.1 Efficiency gains

In terms of efficiency gains, one of the aims of the licensing system is to improve the quality of agents' services, while at the same time protecting clients against low quality or dubious suppliers¹⁹⁴. In this case, the efficiency gains seem to me to outweigh the resulting restrictions on competition, in line with what has been stated in section 3.1.4.3.3.

3.1.4.4.2 Indispensability

As already mentioned¹⁹⁵, this restriction seems to be indispensable for the efficiency gains, even if a system of certification instead of licensing may be less restrictive and also lead to efficiency gains¹⁹⁶. In this regard, reference may also be made to our analysis assessing the licensing system and the submission to FIFA regulations as proportionate to the objectives pursued¹⁹⁷.

3.1.4.4.3 Absence of elimination of competition

Moreover, the licensing system does not eliminate competition for the services in question, since it is still possible for agents to operate on the market provided that they comply with certain pre-defined, reasonable and objective conditions¹⁹⁸.

3.1.4.4.4 Fair share to the benefits of consumers

In addition, a fair share of the benefits of this provision must be passed on to consumers. Consumers are all the direct or indirect users of the services concerned, which means the persons who suffer from the negative impact of the restrictions¹⁹⁹. They may be clubs or in particular players and coaches, who could be deprived of the possibility of approaching their preferred agent and who would have to be represented by a licensed agent. There are also

¹⁹³ Mavroidis, P.C./Neven, D.J. (2024), p. 13.

¹⁹⁴ Guidelines on the application of Article 81(3) of the Treaty, § 69 ff.; Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, § 102.

¹⁹⁵ 3.1.4.3.2 Legitimate objectives and 3.1.4.3.3 Proportionality.

¹⁹⁶ Bull, W., & Faure, M. (2022), p. 29 f. Nevertheless, the certification system does not appear to me to fully achieve FIFA's objectives, as this was the situation that prevailed under the RWVI, which FIFA decided to replace with the FFAR because it was not sufficiently efficient.

¹⁹⁷ See 3.1.4.3.3.

¹⁹⁸ See 3.1.4.3.1.

¹⁹⁹ Guidelines on the application of Article 81(3) of the Treaty, § 85.

licensed and unlicensed agents, actual and potential, for whom access to the market is made more difficult and restrictive²⁰⁰.

As far as clubs, players and coaches are concerned, it is reasonable to believe that the licensing system protects them from unsuitable agents and gives them access to a better quality of services²⁰¹. They also benefit to a greater extent from other FFAR provisions, such as the service fee cap. For agents, this issue is more controversial:

- On the one hand, the licensing system excludes some people from the market who would have been able to operate as agents before the FFAR and forces them to comply with sports regulations to which they do not wish to adhere, and expose them to disciplinary sanctions²⁰².
- On the other hand, it may be argued that the licensing system could provide better control over the quality of services and promote competition on the merits and on more equitable terms²⁰³. Moreover, submission to FIFA's jurisdiction is not merely negative for agents, but also offers an alternative, free and sometimes more effective way of asserting their claims.

For example, given the international context of this market, it can be difficult for players, especially young players, to defend their rights in the home country of their agent, who may be living abroad, where it is difficult to enforce court decisions. A disciplinary mechanism such as FIFA's would enable such agents to be sanctioned. Licences may also give agents a degree of legitimacy on the market and enhance their ability to negotiate representation agreements with clients who have a high confidence in them. Overall, these comments also apply to submission to FIFA regulations. It is therefore not inconceivable that a fair share of the benefits of the licensing system and the FIFA regulations are passed on to market players.

3.1.4.5 Summary

It is difficult to give a clear answer and to determine with complete certainty that Art. 101(3) TFEU would be fulfilled for the licensing system and the submission to FIFA's jurisdiction. Nonetheless, I consider that it may be admitted, in the light of the foregoing considerations, that

²⁰⁰ Papaloukas, M. (2007), p. 47.

²⁰¹ Enclosure 2 to the FFAR, Information Concerning the Application of the FIFA Football Agent Regulations (Timeline, exams, licence, CPD and legacy agents), p. 7.

²⁰² Rohdenburg, P., & Schreiber, S. (2023), p. 94 f.

²⁰³ Case T-193/02, Piau v Commission, § 103.

the licensing system complies with the conditions of Art. 101(3) TFEU if it were to be regarded as a restriction of competition.

Yet, as has been made clear, I believe that this question is not relevant since the (restrictive) legitimate objectives doctrine applies and allows to avoid the application of Art. 101(1) TFEU, although some situations are on the edge and difficult to assess conclusively.

As a result, the licensing system does not appear to be discriminatory and subjects all agents to the same criteria and exams, with a transitory regime for agents who obtained a FIFA licence under the former FIFA regulations on agents²⁰⁴ or recognition of licences granted pursuant national law licensing systems²⁰⁵, as in France²⁰⁶.

In view of these arguments, the introduction of a licensing system and the submission to FIFA regulations seem to be admissible in the light of the principle of proportionality, albeit subject to the remarks expressed in the paragraphs hereinabove.

3.1.5 Other types of FFAR disputed provisions

3.1.5.1 Prohibition of multiple representation (Art. 12(8), (9) and (10) FFAR)

The Art. 12(8), (9) and (10) FFAR prohibit the multiple representation of an agent in the same transaction, notwithstanding the permitted dual representation where the agent represents an individual and the engaging entity in the same transaction and where the clients have given their prior written consent.

This prohibition limits the freedom to choose an agent and the number of possible clients for agents. Meanwhile, FIFA believes that this prohibition avoids conflicts of interest for agents, thereby improving the quality of the services offered and protecting players, coaches and clubs from agents whose interests may diverge from their own²⁰⁷. While this clause may be understood as a limitation on the quantity of services offered, this limitation is negligible and only applies in the context of the same transaction²⁰⁸. Furthermore, in view of the economic and legal context, some EU and non-EU States already prohibit or limit the dual representation

²⁰⁴ Art. 23 FFAR.

²⁰⁵ Art. 24 FFAR.

²⁰⁶ Arts. L222-7 and R222-14 ff. of the French Sports Code.

²⁰⁷ Enclosure 1 to the FFAR, Explanatory notes on the FIFA Football Agent Regulations (Football agent, football agent services, representation agreements, representation/remuneration limitations, enforcement and disputes), p. 4.

²⁰⁸ See Art. 12(8), (9) and (10) FFAR.

of agents, which means that the consequences of these clauses might not be significant in that they follow existing legislation and hence do not impose any further constraints²⁰⁹. Also, the aim pursued by FIFA in this case is not economic, unlike service fee clauses, but rather the mere protection of clients against agents with conflicting interests²¹⁰. As a result, I do not consider that this clause is a restriction by object²¹¹.

If it can be argued that this provision has anti-competitive effects, the doctrine of the pursuit of legitimate objectives or, subsidiarily, Art. 101(3) TFEU may apply in my view. Indeed, the protection of players, coaches and clubs against conflicts of interest on the part of agents rendering the market for agent services more functional should be regarded as a legitimate objective. The prohibition might be proportionate because it applies only to a single transaction and there is an exception for permitted dual representation where this is not problematic²¹². Lastly, competition is not eliminated.

However, it should be pointed out that it could be problematic for this restriction to also apply to the provision of other services, for which FIFA may not be competent²¹³.

3.1.5.2 Limitation on the representation agreement's duration (Art. 12(3) FFAR)

In addition, the FFAR provide for a limitation of the duration of representation agreements to two years²¹⁴. FIFA had already introduced a similar provision in its former regulations on agents, which had been challenged in the Piau case²¹⁵. In that case, the CFI concluded that the Commission had not breached its discretionary powers by accepting that FIFA regulations were not contrary to European competition law²¹⁶. Although this does not mean that the CFI accepted

²⁰⁹ See, e.g., in France: Art. L222-17 of the French Sports Code and Art. 6.2.1 of the French Football Agents Regulations 2023-2024; in Portugal: Art. 22(2) of the Law No. 28/98 of 26 June 1998 on the legal framework of an athlete's employment contract and sports training contract. In Switzerland, for instance, there are no specific provisions or case law concerning sports agents, but Swiss case law, based on Art. 415 of the Swiss Code of Obligations, allows dual representation for estate agents only if there is no conflict of interest or if the parties have agreed to dual representation (Case 4A_611/2023, reason 6.1 of the Swiss Federal Tribunal and DTF 141 III 64; Tercier, P., Bieri, L., & Carron, B. (2016), § 4965). The situation in Switzerland may be slightly different for sports agents, as the interests of the parties involved may be aligned, unlike in the real estate sector (for details on sports agent contract under Swiss law, see Zen-Ruffinen, P. (2002), § 729 ff.).

²¹⁰ FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 18.

²¹¹ Same opinion: Case Rev 12/12/23 of the FA Rule K Tribunal, CAA and Others v FA and FIFA, § 353.

²¹² However, some doubts may arise as to proportionality: while it is clear that dual representation represents a high risk of conflict of interest for the estate agent, there are many situations in sports in which both parties have common interests and could be represented by the same agent (Valloni, L.W. (2023), p. 15.).

²¹³ Case T-193/02, Piau v Commission, § 77; Mavroidis, P.C./Neven, D.J. (2024), p. 23.

²¹⁴ Art. 12(3) FFAR.

²¹⁵ Case T-193/02, Piau v Commission, § 15.

²¹⁶ Case T-193/02, Piau v Commission, § 93.

the validity of the clause, it merely means that the Commission had not breached its discretion in this respect. For the Commission, this would even be pro-competitive, as it would encourage agents to offer attractive services if they want to be renewed, and would force other agents to offer better services in order to attract another agent's client²¹⁷.

The concern is the restriction on contractual freedom, since this reduces competition between agents on some aspects of the services offered. As a whole, the two-year limitation does not amount to a restriction of competition by object, and even if it could have the effect of restricting competition to a very limited extent, the anti-competitive effects are not appreciable and therefore do not meet the standards of Art. 101(1) TFEU²¹⁸.

Therefore, I believe that this clause is on the whole pro-competitive and is not contrary to Art. 101 TFEU. The restriction of the parties' contractual freedom might also infringe the freedom to provide services (Art. 56 TFEU), but even in that case Art. 12(3) FFAR does not seem to me to be problematic under Art. 56 TFEU²¹⁹.

3.1.5.3 Prohibition on “poaching” clients bound by an exclusive agent agreement (Art. 16(1) lit. b and c FFAR)

The above²²⁰ should also apply to the clause prohibiting agents from approaching a client (club, player, etc.) who has entered into an exclusive contract with another agent, except during the last two months of the agreement's duration²²¹. While this clause partially limits the freedom of agents to carry out preliminary steps to attract new clients and prevents the continuation of competition between agents when a player has been acquired under an exclusive agreement, FIFA wishes to avoid the recruitment of important players by influential agents and to ensure contractual stability for representation agreements but also indirectly on the transfer market²²².

As the maximum duration of contracts is two years, this allows agents to approach players or coaches periodically and frequently, thereby maintaining competition for players and coaches. Thus, this clause does not restrict competition by object and the anti-competitive effects are not

²¹⁷ Case T-193/02, Piau v Commission, § 61.

²¹⁸ Similar finding in: Case T-193/02, Piau v Commission, § 93. Furthermore, Art. 6.2.1 of the French Football Agents Regulations 2023-2024 includes an identical provision.

²¹⁹ See Case T-193/02, Piau v Commission, § 106.

²²⁰ 3.1.5.2.

²²¹ Art. 16(1) lit. b and c FFAR.

²²² See FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 19.

appreciable and are somewhat outweighed by the pro-competitive effects. On these grounds, this clause likewise does not appear to me to infringe Art. 101 TFEU.

3.2 Abuse of a dominant position (Art. 102 TFEU)

Beside Art. 101 TFEU, the FFAR may also violate Art. 102 TFEU, which prevents the abuse of a dominant position. In this section, the conditions of application of Art. 102 TFEU will first be described²²³, before analysing the service fee clauses²²⁴, the disclosure and publication of information clauses²²⁵, the licensing system and submission to FIFA regulations²²⁶, and finishing with the other disputed provisions of the FFAR²²⁷.

3.2.1 Applicability of Art. 102 TFEU

The conditions of Art. 102 TFEU are²²⁸:

- i. One or more undertakings;
- ii. The undertakings are in a dominant position;
- iii. The undertakings abuse of their dominant position;
- iv. The abuse takes place within the internal market, and
- v. The conduct may affect trade between Member States.

Following CJEU's case law, an abuse of a dominant position may also be justified either by demonstrating that the conduct is objectively necessary or where the efficiencies outweigh the abusive effects produced by the dominant undertaking²²⁹. Since the conditions of the efficiency defence are substantially similar to those of Art. 101(3) TFEU, the analysis under that article will be repeated and referred to in this section²³⁰.

²²³ 3.2.1 Applicability of Art. 102 TFEU.

²²⁴ 3.2.2 Service fee provisions.

²²⁵ 3.2.3 Information disclosure and publication.

²²⁶ 3.2.4 Licensing system and submission to FIFA regulations.

²²⁷ 3.2.5 Other types of FFAR disputed provisions.

²²⁸ Van de Gronden, J.W., & Rusu, C.S. (2021), p. 105 ff.

²²⁹ Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, § 41; Van de Gronden, J.W., & Rusu, C.S. (2021), p. 159.

²³⁰ In the *Post Danmark I* case (Case C-209/10, *Post Danmark A/S v Konkurrencerådet*), § 42, the CJEU has set out the following conditions for the successful establishment of the efficiency defence: (i) the efficiencies outweigh the likely negative effects on competition and contribute to consumer welfare, (ii) those efficiencies result from the conduct, (iii) the conduct is necessary to achieve those efficiencies, and (iv) competition is not eliminated (see also: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, § 30; Van de Gronden, J.W., & Rusu, C.S. (2021), p. 159 f.).

In the case of the FFAR, it has been established that FIFA was an association of clubs with an economic activity and is an undertaking²³¹. Furthermore, FIFA, as an association of the football clubs and also indirectly of the players, groups all or at least a significant part of the buyers of agent services and is capable of behaving independently of other market players (in this case agents) and is therefore in a dominant position²³². As it has already been established, the FFAR produces its effects within the internal market and is likely to affect trade between Member States²³³.

Consequently, the only remaining issue is to determine whether the provisions of the FFAR constitute an abuse within the meaning of Art. 102 TFEU and whether efficiencies might justify such abuse. An abuse is extremely complex to define, and case law is rather equivocal²³⁴. Essentially, it can be stated that an abuse is any practice which, on a market where one or more undertakings are in a dominant position, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition, by using means different from those which govern normal competition between undertakings²³⁵. Abusive conducts can be divided in two main types of abuses: exploitative abuses and exclusionary abuses²³⁶.

As for Art. 101 TFEU, the next sections will examine whether some FFAR provisions comply with the prohibition of abuse of a dominant position. In order to improve the understandability of this paper, the analysis will be based on the same four categories as in section 3.1. Obviously, many of the considerations set out in the previous section may be repeated. This section will thus be consciously briefer, and it shall be referred to section 3.1 on repeated occasions.

²³¹ Case T-193/02, *Piau v Commission*, § 72; Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 115.

²³² Case T-193/02, *Piau v Commission*, § 114; Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) et Dafra-Lines A/S (C-396/96 P) v Commission*, § 34.

²³³ See 3.1.1.3.

²³⁴ Bishop, S., & Walker, M. (2021), § 6-006.

²³⁵ Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, § 91; Case C-333/21, *European Superleague Company v FIFA and UEFA*, § 125.

²³⁶ Bishop, S., & Walker, M. (2021), § 6-006; Van de Gronden, J.W., & Rusu, C.S. (2021), p. 125 f.

3.2.2 Service fee provisions

In section 3.1.1, it has been stated that the FFAR service fee clauses represent restrictions of competition by object²³⁷. It remains to be determined whether these also constitute an abuse of a dominant position within the meaning of Art. 102 TFEU.

Of all possible types of abuse, it seems that most of the FFAR terms, including those relating to agents' service fees, might be caught by the unfair trading condition abuse, according to Art. 102(a) TFEU²³⁸.

In the sparse case law on unfair trading conditions, it has emerged from precedents that an undertaking does not abuse its dominant position by setting unfair trading conditions as long as the following two conditions are met²³⁹:

1. The trading conditions do not exceed the absolutely necessary limit for the attainment of the legitimate purpose pursued, and;
2. The trading conditions are proportionate in the light of all the circumstances, including the interests of parties affected by these trading conditions.

If one of these conditions is not met, then the imposition of such unfair trading conditions constitutes an abuse within the meaning of Art. 102 TFEU²⁴⁰.

Doubts have already been raised as to FIFA's competence to regulate economic activities indirectly related to football, such as the football agent services²⁴¹. While this has been admitted in this paper, it has also been mentioned that FIFA's ability to regulate other agents' activities, i.e. activities not related to an employment contract between a player or coach and a club or a player transfer agreement between clubs²⁴², is not obvious²⁴³. Consequently, I believe that FIFA would not be entitled to pursue a legitimate objective where it does not even have the competence to regulate such activity. Hence the presumption that other services provided by an agent in the 24 months prior to or following the provision of agent services is deemed to form part of the service fee paid for the agent service cannot comply with Art. 102 TFEU from my perspective.

²³⁷ Same opinion: LG Dortmund, 8 O 1/23 (Kart), § 118, 121, 125, 127 und 129.

²³⁸ Case 127/73, BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior, § 6.

²³⁹ Case 127/73, BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior, § 11.

²⁴⁰ Case 127/73, BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior, § 11.

²⁴¹ 3.1.4.3.4. See also: Case T-193/02, Piau v Commission, § 77 f.

²⁴² Qualified as Other Services in the Definitions section of the FFAR.

²⁴³ 3.1.4.1.

FIFA describes the FFAR as having the following objectives: defining minimum professional and ethical standards for agents, ensuring fair and reasonable fees for agent services, the protection of players, the reinforcement of contractual stability and the prevention of any abusive, excessive or speculative practices²⁴⁴. While ethics and contractual stability are core FIFA objectives present in other FIFA regulations and are undeniably legitimate²⁴⁵, the determination of reasonable fees is more specific to the agent services market and the legitimacy of this objective is more than debatable²⁴⁶. A comparison with the service fee cap set in France by public bodies²⁴⁷, which is more than that set by FIFA, may indicate that FFAR's cap is not adequate. This is particularly evident given that FIFA, as an association of the clubs, is thus not entirely neutral and impartial on this issue.

This is all the more true for the clauses concerning the identity of the payer, the time of payment and the terms of payment, which do not seem relevant to attaining the above-mentioned objectives but are rather intended to only limit the amount of agents' service fees paid by the clubs²⁴⁸.

For the same reasons as those set out in section 3.1.2.4, the efficiency defence set out in the Post Danmark I case²⁴⁹ does not apply to FFAR service fee clauses in my opinion.

For the foregoing arguments, I consider that the FFAR service fee clauses²⁵⁰ represent unfair trading conditions within the meaning of Art. 102(a) TFEU and hence an abuse of a dominant position.

3.2.3 Information disclosure and publication

Similar to what has been said for service fee clauses, it also seems that the possible abuse here might be the imposition of unfair trading conditions. For this abuse to be established it is required that the trading conditions are not absolutely necessary to achieve the legitimate

²⁴⁴ FIFA Reform of the Regulatory Framework for Agents: Context, problems and solutions (March 2023 ed), p. 6 ff.

²⁴⁵ Art. 1(1) FFAR, 2 lit. g FIFA Statutes (May 2024 ed) and 1(3) lit. c RSTP; Case C-519/04 P, Meca-Medina and Majcen v Commission, § 43 ff.

²⁴⁶ See LG Dortmund, 8 O 1/23 (Kart), § 187.

²⁴⁷ Art. L222-17 of the French Sports Code; Art. 6.2.2 of the French Football Agents Regulations 2023-2024.

²⁴⁸ The FA Rule K Tribunal held that “FIFA was primarily concerned with the fees which agents were earning” (Case Rev 12/12/23 of the FA Rule K Tribunal, CAA and Others v FA and FIFA, § 229).

²⁴⁹ Case C-209/10, Post Danmark A/S v Konkurrencerådet, § 41.

²⁵⁰ I.e. Art. 14, 15(1) to (4), and 16(3) lit. e FFAR.

objective pursued or that the trading conditions are not proportionate in the light of all the circumstances, including the interests of the parties affected by those trading conditions²⁵¹.

In the specific case of the disclosure and sharing of information, it has recently been argued before some courts that the forced sharing of data to access a service may constitute an abuse if it is not justified, necessary or proportionate²⁵². This has been the case in Germany, where the Germany's Federal Cartel Office (Bundeskartellamt) decided that Facebook should not be allowed to make use of Facebook conditional on consumers consenting to Meta collecting and storing personal data generated by other Meta services, such as WhatsApp, Instagram, etc.²⁵³. This was upheld by the German Federal Supreme Court (Bundesgerichtshof)²⁵⁴.

For the FFAR, the situation is close to that of the Facebook case, as agents are forced to disclose extensive information that will become public, on pain of being sanctioned or even prevented from operating as a football agent²⁵⁵. It is therefore necessary to determine whether this restriction is justified, necessary and proportionate.

In short, it has already been stated that there are major doubts as to FIFA's ability to set what it considers to be reasonable fees²⁵⁶. In any case, imposing the disclosure and sharing of sensitive commercial information on the market opponent does not seem legitimate, let alone necessary or proportionate²⁵⁷. In the wake of the Facebook decision, agents have the right to control their personal data and this right should only be restricted in defined situations, all the more so when data processing is imposed²⁵⁸. One could imagine less restrictive measures, such as an internal FIFA body responsible for carrying out this control without the details of the transaction being disclosed and shared.

Thus, it should be considered that imposing on agents the disclosure, publication and sharing of data on their transactions to FIFA's platform constitute unfair trading conditions within the

²⁵¹ Case 127/73, BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior, § 11.

²⁵² See Judgment of the United Kingdom Competition Appeal Tribunal on 15 February 2024 ([2024] CAT 11), Case No. 1433/7/7/22 (Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others), § 25(1); Decision of the Germany's Federal Cartel Office on 6 February 2019, B6-22/16 (Facebook), § 914.

²⁵³ Decision of the Germany's Federal Cartel Office on 6 February 2019, B6-22/16 (Facebook), § 914.

²⁵⁴ Decision of the German Federal Supreme Court on 23 June 2020, KVR 69/19, § 103.

²⁵⁵ See Art. 21(1) FFAR and 23(2) FIFA Disciplinary Code (2023 ed).

²⁵⁶ Case T-193/02, Piau v Commission, § 77.

²⁵⁷ LG Dortmund, 8 O 1/23 (Kart), § 173.

²⁵⁸ Decision of the Germany's Federal Cartel Office on 6 February 2019, B6-22/16 (Facebook), § 877 f.; Fountoukakos, K. et al. (2019), p. 61.

meaning of Art. 102(a) TFEU and therefore an abuse of a dominant position²⁵⁹. Of course, the application of the GDPR is reserved.

3.2.4 Licensing system and submission to FIFA regulations

Again, the licensing system and the submission to FIFA regulations may constitute an exploitative abuse (unfair trading conditions).

In line with the two previous sections²⁶⁰, imposing on a market player conditions governing access to the market or forcing that market player to submit to a sanctioning regime imposed by the dominant undertaking may be considered as the imposition of unfair trading conditions, unless these measures can be justified by legitimate objectives, are necessary to achieve those objectives and are proportionate²⁶¹.

Referring back to the discussion on the admissibility of the licensing system and submission to FIFA regulations under Art. 101 TFEU, it has been concluded that these requirements respond to a legitimate objective (ensuring a sufficient quality of agent services and improving ethical standards on the agent service market²⁶²), and that the restrictions are necessary and proportionate, in particular because the criteria for granting the licence are clear, impartial, objective and not excessively restrictive so as to deliberately exclude certain agents from the market²⁶³.

Consequently, it should be considered that the imposition of a licensing system and the submission to FIFA regulations does not amount to the imposition of unfair trading conditions, since it is justified by legitimate objectives, necessary and proportionate.

²⁵⁹ Similar finding in: Decision of the Germany's Federal Cartel Office on 6 February 2019, B6-22/16 (Facebook), § 914.

²⁶⁰ 3.2.2 and 3.2.3.

²⁶¹ Case 127/73, BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior, § 11.

²⁶² Enclosure 2 to the FFAR, Information Concerning the Application of the FIFA Football Agent Regulations (Timeline, exams, licence, CPD and legacy agents), p. 7.

²⁶³ See 3.1.4.3.2 and 3.1.4.3.3.

3.2.5 Other types of FFAR disputed provisions

3.2.5.1 Prohibition of multiple representation (Art. 12(8), (9) and (10) FFAR)

As mentioned in section 3.1.5.1, the purpose of this restriction is not economic, but rather to protect clients against agents having conflicting interests in a single transaction, in order to improve the quality of agent services, as it is already the case in some national laws²⁶⁴.

Furthermore, the restriction on multiple representation could be seen as necessary to achieve this objective and the principle of proportionality may be respected insofar as FIFA authorises one type of multiple representation²⁶⁵ and this restriction on multiple representation only concerns a same transaction²⁶⁶.

However, as discussed in section 3.1.5.1, this provision may likely not be held as proportionate if it would be decided that the FIFA is not competent to regulate other services. In fact, it is likely excessive and not proportionate for FIFA to impose restrictions on multiple representation also for other services²⁶⁷. In addition, it is debatable whether a releasing club and a player necessarily have conflicting interests and, if not, whether dual representation should be prohibited in any case²⁶⁸.

I therefore consider that Art. 12(8), (9) and (10) FFAR on multiple representation could be compatible with Art. 102(a) TFEU, although the extension of this provision to other services might lead to the opposite finding.

3.2.5.2 Limitation on the representation agreement's duration (Art. 12(3) FFAR)

Again, agents may feel that FIFA is imposing unfair trading conditions by limiting the duration of representation agreements to two years, which must be justified by a legitimate objective,

²⁶⁴ See in particular French law (Art. L222-17 of the French Sports Code and Art. 6.2.1 of the French Football Agents Regulations 2023-2024) and Portuguese law (Art. 22 of the Law No. 28/98 of 26 June 1998 on the legal framework of an athlete's employment contract and sports training contract) prohibiting the representation of more than one party in sports agent contract. In Switzerland, there are no specific provisions or case law concerning sports agents, but Swiss case law, based on Art. 415 of the Swiss Code of Obligations, allows dual representation only if there is no conflict of interest or if the parties have agreed to dual representation with regard to estate agents (Case 4A_611/2023, reason 6.1 of the Swiss Federal Tribunal and DTF 141 III 64; Tercier, P., Bieri, L., & Carron, B. (2016), § 4965).

²⁶⁵ Referred to as "permitted dual representation" in Art. 12(8) lit. a FFAR.

²⁶⁶ Art. 12(8), (9) and (10) FFAR.

²⁶⁷ Especially as FIFA may not have the competence to regulate these activities (Case T-193/02, Piau v Commission, § 77; Mavroidis, P.C./Neven, D.J. (2024), p. 23).

²⁶⁸ Valloni, L.W. (2023), p. 15.

necessary to the pursuit of that objective and proportionate²⁶⁹. It has been established that this restriction could prove to be pro-competitive by encouraging agents to offer more attractive services in order to be renewed, which may amount to a legitimate objective²⁷⁰.

However, with regard to the necessity and, above all, the proportionality of such a clause, doubts may be raised. For example, agents may argue that a greater maximum period (e.g. three years) might enable the intended objective to be achieved, while implementing a less restrictive measure for agents and enabling them to have greater contractual stability²⁷¹. As a result, it is difficult to state definitively whether limiting the duration of representation contracts to two years is necessary, proportionate and in accordance with Art. 102(a) TFEU.

3.2.5.3 Prohibition on “poaching” clients bound by an exclusive agent agreement (Art. 16(1) lit. b and c FFAR)

The same as in the previous section²⁷² can be asserted in relation to the clause prohibiting agents from approaching a client (club, player, etc.) who has entered into an exclusive agreement with another agent, except during the last two months of the agreement's duration²⁷³. FIFA's objective may be to prevent influential agents from “poaching” valuable players and to ensure contractual stability not only for representation agreements but also indirectly on the transfer market. While this objective may be deemed legitimate, the question arises as to its necessity and proportionality. In particular, whether the setting of a fixed maximum term of two years might be in itself sufficient to reach the objectives pursued by FIFA, or whether the exception for the last two months of the agreement's duration is appropriate. Consequently, as with the determination of the maximum duration of two years, it is not clear whether this clause imposes unfair trading conditions and infringes Art. 102(a) TFEU.

For my part, the necessity of these clauses may be challenged, although it is difficult to predict the opinion of the CJEU on this issue.

²⁶⁹ Case 127/73, *BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior*, § 11.

²⁷⁰ Acknowledged by the CFI in the Case T-193/02, *Piau v Commission*, § 93.

²⁷¹ For a further example, see *LG Dortmund*, 8 O 1/23 (Kart), § 169.

²⁷² See 3.2.5.2.

²⁷³ Art. 16(1) lit. b and c FFAR.

4. CONCLUSIONS

Before drawing the concluding remarks of this paper, it is worth recalling the key findings of this paper and the expected forthcoming developments of the FFAR.

4.1 Key takeaways from this paper

On the whole, it appears that not all FFAR clauses are equally problematic for European competition law. Conversely, a slight correlation has been observed between Arts. 101 and 102 TFEU in relation to the FFAR since, for most of the clauses, where Art. 101 TFEU has been breached, this has also been the case for Art. 102 TFEU.

Further, it has been established that the identification of an abuse of a dominant position has been based on the limited case law relating to exploitative abuses, particularly unfair trading conditions abuses²⁷⁴. It will be interesting to discover what will be the opinion of the CJEU on the evolution of exploitative abuses and the imposition of unfair trading conditions on this issue and in sports law in general²⁷⁵.

As a reminder, the following findings have been made in relation to the four categories of FFAR clauses examined in this paper:

- As regards service fee clauses²⁷⁶, it has been established that these may constitute restrictions by object within the meaning of Art. 101(1) TFEU and that they may also breach Art. 102(a) TFEU since they impose unfair trading conditions on agents.
- The same goes for disclosure and information-sharing clauses²⁷⁷, which involve both restrictions by object and the imposition of unfair trading conditions on agents.
- By contrast, the licensing system and submission to FIFA regulations appear to be admissible under Arts. 101 and 102 TFEU, although certain issues have been raised that could potentially lead to these clauses being found to be unlawful.

²⁷⁴ E.g., Case 127/73, *BRT and Société belge des auteurs, compositeurs et éditeurs v SABAM and NV Fonior*; Decision of the Germany's Federal Cartel Office on 6 February 2019, B6-22/16 (Facebook); Decision of the German Federal Supreme Court on 23 June 2020, KVR 69/19; Judgment of the High Court of Justice of England and Wales on 20 August 2020 ([2020] EWHC 2276 (Ch)), Case No. CP-2020-000011 (*Preventx Ltd vs Royal Mail Group*).

²⁷⁵ In this regard, the decision of the CJEU in the preliminary ruling Case C-209/23, *FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA)* is eagerly awaited.

²⁷⁶ Art. 14, 15(1) to (4), and 16(3) lit. e FFAR.

²⁷⁷ Art. 16(2) lit. j and k and 19 FFAR.

- The same can be said to multiple representation clauses²⁷⁸, although the inclusion of other services is likely to lead to these provisions being contrary to European competition law.
- Lastly, in the case of the limitation of the duration of agreements to two years²⁷⁹ and the limitation of the possibility for agents of approaching and dealing with players engaged under an exclusive agreement with another agent²⁸⁰, the situation is less obvious, but it has been stated that these clauses do not appear to breach Art. 101 TFEU. Regarding the abuse of a dominant position under Art. 102 TFEU, doubts persist as to the necessity and proportionality of these clauses.

4.2 Concluding remarks

This work has demonstrated that it is not necessarily easy to determine whether the FFAR is compatible with European competition law. It may depend on which clauses are disputed.

One of the reasons why different types of clauses were analysed separately was that Art. 101(2) TFEU provides that "any agreements or decisions prohibited pursuant to this Article shall be automatically void". The CJEU has had the opportunity to clarify that automatic nullity applies only to contractual provisions that are incompatible with Art. 101(1) TFEU²⁸¹. The consequences of such nullity for the other parts of the agreement are determined by national law according to severability rules²⁸².

In addition, it has been stressed that one of the central questions to be resolved by the CJEU will be FIFA's ability to regulate the agent services market, which is only indirectly linked to its primary aim of organising competitions, ensuring the proper development of football and defining the rules of the game²⁸³. If the CJEU were to rule that FIFA is not entitled to regulate the agent services market, it would be difficult to imagine any future regulation on agents by FIFA. More specifically, with the pending Lassana Diarra case²⁸⁴, the CJEU may also challenge certain provisions of the RSTP or even the RSTP as a whole. In this respect, the outcome of the

²⁷⁸ Art. 12(8), (9) and (10) FFAR.

²⁷⁹ Art. 12(3) FFAR.

²⁸⁰ Art. 16(1) lit. b and c FFAR.

²⁸¹ Case C-319/82, *Société de Vente de Ciments v Kerpen & Kerpen*, § 12.

²⁸² Case C-319/82, *Société de Vente de Ciments v Kerpen & Kerpen*, § 12.

²⁸³ 3.1.4.3.4.

²⁸⁴ Case C-650/22, *Fédération internationale de football association (FIFA) v BZ*.

CJEU's rulings in these two cases will have a decisive impact on FIFA's regulatory power and the regulatory autonomy of sports organisations.

Finally, the forthcoming preliminary ruling of the CJEU on the question of the Mainz Regional Court²⁸⁵ will undoubtedly have a major influence on FIFA's future actions on the agent services market²⁸⁶.

- On the one hand, were the CJEU to consider that FIFA is not entitled to regulate the market for agent services in football, or were it to declare that all the disputed clauses infringe European competition law, it would be hard for FIFA to come up with new detailed regulations on agents and their activities, and would likely lead to the repeal of the FFAR.
- On the other hand, were the CJEU to uphold FIFA's position in whole or in substantial part, this might comfort FIFA to implement the FFAR and lift its suspension.

Nonetheless, it should be pointed out that this paper focuses on European competition law and that other European or national provisions may be infringed, such as the freedom of movement for workers (Art. 45 TFEU), the freedom to provide services (Art. 56 TFEU) or data protection law (e.g. the GDPR).

²⁸⁵ Case C-209/23, FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA).

²⁸⁶ Lichtenberg, T. (2023), available at < <https://competitionlawblog.kluwercompetitionlaw.com/2023/07/20/fifas-football-agents-regulation-violates-competition-law/> >, last visited on 28 August 2024.

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