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## EU LAW AND PRINCIPLES APPLIED TO FIFA REGULATIONS

by *Jean-Michel Marmayou* \*

### 1. Introduction

Are the FIFA Regulations on Working with Intermediaries (“FIFA Regulations”), applicable since 1 April 2015, compatible with European Union law?

There are eminent reasons for raising this question.

Compliance with the 2008 FIFA Players’ Agents Regulations,<sup>1</sup> which the FIFA Regulations supersedes, was checked in relation to European competition law.<sup>2</sup> There is no reason why the new version, although it claims to consist of a “deregulatory measure”, should be exempted from a similar examination.

There is no doubt that since the *Meca Medina*<sup>3</sup> case the powers of sports federations to create norms, whether national or international, are also covered by European competition laws and have to satisfy its requirements, in particular those of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

In the *Piau* case, the European commission reserved the right to review the regulations in question, a decision that the court strongly approved of.<sup>4</sup> This change in the regulations offers a major opportunity to carry out this review.

The purpose of the following paper is to compare the new FIFA Regulations with all European Union laws in order to check their compatibility: EU competition laws, EU fundamental freedoms and EU Charter of Fundamental Rights.<sup>5</sup>

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<sup>1</sup> Adopted on 29 October 2007, applicable in part since 1 January 2008.

<sup>2</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, [2005] ECR II-0209. – On appeal: ECJ, 23 febr. 2006, Case C-171/05P, [2006] ECR I-37. – In the same case: CA Rennes 18 may 2010, RG n°09/02939. – Cass. 1<sup>re</sup> civ. 1<sup>er</sup> febr. 2012, n°10-24843, Cah. dr. sport n°27, 2012, 161, S. Le Reste.

<sup>3</sup> ECJ, 18 July 2006, Case C-519/04 P, *Meca-Medina*, [2006] ECR I-06991.

<sup>4</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §104.

<sup>5</sup> Since the Treaty of Lisbon, The Charter forms part of EU primary law: Art. 6.1 Treaty on the European Union.

It is not for us to describe in detail the contents of the new FIFA regulations since this description has already been made in the preceding chapters.<sup>6</sup> We will examine just some of its provisions in order to compare them with European Union law.

We feel that the following provisions need to be analysed:

- the general principle of prior registration with a National Federation and the system of registration every time an intermediary is individually involved (Art. 3 & 4);
- the technique of the “Intermediary Declaration” (Art. 2, 3 & 4);
- the recommendations regarding the amount of the intermediary’s commission (prohibited from minors, 3% cap in other cases) (Article 7.5);
- a mention of the payment (in principle the intermediary must be paid by his client) (Article 7.5);
- the transparency obligations impose detailed disclosure to the public of the amounts paid to intermediaries (Art. 6).

Obviously, this selection is not entirely arbitrary. It results from an uncertainty that arises, although somewhat intuitive, on a first reading of these new regulations that indicate that there are some apparently obvious incompatibilities. This uncertainty has to be eliminated by a more detailed examination that can only express a personal opinion since the last word on the matter will lie with the EU Court of Justice.

Therefore we will examine the compatibility of these five provisions with all EU law, both the principles of competition law (I) and the principles of fundamental freedoms and rights (II).

## 2. *Conflict with the Principles of Free Competition Inside the EU*

For EU competition law to apply to regulations such as the FIFA Regulations on Working with Intermediaries, we have to first examine whether or not it concerns an economic activity. There can be no doubt on this question. Not only is sport an economic activity,<sup>7</sup> but more specifically an intermediary involved in the signature of contracts relating directly (promises of employment, employment contracts, etc.) or indirectly (loan contracts, transfers, etc.) to employed sports persons, including professional footballers, is by definition exercising an economic activity subject to EU law.

Therefore everything leads us to compare the 2015 FIFA Regulations with the principles of the law on agreements between undertakings (A) and the abuse of a dominant position (B).

<sup>6</sup> See in this present book : P. Lombardi, “*FIFA Regulations on Working with Intermediaries*” – R. Branco Martins, “*The agent’s perspective*” – W. Lambrecht, “*The Clubs’ perspective*” – W. Van Meegen, “*The Players’ perspective*”.

<sup>7</sup> See e.g. : ECJ, 12 dec. 1974, Case 36/74, B.N.O. *Walrave*, [1974] ECR 01405. – ECJ 15 dec. 1995, Case C-415/93, *Bosman*, 1995 ECR I-04921. – ECJ, 18 July 2006, Case C-519/04 P, *Meca-Medina*, *op. cit.*

## A. *Illegal Agreements Between Undertakings*

The mechanism set up by Article 101 of the TFEU which prohibits anti-competitive agreements is fairly simple. It first sets out the conditions for agreements to be considered illicit (Art. 101, §1), and then gives the penalties to be applied to these illicit agreements (Art. 101, §2) and finally, offers the opportunity, although limited, of avoiding the contract being considered void (Art. 101, §3).

The conformity of the FIFA Regulations will be examined in two stages. Firstly, we will check whether there are reasons for considering that an agreement is illicit (1), and then we will see whether it may avoid being rendered void by a particular exemption (2).

### A.1 *Prohibited Agreements*

In order to analyse the compliance of the new FIFA Regulations with Article 101 of the TFEU, we must first briefly recap the analysis that emerges from both ECJ case law and the various guidelines issued by the European Commission.<sup>8</sup>

The first step is to check whether the FIFA Regulations may be defined as “agreements between undertakings, decisions by associations of undertakings and concerted practices” (a).

The second step is to check whether the FIFA Regulations may “affect trade between Member States”. The practice of the Court would certainly suggest that this check should only constitute the third stage.<sup>9</sup> However our analysis will follow the much more logical order of the text contained in Article 101 of the TFEU<sup>10</sup> (b).

The third step is to check whether the purpose of the FIFA Regulations is “to have as their object or effect the prevention, restriction or distortion of competition within the internal market” (c).

#### a) *Decision by Association of Undertakings*

The FIFA Regulations on Working with Intermediaries constitutes “an association of undertakings”. Indeed, there is no doubting this conclusion. The ECJ<sup>11</sup> and the Commission<sup>12</sup> have so firmly confirmed this, that there is almost no need to pursue

<sup>8</sup> Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 27 apr. 2004, [2004] OJ C 101/07, 27.4.2004, 81. – Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, [2011] OJ C 11, 14.1.2011, 1. – Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101, 27.4.2004, 97.

<sup>9</sup> ECJ, 28 apr. 1998, Case C-306/96, *Javico International et Javico AG contre Yves Saint Laurent Parfums SA (YSLP)*, [1998] ECR I-01983.

<sup>10</sup> ECJ, 21 jan. 1999, joined Cases C-215/96 & C-216/96, *Carlo Bagnasco e.a. v/ Banca Popolare di Novara soc. coop. arl. (BNP) & Cassa di Risparmio di Genova e Imperia SpA (Carige)*, [1999] ECR I-00135.

<sup>11</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau, op. cit.*

<sup>12</sup> Commission staff working document “*The EU and sport: background and context*” accompanying

the discussion on this point further.

Firstly, it is accepted that FIFA is an “association of undertakings”:<sup>13</sup> “it is common ground that FIFA’s members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC and the national associations grouping them together are associations of undertakings within the meaning of that provision”.<sup>14</sup> It even presents itself as an association of undertakings since Article 10 of its Articles recommends that all FIFA members (i.e. national federations) “involve all relevant stakeholders in football in their own structure”. The fact that as an international sports federation it has no profit motive and derives no direct benefit from regulating the commercial activities of intermediaries changes nothing.<sup>15</sup> Neither does the fact that it states that it is driven by a social and cultural ideal. Indeed, the fact that the majority of the FIFA members are involved in amateur football through associative structures (i.e. non-profit-making) has even less effect.<sup>16</sup>

Secondly, FIFA cannot claim any public power prerogatives that would exclude its activity from the economic sector and protect it against the application of Article 101 TFEU.<sup>17</sup> Even if it did (granted by whom?), the economic activity would have to be separated in order to examine it through the lens of competition law.<sup>18</sup> As we shall see, the regulation of an activity such as sports intermediation (i.e. sports agents) necessarily involves an economic activity. In a country such as France, the delegation of a public service role to sports federations has no effect on this analysis. Firstly, the new FIFA Regulations do not apply to it because the regulations on sports intermediaries are indeed part of the public authority powers granted to the French Football Federation (FFF). Secondly, by the combined application of the general principles of French administrative law and the provisions of Articles 106 and 107 TFEU, the rules published by the FFF will be considered administrative instruments<sup>19</sup> whose internal and external legality may be controlled under French public order law in which European competition rules play a large part.<sup>20</sup>

Thirdly, regulations such as the ones on working with intermediaries,

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document to the White Paper on Sport, 66.

<sup>13</sup> In the sense given by cases *Höfner* (ECJ, 23 apr. 1991, Case C-41/90, [1991] ECR I-01979) & *Frubo* (ECJ, 15 may 1975, Case 71/74, [1975] ECR 00563).

<sup>14</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §69.

<sup>15</sup> ECJ, 1 July 2008, Case C-49/07, *Motoe*, [2008] ECR I-4863.

<sup>16</sup> ECJ, 11 apr. 2000, Joined Cases C-51/96 & C-191/97, *Deliège (C-51/96) & François Pacquée (C-191/97)*, pt.46, 2000 ECR I-02549.

<sup>17</sup> ECJ, 19 jan. 1994, Case C-364/92, *SAT Fluggesellschaft mbH v/ Eurocontrol*, [1994] ECR I-00043

<sup>18</sup> ECJ, 24 oct. 2002, Case C-82/01 P, *Aéroports de Paris v/ Commission of the European Communities*, [2002] ECR I-09297.

<sup>19</sup> CE, 22 nov. 1974, n°88828, *Fédération des industries françaises d’articles de sport*, Lebon, 577. J. Théry.

<sup>20</sup> F. Buy, J.-M. Marmayou, D. Poracchia et F. Rizzo, *Droit du sport*, LGDJ 2015, n°301 et s.

undoubtedly constitute a “decision”. The fact that the FIFA Regulations are not enacted unanimously but by a majority does not alter this, nor should the fact that it takes the form of a “mere recommendation” lead to it being underestimated. EU law has its own understanding of the concept of a “decision” and readily accepts that a recommendation, even when not mandatory (which is the case of the 2015 Regulations), may be considered a decision under Article 101.<sup>21</sup> Like the 2001 Regulations in their time,<sup>22</sup> the 2015 law is “*binding on national associations that are members of FIFA and on clubs, players and players’ agents*”.<sup>23</sup> These Regulations are “*the reflection of FIFA’s resolve to coordinate the conduct of its members with regard to the activity of players’ agents*”.

#### b) *Effect on Trade Between Member States*

The FIFA Regulations on Working with Intermediaries “may affect trade between member states”. Once again, there is little room for doubting this statement. Court of Justice jurisprudence<sup>24</sup> and the decision-making practices of the rules that the Commission<sup>25</sup> adopted in 2004<sup>26</sup> on associations of undertakings leave no room for doubting that the regulations of an association of undertakings that recommend a maximum price for a service and are designed to apply in each of the association’s member states, and to the benefit of economic operators within the different member states, may significantly “affect trade between member states” within the meaning of the TFEU.

First of all, the Regulations seek to regulate an economic activity in so far as the intermediaries in question are “*natural or legal persons who, for a fee or free of charge, represent players and/or clubs in negotiations with a view to concluding an employment contract or represent clubs in negotiations with a view to concluding a transfer agreement*”.<sup>27</sup> Hence, the activity is the same as the one that the Court had to analyse in the *Piau* case.<sup>28</sup>

<sup>21</sup> ECJ, 29 oct. 1980, Case C-209/78, *Heintz van Landewyck SARL v/ Commission*, [1980] ECR 3125. – ECJ, 8 nov. 1983, joined Cases C-96-82 to 102/82, 104/82, 105/82, 108/82, 110/82, *IAZ v/ Commission*, [1983] ECR 3369. – EU Comm., 5 dec. 1984, Case COMP 85/75, *Fire insurance*. On appeal : ECJ, 27 jan. 1987, Case C-45/85, *Verband der Sachversicherer v/ Commission*, [1987] ECR 405. – ECFI, 11 march 1999, Case T-136/94, *Eurofer v/ Commission*, [1994] ECR II-263. – EU Comm., 24 june 2004, Case COMP/A.38549, *Belgian Architects’ Association*, [2005] OJ L4/10. – ECJ, 18 july 2013, Case C-136/12, *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*.

<sup>22</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau, op. cit.*, §75.

<sup>23</sup> See also art. 13, FIFA’ statutes.

<sup>24</sup> ECJ, 19 febr. 2002, Case C-309/99, *Wouters*, [2002] ECR I-01577.

<sup>25</sup> EU Comm., 24 june 2004, Case COMP/A.38549, *Belgian Architects’ Association, op. cit.*

<sup>26</sup> Guidelines on the effect on trade concepts contained in Articles 81 and 82 of the Treaty, 27 apr. 2004, [2004] OJ C 101/07, 27.4.2004, 81.

<sup>27</sup> FIFA, Regulations on working with intermediaries 2015, «*Definition of an intermediary*», 4.

<sup>28</sup> See : §73 : «*As regards, second, the concept of a decision by an association of undertakings, it is apparent from the documents before the Court that the purpose of the occupation of players’ agent, under the very wording of the amended regulations, is ‘for a fee, on a regular*

Secondly, the purpose of the FIFA Regulations is to determine the behaviour of all its members in all the countries in which it is active. As this concerns all EU member states, it is clear that the “trade between member states is likely to be affected”. In practice, the fact that none of FIFA’s European associations will follow its recommendations does not affect this aspect since there is “*potential for a sufficient degree of probability on the basis of a series of objective factors in law or in fact*” for the new FIFA Regulations to apply. Even assuming that just one European national federation was to follow the FIFA recommendations, it would still have an effect on trade between member states. Indeed, by acting to influence the price on a domestic market, the partitioning off of the market in question would have a knock-on effect on other national markets.<sup>29</sup> This type of recommendation on pricing has necessarily a “*direct or indirect influence, current or potential, on the pattern of trade between member states*”. And the fact that FIFA has its headquarters in Switzerland does not alter this conclusion since it is only the finality of the agreement that counts, not the location of the member undertakings.

### c) *Restraints on Competition*

In this case, the reasoning is not obvious since the analysis of the third condition of Article 101 of the TFEU is the most complicated to apply. However, we feel that the new Regulations have not only the *effect* but have as their *main purpose* the creation of restraints on normal competition.

First of all, the FIFA Regulations impose a special registration procedure that could be considered a barrier to anyone wishing to enter the market of sports intermediation. The effect of the new registration system will clearly delay the start of a business activity and slow down the progress of each of its operations by the requirement to complete registration formalities which will also generate fees.

In fact, it is difficult to imagine that the national federations will carry out the checks that FIFA requests without asking the undertakings involved to pay the administrative costs of examining each application. These formalities and additional costs will obviously constitute an obstacle to certain candidates becoming sports agents. It could well be argued that the new regulations will act more as a moderator than a barrier, and it has to be said that they are certainly less complicated than the previous Regulations which required licensing by passing an exam, whereas the new ones remove the exam and consist in the simple registration on the start-up of

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*basis [to introduce] a player to a club with a view to employment or [to introduce] two clubs to one another with a view to concluding a transfer contract’. This is therefore an economic activity involving the provision of services, which does not fall within the scope of the specific nature of sport, as defined by the case-law (Case 13/76 Donà [1976] ECR 1333, paragraphs 14 and 15, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 127, Deliège, paragraphs 64 and 69, and Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681, paragraphs 53 to 60)».*

<sup>29</sup> ECJ, 17 oct. 1972, Case 8/72, *Vereeniging van Cementhandelaren*. – ECJ, 11 jul. 1985, Case 42/84, *Remia BV*, [1985] ECR 02545.

the business and the recording of each transaction. In fact, the new Regulations have abandoned the previous cumbersome procedure that was considered restrictive and preferred a certainly less heavy although iterative procedure in its place.<sup>30</sup> But isn't the cumulative effect of these repetitive checks just as dissuasive as an entrance exam? Moreover, FIFA requires that federations, clubs and players to do everything possible<sup>31</sup> to persuade the agent to sign the "intermediary declaration". Indeed, although this declaration constitutes a contractual agreement, in reality it is a sort of trap that ensures that the agents are tied to the FIFA Regulations. In his capacity as a sports agent, an intermediary is not subject to the FIFA legal system. However, he will contract in if he signs the declaration. This is the purpose of the famous "intermediary declaration" that clubs and players will have to extract from agents whose services they require to use. Nevertheless every attempt to obtain an intermediary declaration will be a further impediment to the exercise of the sports intermediary's activity.

Secondly, the FIFA Regulations recommend that its members cap the remuneration of intermediaries' fees at 3% of the contract amount. This can be described as horizontal price-fixing, i.e. a price cartel. According to some,<sup>32</sup> this is an "unjustifiable" agreement as it creates a restriction on prices that is a restraint on competition "*in one of its fundamental forms*".<sup>33</sup> Article 101 §1 TFEU is clear when it targets decisions by associations of undertakings which involve "directly or indirectly fixing the purchase or sale price or other transaction conditions". The Court of Justice takes the view that a simple indicative scale of prices drawn up by professional associations constitutes an illicit agreement.<sup>34</sup> The European Commission is of the same opinion<sup>35</sup> and the Guidelines concerning the applicability of Article 101 TFEU to horizontal cooperation agreements do not even mention it.<sup>36</sup> However, there is no difficulty in recognising that the purpose of such a pricing

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<sup>30</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §101. – Note that the FIFA regulations had been qualified as unlawful agreement by the French competition authority and the administrative courts because its licensing and financial warranty system restricted market access: Cons. conc., avis n°99-A-20, 23 nov. 1999. – CAA Paris, 14 june 2010, n° 08PA00502, *Scalet*, set aside TA Paris, 6 sect., 1<sup>re</sup> ch., 11 dec. 2007, *Scalet*, n° 0320569/6-1.

<sup>31</sup> Compare: art 2.2 («reasonable endeavours») & art. 4.4 «Associations are considered to have complied with their obligations under paragraphs 1 to 3 above if they obtained a duly signed Intermediary Declaration[...]», Regl. FIFA 2015.

<sup>32</sup> N. Petit, *Droit européen de la concurrence*, Domat Droit privé, Montchrestien, 2013, n°1473 et s.

<sup>33</sup> EU Comm., 19 dec. 1984, Case COMP IV/29.725, *Wood pulp*, [1985] OJ L, 26.3.1985, 1 (§114).

<sup>34</sup> ECJ, 17 oct. 1972, Case 8/72, *Vereeniging van Cementhandelaren v/ EC Commission*, *op. cit.* – ECJ, 27 jan. 1987, Case C-45/85, *Verband der Sachversicherer v/ Commission*, *op. cit.* – ECFI, 22 oct. 1997, Joined Cases T-213/95 & T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v/ Commission of the European Communities*, [1997] ECR II-01739.

<sup>35</sup> EU Comm., 24 june 2004, Case COMP/A.38549, *Belgian Architects' Association*, *op. cit.* – EU Comm., 5 june 1996, Case COMP/96/438, *Fenex*, [1996] OJ L181/28.

<sup>36</sup> Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, [2011] OJ C 11, 14.1.2011, 1. – *Adde* : Guidelines on the application of Article 81(3) of the Treaty, *op. cit.*, pt. 21.



agreement is to constitute a restriction on competition within the meaning of Article 101 §1 and therefore exempts us from the need to examine the actual or potential effects on the market.<sup>37</sup>

The content of the FIFA Regulations is clear in that “the total amount of remuneration per transaction due to intermediaries [...] should not exceed 3% [...]”, its aim is to achieve the same result: that is to say reduce the cost of services used by FIFA members. The economic and legal context in which it fits reveals that the most important aspect of the FIFA Regulations concerns not the process of professionalisation of the profession (i.e. the abandonment of selection based on quality), but the reduction in the price of the service.<sup>38</sup> The fact that the FIFA Regulations come in the form of a “recommendation” does not alter our conclusion: the clubs and players have a common interest in ensuring that it is applied and the national federations are obliged to make every effort to transpose it into their own domestic rules. In any event, particularly in view of the publicity given to it, the recommendation provides all persons involved in football with a guide to negotiations that will necessarily have an effect on the contracts signed. The only argument that could possibly be put forward to save this recommendation is by simply justifying that it has neither the *aim* nor the *effect* of restricting competition. But this is a counter-intuitive argument. One could indeed erase the wording used in the FIFA Regulations “*while taking into account the relevant national regulations and any mandatory provisions of national and international law, and as a recommendation [...]*”. In fact, domestic laws in EU countries do indeed impose compliance with European competition law. Therefore, these FIFA Regulations could not be incorporated by the national federations of EU *de facto* and *de jure*. Therefore they would only apply outside the EU but without any restraining effect inside the European market. This argument is absurd.

Thirdly, these FIFA Regulations can still be described as a pricing cartel the purpose of which is to restrict competition because it imposes an enhanced free of charge principle when the intermediary is involved in an operation that concerns a minor. In this case the intervention takes place to the benefit of the club and the minor. Needless to say, the elimination of the price of the service by applying a ban on paying for this service constitutes an agreement which is designed to fix a price ... at 0.

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<sup>37</sup> Failure to recognize that the FIFA Regulations have a restrictive *purpose* means that it is impossible for us to demonstrate that it does not have a *restrictive* effect within the meaning of Article 101(1) TFEU. It is simply sufficient to apply the principles of “counterfactual analysis”. Today, without the implementation of the new Regulations, the prices in the market of the sports intermediaries (already limited in some countries like France) are around 5 to 10% of the contract signed by the intervention of the intermediary (UEFA, The European Club footballing landscape - Club Licensing Benchmarking Report, Financial year 2012: [www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/09/18/26/2091826\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/09/18/26/2091826_DOWNLOAD.pdf)).

If the national federations, clubs and players follow the recommendation, the price range established in an almost free market will change, which is itself sufficient to demonstrate a restrictive effect on competition.

<sup>38</sup> These are the 3 criteria put forward to assess the anti-competition nature of an agreement.

Fourthly, it is pointless to justify the restrictive effect by the application of the well-known “inherence” criterion that would result according to the European commission<sup>39</sup> from the *Wouters* precedent.<sup>40</sup> It has to be remembered that this test of “inherence” is argued, by some, as negating the qualification of the restraint by *object* by offering some sort of exemption under the first paragraph of article 101 TFEU (a simpler exemption because it is based on only two conditions), without needing an exemption under the third paragraph (exemption based on the four conditions), which is almost impossible to obtain in cases of restriction by *object*. On the one hand, the *Wouters* test should not be used as an exemption from an illicit agreement based on proof of its restrictive effect by assessing its “overall context”. Indeed, the *Wouters* case, like others after it,<sup>41</sup> is only the illustration<sup>42</sup> of what the guidelines call “ancillary restraints”.<sup>43</sup> In other words, these restraints are merely ancillary to the principal decision not covered by the TFEU according to the decision-making regime... *accessorium sequitur principale* (the decision on the main issue applies to associated issues).

Furthermore, although this test has been used in the rule-making powers of sports federations, in particular the *Meca Medina* case,<sup>44</sup> it has to be noted that it is more a kind of procedure that makes it possible for the Court to economise its resources and reasoning efforts in cases which involve both the principles of competition law and those of fundamental freedoms.

This test therefore constitutes a syncretism of motivation and does not imply that the normal working of Article 101 TFEU has to be set aside. Finally, when wanting to apply this kind of balance between the pro-competition and anti-competition effects of measures,<sup>45</sup> FIFA is unable to claim any public service powers that would imply for example that certain aspects of its regulatory powers should be treated differently from its business activities. It should also be noted that it has no non-profit-making aim of defending the public interest but rather the specific interests of its members who are also the customers of the sports intermediaries. Therefore, it has no legitimacy that would make its intervention “essential” when

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<sup>39</sup> White paper on sport, 11 July 2007, COM(2007) 391 final : « *As is explained in detail in the Staff Working Document and its annexes, there are organisational sporting rules that – based on their legitimate objectives – are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued* ». – Adde : J.-L. Arnaut, *Independant european sport review*, 2006, p.47 : « *rules concerning players’ agents are inherent to the proper regulation of sport and therefore compatible with European Community law* » (the review was funded by UEFA).

<sup>40</sup> ECJ, 19 febr. 2002, Case C-309/99, *J. C. J. Wouters, e. a, op. cit.*

<sup>41</sup> ECJ, 28 febr. 2013, Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v/ Autoridade da Concorrência*, [2013] ECR -00000. – ECJ, 4 sept. 2014, Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API*.

<sup>42</sup> D. Bosco et C. Prieto, *Droit européen de la concurrence – Ententes et abus de position dominante*, Bruylant 2013, n°575 et n°598 et s.

<sup>43</sup> Guidelines on the application of Article 81(3) of the Treaty, *op. cit.*, §2.2.3.

<sup>44</sup> ECJ, 18 July 2006, Case C-519/04 P, *Meca-Medina, op. cit.*

<sup>45</sup> Which should only take place in the context of Article 101 §3 of the TFEU : see 11 of the «Guidelines» on the application on Article 81(3) of the Treaty, *op.cit.*

regulating the profession of the sports intermediary. In particular, fixing the maximum price for a sports intermediation service is far from being the measure which is most suitable and appropriate for “moralising” the business of the intermediaries in football, or ensuring the transparency of transfers.

All this shows that the FIFA Regulations on collaboration with intermediaries constitute an illicit agreement within the meaning of Article 101 §1 of the TFEU, and as such merit nullification under Article 101 §2. However the question then arises as to whether they can avoid nullification by an individual exemption under Article 101 §3 of the TFEU.

#### A.2 *The Possibility of an Individual Exemption*

According to Article 101 §3 TFEU, an individual exemption may be granted if four cumulative conditions are met.<sup>46</sup> Thus, as an exception to the principle of free competition, an agreement between undertakings may survive if it leads to increased efficiency (condition 1), a fair share of this gain benefits the users (condition 2), it is not unnecessary or disproportionate to the aims pursued (condition 3), and it does not eliminate competition (condition 4). Even though the guidelines recommend a different order when considering these four general conditions in Article 101 §3 TFEU, and the absence of one of them makes the examination of the other three pointless, we will nevertheless consider the full TFEU list.

However, before proceeding to this analysis, one has to examine whether the fact that the 2015 FIFA Regulations designate an agreement between undertakings as illegitimate can be justified? The question is perfectly valid since there may be agreements that are so harmful to competition that they constitute unjustifiable practices. These agreements are not excluded *de jure* from the scope of Article 101 §3 but it is highly “*unlikely*” that in practice they can cumulatively meet the four conditions for exemption. In this case we often speak of “hardcore restrictions”.<sup>47</sup> Indeed these “hardcore restrictions” include price-fixing agreements, and the 2015 FIFA Regulations introduce such price fixing measures.

##### a) *Increased Efficiency*

In order not to be declared void, an agreement must first contribute to improving the production or distribution of goods, or the promotion of technical or economic progress. It must have a pro-competition economic effect and/or a non-economic benefit of improved well-being. This effect is assessed relative to the aim pursued in the form of an agreement that restrains competition. To justify that its new regulations pursue the aims of increased efficiency, FIFA has to demonstrate that it

<sup>46</sup> The burden of proof that the four cumulative conditions are met lies with the creators of the agreement.

<sup>47</sup> See pt. 23, 46, 55, 79 & 82 of the Guidelines on the application of Article 81(3) of the Treaty, *op. cit.*

pursues the legitimate aim of allowing more competition in the sports agency sector, or an improvement in the quality of the service.

In this respect, FIFA takes care to set out its aims, which are “to promote and safeguard high ethical standards in the relations between clubs, players and third parties, and thus to live up to the requirements of good governance and financial responsibility principles”; “to protect players and clubs from being involved in unethical and/or illegal practices and circumstances in the context of transfer agreements and employment contracts between players and clubs”; “to enable proper control and transparency of player transfers”.

Are these aims legitimate?

This question is easily conceded, at least in theory. Imposing ethical obligations on professionals in order to promote the protection of deals, the quality of service provided to the consumer or the user, and reduce opportunities for fraud, are in the public interest, i.e. the interest that leads States to regulate certain professions (lawyers, architects, accountants, travel agents, etc.) or certain types of contracts (sales contracts, credit agreements, etc.).

In more practical terms, the legitimacy of FIFA’s concern for the public interest may be questioned. It can even be addressed openly as was the case before the Court in the *Piau*<sup>48</sup> hearings:

« Pt. 74 : [...] the Players’ Agents Regulations were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraphs 68 and 69). Those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either (*Bosman*, paragraph 81, and *Deliège*, paragraph 47). [...]»

Pt. 76 : With regard to FIFA’s legitimacy, contested by the applicant, to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football (see paragraph 2 above), is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.

Pt. 77 : The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.

Pt. 78 : In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities [...]».

<sup>48</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*

In this case, the Court considered, and its analysis is still valid, that an association governed by Swiss private law is not able to pass rules concerning an economic activity such as sports agency on European Union territory. However, in the *Piau* case, and despite this doubt, the Court validated the former Regulations. Indeed it could not do otherwise, because, in the context of this litigation “*the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision has to be assessed, while considerations relating to the legal basis that allows FIFA to carry on a regulatory activity, however important they may be, are not the subject of judicial review in this case*”. Therefore, it is for a procedural reason that the Court did not “divest” FIFA of a competence that it had unlawfully adopted.<sup>49</sup>

No very positive changes affecting FIFA have taken place since then.

Indeed, it is still unable to authorize any delegated public interest mission that would have conferred on it a state or EU public authority role. Worse, it is now forced to deal with all the national regulations in force in EU countries. Indeed, in 2015 at least five countries adopted special laws on sports agents (France, Greece, Portugal, Bulgaria, Hungary), and other countries have also regulated this profession even if they only do so through general employee placement laws. The result is that FIFA cannot even claim that the public authorities are failing to deal with a necessary but abandoned law-making competence.

Moreover, the justification put forward by FIFA for dealing with this question is misleading. Is it really seeking to protect the players? Why would FIFA have the law-making capacity to regulate all contracts signed by these players on the pretext that footballers are easy prey because they earn so much money and FIFA would prefer that they concentrate on football without financial motives? The agreement to purchase a property, open a bank account, take out an insurance, sign an electricity supply contract, contract a gardener, contract to purchase a vehicle: do not all these contracts contain an element of risk with potential for fraud? So why does FIFA not deal with them too? The reason is that it is only the sports agency contract that interests FIFA. Why? Because it considers that the agent is a vector for extracting money that belongs to the footballing world. It is guided by the same principles as when it decided to ban the technique of the TPO, i.e. protect the boundaries of the football economy from outside interference.

If we take a step back to review this question, we realize that in absolute terms there are not that many agents in Europe, their activity is not risky in itself, the world of football needs the agents, they exercise their business in a competitive environment without asymmetry that should be corrected, and it has no impact on the sporting competition. And although some would like us to believe this, in fact it is only a smokescreen.

A player does not always change club because the agent has put forth the prospect of greener grass to him. But perhaps because the player, unfaithful to his

<sup>49</sup> See also ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, pt.81.

advisers, is no more faithful to his employer and it may also be because his first employer has failed to maintain the grass as green as a neighbouring club employer. It is not clear how the agent could be held responsible for competitive tension on the employment market of sporting talent. It is an indisputable fact that talent is rare and the clubs are willing to pay dearly for it. This only means that the financial decisions lie with the clubs, not the middlemen who set up the relations with such talents, even if these intermediaries are involved in the negotiations. It would be a good thing for clubs to assume the financial decisions they make without attempting to identify the agent as a sacrificial victim of their own mediocrity. In particular, what makes the regulation of this profession completely unnecessary is that it can be dealt with perfectly well by private investment laws. Moreover, this is the choice made in many European countries (Germany, Spain, Netherlands, UK, etc.).

Finally, the increased efficiency that the Court had implicitly recognized in the *Piau* case has disappeared as a result of the so-called deregulation brought in by the new FIFA Regulations. Indeed, as an argument in support of the exemption that had been granted to the former regulations, it was noted that the system of the prior compulsory licensing delivered by way of an exam was more “*a qualitative selection, appropriate for the attainment of the objective of raising professional standards for the occupation of players’ agents, rather than a quantitative restriction on access to that occupation*”.<sup>50</sup> In fact, there is no disputing that the new Regulations do not establish restrictions on the numbers entering the sports agency market since simple registration still leads to fewer participants than screening by prior examination. It no longer offers the slightest guarantee of agents’ improved professional standards, nor does it guarantee improved efficiency. The first condition for the exemption is thus not met.

#### *b) Shared Profit to the Benefit of the User*

According to the ordoliberal vision of European competition law, saving an illegal association of undertakings or cartel can only be envisaged if the potential positive effects of the agreement, i.e. those which counterbalance the harm of the cartel on competition, benefit economic players who are not party to the agreement. This requires an equitable share of the increased efficiency gained by the agreement is passed on to the final consumer, to any intermediary, or to any user of the service or product.

By analysing the aims of the 2015 FIFA Regulations or the potential effects of its provisions in relation to price, the temptation is to say that the users of sports agents’ services (clubs and players) will necessarily see a fall in the agents’ prices following the implementation at national level of the 3% cap recommendation. At first glance this appears obvious.

However, this would be to make a dual error of judgement.

First of all, the argument is so strong that there is no need to discuss the

<sup>50</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, pt.103.

second error. The users of the service, that is to say, the clubs and the players, are parties to the agreement. They are not third parties to the decision of the undertakings to associate and form an illegal cartel. And, the end user cannot be allowed to set the price of the service he uses on the grounds that the increased efficiencies will be equitably distributed. This is not a case of equitable sharing of the profits; this is a case where the user is granted this benefit by means of the agreement in which he is an interested party.

Some would have us believe that the final beneficiary is the spectator, i.e. if clubs and players had to pay their agents less, they would be able to offer a better spectacle. Besides the fact that this does not automatically follow, it has to be noted that this analysis does not take place on the most relevant market.<sup>51</sup> Indeed, the relevant market for the 2015 FIFA Regulations is that of the intermediary, and not the sporting spectacle, nor the audiovisual rights, nor sponsorship, but that of sports agency services. And by wanting to eventually expand the market, we can only do so via the employment of more players or by more transfers, two markets on which the dominant operators are once again the clubs and the players, that is to say the parties to the agreement between undertakings.

Secondly, and although the discussion of this argument is needless in view of the strength of the first one, it is far from certain that players will benefit from this price cap. Indeed, a price cap on this type of service down to a level that would not allow the agent to cover his costs on certain transactions,<sup>52</sup> can only lead to a decline in the quality of service. A decline that is all the more substantial as a player's salary decreases. It should not be thought that all football players in Europe have huge salaries, quite the contrary in the case of all those in the lower divisions.

And what about minors who are certainly most in need of advice but can only hope that it will be adequate and appropriate since the services provided to a minor are free of charge to begin with. The argument that the agent invests for the future by offering his services free of charge to a minor is not convincing. A "future" at 3% rather than 5 or 10% is not an incentive that would persuade a professional agent to invest his time, especially when the loyalty and consistency of footballers is well known.

### c) *Proportionality Test*

The examination of the third condition consists in checking the essential nature of the restriction on competition in relation to the stated objectives. These should normally be increased efficiency and the fair sharing of the resulting benefits with

<sup>51</sup> See pt. 43 of the Guidelines on the application of Article 81(3) of the Treaty, *op. cit.*

<sup>52</sup> For instance, let us assume that an agent in Paris assists a young player to join a club in Marseille for 2 years at a gross salary of •5000/month. At 10% commission, the agent will receive •12000 net which will cover both his negotiation and surveillance expenses over the 2 year period and provide him with a margin. However, at 3% commission, he will receive only •3600 net which is insufficient to pay for 3 return journeys in order to check on the player, cover the other costs and generate a margin.

third-party users. Therefore, with respect to the said objectives which we have already been discussed, this review requires us to assess the extent to which the restraint on competition is necessary and proportionate. This requires a triple check as to whether there is a measure as effective but less intrusive, or whether there is a more effective and as intrusive a measure, and whether there is a measure that is more effective and less intrusive. Moreover, *each one* of the restrictive measures has to be reviewed while noting that *all* the measures can be considered effective and proportionate in the given context although one of the said measures, taken in isolation, may prove to be unnecessary or disproportionate.

Regarding the registration rules set out in Articles 3 and 4 of the FIFA Regulations, it may well be accepted that they are appropriate in promoting the “ethics” and “morals” of the profession of agent. Indeed, it is a measure widely used by States wanting to check the morality and capacity of persons wishing to engage in an activity, especially an intermediary.<sup>53</sup> In the *Piau* case, the Court also considered that the Commission did not commit a manifest error by considering that a system of compulsory licensing could constitute an appropriate and adapted measure towards achieving “*a dual objective of raising professional and ethical standards for the occupation of players’ agent in order to protect players, who have a short career*”.<sup>54</sup> But in the *Piau* case the compulsory licensing system involved a qualitative selection that was regarded as potentially effective by the Commission at the time. In the current context however, it is uncertain as to whether the new Registrations are deemed fit for purpose. All the more so because their application will have to be objective, effective and impartial, and with no distortions between the different national federations responsible for applying them (i.e. list of documents to be provided, length of the checking process, cost control, dispute procedures, etc.) that would result in unnecessarily partitioning of domestic markets.

However, with regard to the “intermediary declaration” that players and clubs should strive to have signed by the agents, it is difficult to envisage that these will be fundamental in achieving the stated objectives. While some of the clauses of this “forced” contract may contribute to more transparency and higher ethical standards, most have no connection with these objectives. In addition, certain statements made by the agent are not necessarily the most effective for achieving impeccable ethical standards. It is also a source of great inequality between agents who accept (or comply with) the declaration and those who are strong enough to resist it.

Are the provisions regarding the price of the intermediary’s services (cap, mention of payment, and so on) needed? To ask this question is almost to answer it: setting a price cannot have a positive effect on the ethics and morals of the players, the transparency of operations, or the fight against illegal practices. On the contrary, by setting a low ceiling, it is clear that to maintain their level of remuneration

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<sup>53</sup> For instance, in France this type of measure is applied to estate agents, artists’ agents, travel agents, and so on.

<sup>54</sup> ECFI, 26 jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §102 & 104.



and retain the complicity of the clubs in a competitive market, the agents will be tempted to disguise their operations in order to circumvent the cap. Therefore, this measure is inadequate and counterproductive relative to the objective it is intended to achieve. And even if it was associated with a loophole-proof check, it would only be really effective if the price was set at 0. This would have the effect of preventing any form of fraud, extortion or money laundering and, correspondingly, any form of competition via the price, which is prohibited. This simple (absurd) test of the 0 price therefore leads yet to the conclusion that the measure is not essential since it would only be useful by being totally disproportionate.

As to the provisions concerning the prohibition on receiving remuneration from a minor, the disproportion of this measure is self-evident. There is no doubt that a minor needs more protection than a major. But how could a ban on payments prevent fraud, extortion or bad advice? The regulations imposed on sports agents contain an underlying presumption of immorality which, once the agent is involved with minors, becomes irrefutable. In other words, a minor may well not receive quality advice from an agent of impeccable and verified morality simply because good advice from a professional comes at a price! The ban is not only disproportionate but also counterproductive.

Regarding the transparency obligations which require detailed public disclosure of the amounts paid to agents. Once again it can be easily demonstrated that there is a measure that is both more effective and less intrusive but which achieves this goal of transparency and legality of operations. Indeed, rather than providing the public with all the information on all financial transactions in which the agent takes part, which would have no other effect than to reinforce a demagogic view of football, it is better that this information is transmitted to a supervisory authority composed of specialized and experienced persons required to satisfy various obligations of morality, impartiality and confidentiality.

In order to highlight the inappropriateness of FIFA's measures, other systems of regulation that are more effective and less intrusive compared to the aims sought may be envisaged.

First of all, FIFA should encourage players to group together and regulate themselves in a professional association that would have more authority in defining the standards of morality, quality and transparency in the exercise of the activity of sports agent. Instead of wasting energy and money to structure the profession, why not fund the creation of an international professional association? There are already well-organized agents' professional associations in some countries. There is also a European Union association and it is these entities that FIFA should rely on to encourage the creation of an industry self-regulatory body, and then let it live independently. Without the same characteristics as the legal profession or medical practitioners who can claim to have a single hegemonic order, the agents' own order could initially create a collective quality label that would be attractive to both clubs and players. They would be free to make use of "non-labelled" agents, but knowingly and under an obligation to assume any disappointments.

Secondly, it does not appear that the prior review measures are the most appropriate or adapted to fight against fraud. In order to implement such measures, it has to first prove that the fraud has taken place and its extent and demonstrate the ineffectiveness of the measures retrospectively. This means that a subsequent review, if necessary reinforced and practised by the competent and legitimate authorities (the police are such), is certainly more in keeping with the realities of the problem. This further confirms that FIFA does not have the legitimacy to regulate an economic activity such as that of the sports agents.

d) *Non-Elimination of Competition*

The economic assessment made by combining the first three conditions of Article 101 §3 TFEU, if positive (which is not the case in our hypothesis), may eventually justify restricting the competition. It remains that a positive economic result does not validate the elimination of the competition argument. The agreement between undertakings must not allow its promoters to eliminate competition in the market for sports agents or in their own market.

Once this rule has been recalled, one does not need to be an economist to see that regulations such as FIFA's, which do not meet the conditions of Article 101 §3 and therefore do not merit an exemption, do not on a first approach have the power to eliminate competition between players' agents. It will deter many candidates from entering the market, and make the activity of small structures and small agents very difficult, and perhaps convince some of them to change their activity or even to abandon it as insufficiently profitable. But it does not necessarily reserve the market to the larger existing operators, the actual market power of whom is not known exactly. However, the elimination of competition is not that simple, i.e. solely by market share. Indeed, other parameters must be taken into account, and in this respect price competition requires particular attention. The Commission states bluntly: "*The last condition for exception under Article 81(3) is not fulfilled if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition [...]*"<sup>55</sup> However, by setting a price cap at 3%, which is not reasonably high enough, any financial flexibility that would enable agents to compete on the quality/price of their service is eliminated.

In addition, consideration must also be given to the competitiveness of potential new entrants who will begin their careers by working with young players or players on low incomes compared to the agents running an established business who can work with highly paid players. By applying the 3% cap on small operations, these newcomers will not be able to invest in their development and compete with incumbents who benefit from regular incomes, real though reduced, achieved on more financially viable operations.

Therefore, this fourth condition is not met either.

<sup>55</sup> Guidelines on the application of Article 81(3) of the Treaty, *op. cit.*, pt. 110.

## *B. Law on the Abuse of a Dominant Position*

The wording of Article 102 TFEU, which prohibits the abuse of a dominant position, is not as clear as Article 101. Indeed, although its provisions lay down the principle of prohibition, they are silent on those that allow, exceptionally, its avoidance. Yet according to the jurisprudence of the Court of Justice and the decisional practices of the Commission, there are many cases of well-founded justification in the abuse of dominance. We will deal with the new FIFA Regulations with a two-step analysis. Firstly, we will check if it constitutes an abuse of dominance (1) and then we will check whether the ban could be avoided as a well-founded objective justification (2).

### *B.1 Abuse of a Dominant Position*

Like Article 101, Article 102 TFEU has its own “analysis grid” and the conformity of the new FIFA Regulations will be analysed by applying this grid.

As a first step, we have to check whether FIFA can be described as an undertaking holding a dominant position on the internal market or a substantial part of it (a).

Secondly, we have to rationally examine whether the FIFA Regulations could “affect trade between member states”. However, this check has already been carried out in the analysis of Article 101 and we would therefore refer the reader to the aforesaid text.

As a third step, we have to check whether the FIFA Regulations characterise the abuse of a previously demonstrated dominant position (b).

#### *a) Dominant Position*

The dominant position prohibited by Article 102 TFEU means dominance on a market that is designated under the name “relevant market”. It is this relevant market that decides whether or not one or several undertakings occupy a dominant position.

The market on which the FIFA Regulations on collaboration with intermediaries are challenged is the market of sports agency services, that is to say, a market on which clubs and players are both the principals and users, while the sports agents are service providers. If we were to reduce this to a simple economic description, while ignoring strict legal considerations, it could be said that, on this market, the sports agents are “sellers” and the clubs and players are “buyers”.

The FIFA Regulations do not seek to regulate anything other than this market. However, they also have indirect effects on the transfer market and the market for sporting talent which are necessarily affected by regulations specifically targeting the intermediaries involved in transfer operations and players’ placement in employment. And on these two associated markets, once again we find the clubs

and the players. However, FIFA is present on none of these sports agency markets, the transfer market, or the sporting talent market. While it is clear that FIFA is an actor on the sports organisation market on which its dominant position is evident,<sup>56</sup> it is also clear that it does not itself participate in the sports intermediation market. Can FIFA be in a dominant position on a market in which it is not involved? As FIFA is an association of undertakings grouping the economic players on the market in question, the answer is necessarily in the affirmative. Indeed, FIFA has already been recognized as such, especially in the *Piau* case when the Court held that FIFA is “*the emanation of the national associations and clubs, actual buyers of the services of players’ agents, and it therefore operates on this market through its members*”.<sup>57</sup> We regret that the Court only partially analysed this question because FIFA, due to the effect of its pyramidal structure, groups together not only the clubs but also the players, who are also the “buyers” in the relevant market.

Another theoretical question arises: can FIFA be both an association of undertakings within the meaning of Article 101 TFEU and a dominant undertaking within the meaning of Article 102? This is a legitimate question because behaviour can be, both considered and eventually penalized when viewed from the antitrust law standpoint and its abuse of dominance. However, these two qualifications seem incompatible at first sight. But this is not the case, because Article 102 TFEU has two hypotheses: one where “a business” has a dominant position and one where “several companies” occupy the same dominant position. It is from this second hypothesis that the concept of “collective dominance” has arisen and was applied to FIFA in the *Piau* case.<sup>58</sup> Indeed, it is through FIFA that the clubs (purchasers of sports agency services) presented themselves in the eyes of the Court as “a collective entity”.<sup>59</sup> In our view, they always present themselves as such and one must also associate the players with this collective entity since it is the players who procure the services of sports agents and are covered by FIFA Regulations as members of national associations grouped within FIFA.

Therefore, even though FIFA is not active in the relevant market, as it may be for example in the market for the organization of sporting events, it should be regarded as occupying a dominant position in the intermediation market on the sole grounds that it exercises its business through its members. All the more so in that it includes an entire category of market participants, in this case the “buyers”. Indeed, no buyer escapes from this regulatory power because, by definition, all European football clubs and all players who are employees participate in this “collective entity”. It is therefore clear that by dictating the behaviour of all the buyers on a particular market, an association that groups them within a single

<sup>56</sup> Commission White Paper on Sport, COM(2007) 391 final, Annex I, 68. – ECJ, 1 July 2008, Case C-49/07, *Motoe*, *op. cit.*

<sup>57</sup> ECFI, 26 Jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §112 & §116.

<sup>58</sup> In France, the collective dominant position of FIFA has already been recognized regarding the sale of tickets to a competition : Cass. com., 8 July 2003, n°01-17015.

<sup>59</sup> ECFI, 26 Jan. 2005, Case T-193/02, *Piau*, *op. cit.*, §113.

undertaking and without exception will occupy a dominant position, because it is in a “position of strength that makes it a mandatory partner”.<sup>60</sup> The question that then arises is whether this constitutes an abuse.

b) *Abuse*

Does FIFA abuse its position of collective dominance by enacting a regulation which recommends a maximum price for sports agency operations, prohibits payments in transactions involving minors and imposes various transparency and registration measures? Indeed, recognizing that FIFA occupies a dominant position is not sufficient to condemn its regulations since “*finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*”.<sup>61</sup> The question is then whether or not the new regulations lead FIFA to adopt “*the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market*”.<sup>62</sup>

In order to answer this question, it is sufficient to highlight the restraints on competition demonstrated through the application of article 101 TFEU insofar as any effective restraint on competition renders the market dominance that it derives from this situation abusive.

There is no real doubt as to the answer regarding the provisions creating the 3% cap or prohibiting any payment when acting for minors. This type of practice is targeted by Article 102 TFEU, which states that the abuses it intends to combat “*may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. It has to be repeated: fixing a price in normal market supply and demand forces according to the European ordoliberal vision is the most obvious proof that competition is not free in this market. Therefore, the reasoning followed concerning Article 101 TFEU is equally relevant concerning Article 102.

The answer may not be so clear on the provisions for the registration of agents and each of their operations as, strictly speaking, they cannot be authorized directly by the TFEU. Once again, the reasoning concerning Article 101 can be transposed onto Article 102. Indeed, the application of a simple test of the counterfactual situation allows us to say that such measures have the effect of

<sup>60</sup> ECJ, 13 febr. 1979, Case 85/76, *Hoffmann*, pt. 41, 1979 ECR 461.

<sup>61</sup> ECJ, 9 nov. 1983, Case 322/81, *Michelin*, pt. 57, 1983 ECR 3461. – ECFI, 7 oct. 1999, Case T-228/97, *Irish Sugar*, pt.112, 1999 ECR II-02969.

<sup>62</sup> ECJ, 13 febr. 1979, Case 85/76, *Hoffmann*, *op. cit.*, pt. 91. – ECJ, 9 nov. 1983, Case 322/81, *Michelin*, *op. cit.* – ECJ, 3 July 1991, Case C-62/86, *AKZO Chemie BV v/ Commission*, pt.69, 1991 ECR I-03359. – ECFI, 7 oct. 1999, Case T-228/97, *Irish Sugar*, *op. cit.*, pt.111. – ECFI, 25 june 2010, Case T-66/01, *Imperial Chemical Industries Ltd v/ European Commission*, pt.193, 2010 ECR II-02631.

slowing down new market entrants or even discouraging them, and needlessly complicates the exercise of the activity to the detriment of its end users. All these provisions are therefore likely to influence the market structure.

This is because the new FIFA Regulations, although they come with many precautions in the form of simple recommendations, are in fact mandatory for direct and indirect members of FIFA (such as the national federations, clubs and players) that cannot withdraw without risking a penalty. And an agent who refused to pander to clubs and players responsible for implementing the FIFA obligations would be immediately excluded from the market. He/she would be excluded not because the quality of service was less or too expensive compared to other competing agents, but only because of his refusal to sign the “intermediary declaration” and agreeing to all the resulting obligations. In other words, he would be excluded from the market without being able to make use of the normal competition tools such as normal market pricing, the conditions of its proposal, the quality of its service, or its capacity for innovation.

Therefore, the new FIFA Regulations have sufficient potential to influence the conditions in which the sports agency operations or interventions are carried out on the relevant market.

The question that then arises is whether the service user, “consumer” within the meaning of Article 102 TFEU, suffers prejudice due to the measures criticised. Indeed, if we follow the recommendations of the Commission, the restrictions on competition and the eviction of competitors can only be taken into account to the extent that they are harmful to consumers. However, this issue takes a very particular turn in the case that concerns us here because the contested regulations emanate from the users of the service in question. One could then argue that, as authors of the measure agreeing to restraints on competition, the consumers will suffer no prejudice. But this argument is false for at least two reasons.<sup>63</sup> The first is that the quality of service will only be diminished when the providers are unable to adjust the price of their interventions or contractual conditions. The second is that the consumer referred to in the Commission’s recommendations is necessarily a third party. Indeed, by the logic of the prohibition on abuses of dominance, one can be both a consumer that has to be protected and an undertaking in a dominant position whose actions have to be monitored.

## *B.2 Justification of an Abuse*

Although Article 102 TFEU cannot serve as justification for an abuse of a dominant position, in practice two sources of exemption are accepted by the Commission<sup>64</sup> and the Court of Justice.<sup>65</sup> The first is to argue that the criticized measure is not

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<sup>63</sup> Two reasons already developed regarding efficiency gains achieved by agreements between undertakings.

<sup>64</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45, 24.2.2009, 7.

<sup>65</sup> ECJ, 17 febr. 2011, Case C-52/09, *TeliaSonera*, pt.75, 2011 ECR I-00527. – ECJ, 27 march 2012,

directly attributable to an undertaking in a position of dominance only acting under duress from state legislation. The second is to justify the criticized conduct by an “objective necessity”.

a) *State Constraint*

FIFA can expect nothing from the first line of defence. No Member State has ordered it to regulate the profession of sports agents and it does not claim any specific legal obligation emanating from a constraint or a state or supra-state order. Certain national federations may hide behind the laws of their country, but only provided it regulates the profession of sports agents. This is the case in France for example, where the provisions of the *Code des Sports* [sports laws] require a prior authorization in order to exercise the business of sports agents, set a cap (although 10%) and various transparency obligations (less cumbersome). Still, even in these very particular cases, the defensive measures have to be put into perspective. Indeed, it has to be emphasised that state compulsion is only marginally accepted as justification,<sup>66</sup> and that it must itself be objectively justified by an overriding public interest in relation to which the legislation in question must be strictly proportionate. In addition, it should be recalled that European Union law<sup>67</sup> resents that States take or retain measures, even of a legislative or regulatory nature, that may render ineffective the competition rules applicable to undertakings.<sup>68</sup> Thus, the States do not have the powers to withdraw the “official” nature from their own legislation by delegating to private operators responsibility for taking decisions in the economic sphere.<sup>69</sup> They therefore cannot delegate to national federations the task of setting the price of a service that would normally be left to the free play of supply and demand.

Case C-209/10, *Post Danmark*, pt. 40. This hypothesis had already been asked (ECFI, 7 oct. 1999, Case T-228/97, *Irish Sugar*, *op. cit.* pt. 218. – ECJ, 15 march 2007, Case C-95/04 P, *British Airways plc v/ Commission*, pt.69, 2007 ECR I-02331).

<sup>66</sup> ECJ, 20 march 1985, Case 41/83, *Italia v/ Commission*, 1985 ECR p.873, pt. 19. – ECJ, 10 dec. 1985, joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 & 269/82, *Stichting Sigarettenindustrie e.a. v/ Commission*, 1985 ECR p.3831, pt. 27 to 29. – ECJ, 9 sept. 2003, Case C-198/01, *CIF*, 2003 ECR, I 8055, pt. 67.

<sup>67</sup> See art. 4, TEU & art. 106 TFEU.

<sup>68</sup> ECJ, 5 dec. 2006, Case C-94/04, *F. Cipolla v/ R. Portolese*, & Case C-202/04, *S. Macrino & C. Capoparte v/ R. Meloni*, 2006 ECR, I-11421, pt. 46. – ECJ, 1 july 2010, Case C-393/08, *Emanuela Sbarigia v/ Azienda USL RM/A and others*, pt.31, 2010 ECR I-06337.

<sup>69</sup> ECJ, 5 oct. 1995, Case C-96/94, *Centro Servizi Spediporto Srl v/ Spedizioni Marittima del Golfo Srl*, pt.21, ?1995? ECR I-02883. – ECJ, 16 nov. 1977, Case 13/77, *Gb-Inno-Bm*, ?1977? ECR, p.2115, pt. 29-31. – ECJ, 21 sept. 1988, Case 267/86, *Van Eycke*, ?1988? ECR, p.4769, pt. 16. – ECJ, 18 june 1998, Case C-35/96, *Commission v/ Italia*, 1998 ECR, I-3851. – ECJ, 19 febr. 2002, Case C-35/99, *Arduino*, 1988 ECR, I-01529. – ECJ, 9 sept. 2003, Case C-198/01, *Consorzio Industrie Fiammiferi & Autorità Garante della Concorrenza e del Mercato*, 2003 ECR, I-8055.

b) *The “Objective Necessity”*

FIFA cannot count on the second line of defence either. Indeed, to be accepted, it requires that convincing evidence be provided of the three cumulative conditions, it being stipulated that the onus of proof would be on FIFA. Therefore it has to demonstrate that its new regulations have led to a gain in efficiency, that part of this economic gain is shared with the user, that the new regulations are necessary and strictly commensurate with achieving the progress it is pursuing, and does not have the effect of eliminating competition.<sup>70</sup>

If FIFA wishes to save its regulations under Article 102, it must ultimately justify the existence of conditions identical to those in the context of Article 101. However, as we have already shown, none of these conditions can be fulfilled convincingly by the new FIFA Regulations. Moreover, the Court of Justice accepts this defence only if the objective pursued by the company in a situation of dominance is not only legitimate, which in our view is not the case, but also results from an “external factor”,<sup>71</sup> which is even less the case here. Indeed, the principle governing the application of Article 102 is that it is normally for the public authorities to set up and enforce national standards in the public interest such as public health, safety, environment, or consumer protection. In principle therefore, it is not for the company in a dominant position to take initiatives to meet such goals, and it can only be as an exceptional measure and after having justified both the urgent need for action and the failure of the State, that a dominant undertaking can legitimately argue that it constitutes an impediment to competition. But we do not see how FIFA could be convincing on all these conditions when the sports agency business is already regulated, albeit to varying degrees, by European states and that it is not for an association governed by Swiss law to judge the sufficiency or insufficiency of states’ regulation of a profession or economic activity.

This is even less evident in that the FIFA Regulations’ aim is to liberate direct and indirect members from any reflection, innovation or negotiation in transactions with the agents, without it being able to reasonably describe the clubs and players as weak and vulnerable consumers who should be protected from the harsh realities of market conditions. Finally, the demonstration of these four conditions seems all the more improbable for FIFA to meet in that the latter might well be regarded as in a “super dominant position”<sup>71</sup> since it groups together all the

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<sup>70</sup> Should the Court of Justice not seem to take account of this fourth condition (ECJ, 17 Feb. 2011, Case C-52/09, *TeliaSonera*, *op. cit.* pt.76. – ECJ, 27 March 2012, Case C-209/10, *Post Danmark*, *op. cit.*), it is nevertheless listed by the Commission in its recommendations (Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *op. cit.* §30).

<sup>71</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *op. cit.* §29.

<sup>72</sup> About this issue: ECJ, 16 march 2000, joined Cases C-395/96 P, C-395/96 P & C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P)*, *Compagnie maritime belge SA (C-395/96 P)* and *Dafra-Lines A/S (C-396/96 P) v/ Commission*, 2000 ECR I-01365.



“buyers” of the service on the entire European market, and even worldwide, and that based on this consideration the objective justifications that it might put forward would examine even more severely.

### 3. *Compatibility with EU Principles of Fundamental Freedoms and Rights*

The analysis of the conformity of the 2015 FIFA Regulations with EU law can be approached from different angles. Its obvious incompatibility with the principles of competition law does not prevent its continued examination under the different angles of EU fundamental rights and freedoms. It is now for us to compare the fundamental freedoms under the Treaty on the Functioning of the European Union (A) and the fundamental rights under EU law (B).

#### A. *Fundamental Rights Under the Treaty*

Out of the four main freedoms under the TFEU, three are directly affected by the 2015 FIFA Regulations: freedom of movement of capital (1), freedom of movement of workers (2) and the freedom of establishment and services (3). The freedom of movement of goods does not concern sports agents and can be ignored.

##### A.1 *Free Movement of Capital*

At a first glance, the new FIFA Regulations do not infringe the free movement of capital guaranteed by Article 63 of the TFEU. Indeed, one cannot really argue convincingly that the prior registration of the agent, the registration of each of its operations or the publication of details of the commissions paid, will directly affect the movement of capital between Member States. The free movement of capital has its own function and is not intended, in principle at least, to render services more fluid, other than those relating to the world of finance. But a sports agency service is not a provision of financial services such as, for example, the provision of TPO services.

Nevertheless, FIFA Regulations can affect the “payments” made between Member States or between Member States and third countries. These are prohibited by Article 63 §2 TFEU. By preventing sports agents from receiving any payment when intervening in a transaction involving a minor, do not the FIFA Regulations potentially involve a restriction on cross-border payments (seeing as it has already been shown that the sports agency business is cross-border)? By requiring that the payment of the agent can only be made by its principal,<sup>73</sup> do not the FIFA Regulations restrict payments within the meaning of Article 63 §2?

The answers to these questions seem positive insofar as we accept that there is interference with the free movement of capital and payments as soon as a legal or *de facto* barrier has the aim or effect of preventing or limiting, directly or

<sup>73</sup> Art. 7.5, R. FIFA.

indirectly, movement of capital or a payment. And once again, this condemns the FIFA Regulations, especially as the principle of the freedom of movement of capital is not subject to the application of a *de minimis* rule, and even a minor breach is sanctionable.<sup>74</sup>

Some claim that the payment for a service is not part of the operations specifically covered by the list of capital movements given in Annex I to Directive 88/361/EEC of 24 June 1988. However, this directive is only indicative and the Court has always recognized that it was neither comprehensive nor exhaustive.<sup>75</sup>

Some also claim that Article 63 TFEU is only meant for application by Member States and EU institutions, and therefore private individuals are not covered by its provisions. However, doctrine recognises without difficulty, and it is unclear what would lead the Commission and the Court of Justice not to do the same, that the terms of Article 63 TFEU are very close to those applicable to other freedoms and are therefore, like others, also applicable to individuals.<sup>76</sup> To give practical effect to Article 63 TFEU, it should apply to both Member States and to private entities such as banks, credit institutions, professional bodies and appropriate associations of undertakings, such as the UEFA or FIFA.

Some also claim that the FIFA Regulations are worth retaining by applying the rule-of-reason principle. But this would require evidence proving that the restraining measure is authorized by an “overriding public interest” and is strictly proportionate to the aim pursued.<sup>77</sup> Based on the evidence we have examined, the conditions for exemption are roughly the same in terms of competition law.

In fact, the most relevant argument for preventing the application of Article 63 TFEU to the new FIFA Regulations results from the freedoms guaranteed by the TFEU. Indeed, the free movement of capital is naturally extensive in nature insofar as it is intended to cover all movements of money whatever their source. But this means that, as an alternative or at least a supplement, the freedom of capital movement is likely to be invoked with all the other freedoms of movement. It can even be invoked for all competition issues related to the concept of a price cartel. Does not the price mechanically cause an obstacle to the free movement of capital? Therefore we need to define the scope of the freedom of movement of capital. By means economy worries, as a general rule the Court of Justice will only examine the compatibility of state regulations or private measures under investigation from one freedom: freedom which is mainly hampered, and this by examining the aim of the measure in question.<sup>78</sup> Regarding the FIFA Regulations, it appears that

<sup>74</sup> ECJ, 1 July 2010, Case C-233/09, *Dijkman*, pt.42, 2010 ECR I-06649.

<sup>75</sup> ECJ, 16 March 1999, Case C-222/97, *Manfred Trummer and Peter Mayer*, 1999 ECR I-01661. – ECJ, 7 Nov. 2013, Case C-322/11, *K. v/ Finland*, 2014 OJ C 9, 11.1.2014, 3.

<sup>76</sup> F. Picod, “*Les entraves aux libertés de circulation d’origine privée : une nouvelle denrée communautaire?*”, in *Mélanges G. Vandersanden* », Bruxelles, Bruylant, 2008, 635.

<sup>77</sup> e.g. : ECJ, 13 May 2003, Case C-463/00, *Commission v/. Spain*, 2003 ECR I-04581.

<sup>78</sup> e.g.: ECJ, 24 March 1994, Case C-275/92, *Schindler*, 1994 ECR I-01039. – ECJ, 3 Oct. 2006, Case C-452/04, *Fidium Finanz AG v/ Bundesanstalt für Finanzdienstleistungsaufsicht*, 2006 ECR I-09521. – ECJ, 24 May 2007, Case C-157/05, *Winfried L. Holböck v/ Finanzamt Salzburg-Land*, 2007 ECR I-04051.

its principal aim is the regulation of a service and secondly the movement of sums generated by the provision of the services in question. The result is that in this case the freedom of movement of services has to prevail and that there is no need to examine the FIFA Regulations in relation to the free movement of capital.

#### A.2 *Workers Freedom of Movement*

Do the FIFA Regulations constitute an obstacle that may hinder or render less attractive the exercise by footballers, nationals of the Member States, of their freedom of movement as guaranteed by Article 45 TFEU<sup>79</sup> and Article 15.2 of the EU Charter of Fundamental Rights? This simple question does not immediately spring to mind when reading the FIFA Regulations because it directly targets sports agents and displays an intention to protect the players. However, by hampering the activity of the agents, does it not contribute to reducing the freedom of the sportspersons, users of intermediary services, to find an employer, change employers and negotiate with employers? The question is all the more justified in that the football authorities have often highlighted that the role of sports agents was essential in these transactions and that it was moreover necessary to establish rules in order to limit the continued expansion of players' movements.

Consequently, if it is considered, as we do, that the *aim* and *effect* of the FIFA Regulations is to restrict competition between agents at the expense of newcomers on the market and small players, and impede the latter's freedom to set up and offer a service, we must logically conclude that the decrease in the number of agents and the quality of their services will impact the placement of players in terms of their wages and hence on their freedom of movement as workers. The player who receives no help in negotiating a salary and benefits will not achieve the working conditions he merits. He could consider the prospect of having to find a new employer without the help of an agent less attractive and thus be deterred from changing clubs and thus from exercising his freedom of movement. Obviously the market for professional footballers will not entirely shut down, but it is well known that there is no *de minimis* test on the free movement of workers; once again even a minor infringement should be punished.

This will require that FIFA provide evidence that the four conditions are cumulatively met in order to justify its regulations in the light of Article 45 TFEU. In other words: (i) it applies without discrimination; (ii) it is justified by overriding reasons of the public interest; (iii) it is appropriate to guarantee the attainment of the objective pursued; and (iv) it does not go beyond what is necessary to achieve it. This test is well known and has already been implemented in a slightly different form, by applying Article 101 TFEU.

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<sup>79</sup> ECJ 31 march 1993, Case C-19/92, *Dieter Kraus*, 1993 ECR I-01663. – ECJ 15 dec. 1995, Case C-415/93, *Bosman*, *op. cit.* – ECJ, 16 march 2010, Case C-325/08, *Bernard*, 2010 ECR I-02177.

### A.3 Freedom of Establishment and Freedom to Provide Services

Do the 2015 FIFA Regulations breach the generally associated principles of freedom of establishment (Articles 49 to 54 TFEU) and the freedom to provide services (Article 56 TFEU)? An answer in the affirmative appears obvious insofar as these Regulations set up real obstacles for which no convincing justifications can be put forward.

#### a) The Obstacles

Within the meaning of the TFEU, a service provider is an independent business that is eligible for remuneration, no matter the business sector in which it offers the service. As such, it is accepted without question that the brokerage business, the activity of an agent, and more broadly the activity of the intermediary, do indeed constitute economic activities.<sup>80</sup> In this respect, the placement of employees has been recognized as an economic activity<sup>81</sup> and therefore there is nothing surprising in the Court applying Article 56 TFEU<sup>82</sup> to the services offered by the sports agents, provided that this activity has undoubtedly a European-wide dimension since it provides a cross-border service.

In general, measures that impede access to national markets are considered contrary to the principles of freedom as well as those that make less attractive the exercise of the freedom of establishment and to offer services. Whether there is discrimination or not does not change the concept of an impediment, which is an indistinctly applicable measure that may be considered prejudicial. In this context, the Commission and the Court of Justice are equally attentive to the aim and to the effect of the disputed measure. A measure that does not aim to regulate the conditions of establishment or the exercise of a service may have an *effect* on access to the market in question and thus be challenged under the provisions of the TFEU.<sup>83</sup> Furthermore, the nature of the measure in question is irrelevant. Whether statutory, administrative or judicial, state or private, a measure removing or diminishing the freedom of establishment and to offer services must be regarded as an impediment.<sup>84</sup> Moreover, it is irrelevant that an infringement is minor since according to the *de minimis* principle (the law does not care for small things), it does not apply to

<sup>80</sup> ECJ, 6 June 1996, Case C-101/94, *Commission v/ Italia*, [1996] ECR I-02691. – ECJ, 26 Nov. 1975, Case 39-75, *Robert-Gerardus Coenen and others v/ Sociaal-Economische Raad*, [1975] ECR 01547.

<sup>81</sup> ECJ, 23 Apr. 1991, Case C-41/90, *Höfner*, *op. cit.* – ECJ, 10 Dec. 1991, Case C-179/90, *Merci convenzionali porto di Genova SpA v/ Siderurgica Gabrielli SpA.*, [1991] ECR I-05889. – ECJ, 19 Oct. 1995, Case C-111/94, *Job Centre Coop. arl.*, [1995] ECR I-03361. – ECJ, 11 Dec. 1997, Case C-55/96, *Job Centre (2) coop. Arl.* [1997] ECR I-07119. – ECJ, 8 June 2000, Case C-258/98, *Giovanni Carra and others*, [2000] ECR I-04217.

<sup>82</sup> ECFI, 26 Jan. 2005, Case T-193/02, *Piau*, *op. cit.*

<sup>83</sup> e.g. : ECJ, 18 July 2006, Case C-519/04 P, *Meca-Medina*, *op. cit.*

<sup>84</sup> See Services Directive n°2006/123/CE, 12 Dec. 2006, art. 4.

freedom of movement of services.<sup>85</sup>

In our opinion, the FIFA Regulations, and especially the provisions concerning the prior registration of agents, the registration of each operation together with its stipulations regarding the disciplinary sanctions constitute flagrant breaches of the freedoms guaranteed by the TFEU. Indeed, it is accepted that a measure that submits the exercise of a profession to licensing, registration or prior authorisation constitutes an obstacle that delays the start-up of businesses and may, in certain circumstances, lead to additional costs and therefore discourage the interested parties from setting up and running a business although perfectly legal. As we have already said, the 2015 FIFA Regulations set up a stepped control procedure, the cumulative effect of which is much more intrusive and dissuasive than the examination that existed previously. Hence, the FIFA Regulations appear to be in direct conflict with the TFEU. Any national federation that incorporates them in its own internal regulations would also be in conflict with the TFEU and run the risk of being penalised by its domestic courts.

There is even more of a risk of a penalty when the activity of the sports agent or intermediary is subject to the Services Directive 2006/123/EC dated 12 December 2006. Indeed, this type of business is not excluded from its scope, nor is that of agent or employee placement. It simply excludes the services performed by temporary employment agencies, which is not the same thing, and does so because there is a specific harmonising directive.<sup>86</sup> As a result, it targets the activities of estate agents, travel agents and also textually targets services relating to recruitment.<sup>87</sup>

As a matter of principle, this Services Directive only accepts “authorisation schemes”, to which it applies an independent and very broad definition, as exceptions requiring justification,<sup>88</sup> and systems for declarations, registration, service contracts, etc.<sup>89</sup> It considers that an obstacle is created when the service provider is fettered by an unjustified procedure when setting up his business or providing services. However, it also considers that an obstacle is created when the consumers’ (or users’) recourse to a service is slowed down or rendered more complex, for instance by a prior declaration or by registration with an administrative organisation.<sup>90</sup> In fact, by requiring that the clubs and players do everything possible to ensure that the agent signs the “intermediary declaration”, the FIFA Regulations also hamper the service provided by the agent and infringe the freedoms established by the TFEU.

Moreover, it has to be pointed out that in the case of the service providers, the Services Directive prohibits the Member States (in fact, anyone since the States

<sup>85</sup> ECJ, 1 apr. 2008, Case C-212/06, *Government of Communauté française and Government wallon v/ Government flamand*, [2008] I-01683.

<sup>86</sup> Directive n°2008/104/EC, 19 nov. 2008, on temporary agency work, [2008] OJ L 327, 5.12.2008, 9.

<sup>87</sup> See: Whereas n°33.

<sup>88</sup> Art. 9.

<sup>89</sup> Whereas n°39.

<sup>90</sup> Whereas n°92 & Art. 19. – See also: ECJ, 28 apr. 1998, Case C-118/96, *Jessica Safir*, [1998] ECR I-01897.

have to ensure that they do not assist with the creation of a restraining system) from imposing “*the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed*”.<sup>91</sup> Above all, it has to be underlined that the Services Directive applies in particular to certain requirements and measures by the states that are subject to an assessment regarding the freedom of establishment objective that they pursue. In this respect, they specifically target “*fixed minimum and/or maximum tariffs which the provider must comply with*”<sup>92</sup> that it assumes have a detrimental effect. In fact, we have seen that the 2015 FIFA Regulations set a maximum tariff in the form of a 3% cap and prohibit any payment when the player in question is still a minor.

### b) *The Possibility of a Justification*

Since the “Cassis de Dijon” case,<sup>93</sup> the rule-of-reason principle applies to the freedom of movement and any interference with this freedom may be justified if five cumulative conditions are met: (i) the field has not been harmonised, (ii) the measure in question is applied in a non-discriminatory manner, (iii) the measure is justified by the overriding reason of public interest, (iv) the measure is necessary, objective and effective in order to achieve its pursued aim and (v) the measure is proportionate to the aim pursued.

To examine the first two conditions, that seem closely related, we need to return to the *Piau* case. Indeed, at the time of the *Piau* judgement the question of the international and harmonized regulation of the sports agency business could have arisen. At the time it was possible to envisage and eventually agree with FIFA that its regulations on sports agents satisfied a public interest need, and this, although it was a self-attributed competence, should in principle belong to the State. Today, after the *Piau* judgment, the White Paper on sport,<sup>94</sup> following the Study on sports agents in the European Union,<sup>95</sup> and after some Member States have opted for legislation and others to make no change, we consider it reasonable to conclude that the need for harmonised regulations on European territory does not seem important in the eyes of the Member States. Since the *Piau* judgement, they have all been aware that they have not implemented harmonisation. Therefore today, no-one can be above the States which have expressed their sovereignty, some by legislating, others by reinforcing their existing legislation, and others by maintaining the activity of sports agents within the sphere of ordinary investment activities. Today, FIFA cannot assume that it has the right to regulate this activity on EU

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<sup>91</sup> 1 Art. 16, 2°, d).

<sup>92</sup> Art. 15, 2°, g).

<sup>93</sup> ECJ, 20 febr. 1979, Case 120/78, *Rewe-Zentral AG v/ Bundesmonopolverwaltung für Branntwein*, [1979] ECR 00649.

<sup>94</sup> White Paper on Sport, 11 July 2007, COM(2007) 391 final.

<sup>95</sup> KEA & alii, Sports agents in the European Union, Study conducted in 2009 for the European Commission.

territory.

We should probably consider that the protection of the users of a service is part of these “overriding reasons relating to the public interest” referred to in the Services Directive, as well as the protection of fair trade and the fight against fraud.<sup>96</sup> But it is for the Member States to justify these overriding reasons of public interest when their own measures constitute barriers to these two freedoms. It is for the States to set out their concept of the general interest and when necessary to regulate any particular services on their territory so that a quality of service is guaranteed. And even when it concerns the public interest, the States are obliged to meet obligations that guarantee the exercise of EU freedoms: mutual recognition of diplomas; system of equivalence, obligation to give reasons for the refusal, appeal process, etc. In fact, the general interest only allows strictly justified and proportionate obstacles to be set up. The Court has often stated<sup>97</sup> and the Commission is convinced that, “*an authorization scheme*<sup>98</sup> *should be permissible only where a subsequent inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned afterwards, due account being taken of the risks and dangers which could arise in the absence of a prior inspection*”.<sup>99</sup> And yet it must be said that the possibility of a justified authorisation scheme can only really be understood regarding the freedom of establishment and not the freedom of enterprise,<sup>100</sup> and a restriction on the free movement of services cannot benefit from an exception unless it is “*consistent with fundamental rights which form an integral part of the general principles of law enshrined in the Community legal order*”.<sup>101</sup>

Therefore, the conclusion is clear: the 2015 FIFA Regulations do not comply with Articles 49, 54 and 56 TFEU. It has to be said that it does not define a correct method for cleaning up the profession of sports agent and protecting the interests of sportspersons. If it is wished to pursue these objectives it would be better to follow the recommendations of the Services Directive which encourages the Member States and the Commission to work towards the creation of professional associations and the drafting of good practice codes.<sup>102</sup>

## B. Fundamental Rights

Article 6 §3 TFEU, recognises that “*the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental*

<sup>96</sup> Whereas n°40 & Art. 4.

<sup>97</sup> ECJ, 22 jan. 2002, Case C-390/99,

*Canal Satélite Digital SL v/ Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, [2002] ECR I-00607.

<sup>98</sup> In the sense given by the directive: Whereas n°39.

<sup>99</sup> Whereas n°54 & Art. 9.

<sup>100</sup> See and compare: Art. 9 & Art. 16.

<sup>101</sup> Whereas n°83.

<sup>102</sup> Whereas n°7 & 113 & Art. 37.

*Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". Examining the compatibility of the 2015 FIFA Regulations with EU law makes necessary a comparison with the corpus of the Council of Europe laws (this *other* body of European law), and with the EU's Charter of Fundamental Rights, which has been an integral part of EU primary law since the Lisbon treaty. In this dual corpus of law, a selection must be made in order to only retain the most relevant aspects with regard to the contents of the FIFA Regulations. This is why we will only concern ourselves with the freedoms of enterprise and work (1), the right of employees to placement free of charge (2), and the right to non-disclosure, corollary to the right to privacy (3).

### *B.1 Freedom to Work and Freedom of Enterprise*

The EU Charter of Fundamental Rights devotes two articles to professional freedoms: Article 15 on professional freedom and the right to work (Freedom to choose an occupation and right to engage in work) and Article 16 on the freedom of enterprise (Freedom to conduct a business).

Article 15 differs little from the TFEU. Indeed, its second paragraph merely reaffirms the principles of free movement of workers (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU) and the freedom to provide services (Art. 56 TFEU). In doing so, it implicitly refers to the conditions and limitations under the TFEU developed by Court of Justice case law; conditions we have already amply examined. That said, its first paragraph establishes the right of everyone to work and to pursue a freely chosen or accepted occupation; right that is not specifically listed in the TFEU. This right to choose its activity freely is part of the EU's liberal rationale and involves the removal of all unjustified barriers (rules, conditions, formalities, etc.) that restrict the free meeting of minds between employers and employees. It requires not only a prohibition of all discrimination in employment but also the right of employees to be recruited on the sole consideration of their professional skills and abilities. In this regard, it appears that the 2015 FIFA Regulations have the effect of limiting this freedom to the extent that it requires that employed players only contract, on risk of sanctions, with duly registered agents and signatories of the famous "intermediary declaration". The sanctions are also applicable to employers (the clubs). Indeed, it could well happen that a player may not be recruited by a club on the grounds that his agent is not in compliance with the FIFA Regulations.

For its part, Article 16 of the Charter of Fundamental Rights confirms one of the essential principles that constitute European law, the freedom of enterprise being a cornerstone of the single market. Like the freedom of movement, it is not absolute and may be subject to restrictions. However, these have to satisfy the conditions of Article 52 of the Charter which states, by adopting the well-known method of freedoms set out in the TFEU that "*any limitation on the exercise of*



*rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*". Indeed, in the light of this principle of freedom of enterprise, it appears evident that the 2015 FIFA Regulations, in particular the stipulations regarding the registration of intermediaries and those concerning disciplinary sanctions, define unjustified restrictions on the freedom of enterprise. By delaying the start of a business activity, by complicating each operation, by rendering more cumbersome the exercise of the business of sports agent by a system of stepped declarations, the FIFA Regulations could discourage persons wishing to set up sports agency businesses without this being justified by a very questionable desire to clean up the profession and protect its users. Once again, the FIFA Regulations do not pass the proportionality test.

## B.2 *Right of Workers to Free Placement*

Is Article 7.5 of the FIFA Regulations on Working with Intermediaries compatible with the fundamental principles of European social law? In our opinion the answer to this question can only be negative.

According to this Article, "*any payment for the services of an intermediary shall be made exclusively by the client of the intermediary to the intermediary*". This provision applies together with what might be called a strict prohibition on payment and, by correlation, the prohibition on the agent to be paid by anyone other than his principal. The fact that Article 7.6 stipulates that "*after the conclusion of the relevant transaction and subject to the club's agreement, the player may give his written consent for the club to pay the intermediary on his behalf*" does not alter this prohibition in principle. It simply sets out an exception that can only take place in one situation. Before his intervention has achieved its goal, the agent is unable to "offer" his services to his principal, the player, and have the cost borne by the club. Above all, the debt for the payment of the commission owed to the agent is from the outset part of the principal's assets (usually the player), even though the parties subsequently agree that the commission will be paid in whole or only in part, by the club.

In fact, where the placement of employees is involved, one of the principles is that the costs of the placement are borne entirely by the employer without any payment being due by the employee.<sup>103</sup>

Article 7 of Convention C181 on private employment agencies signed in 1997 under the auspices of the International Labour Organisation stipulates:

"1. Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.

<sup>103</sup> J.-M. Marmayou et F. Rizzo, "L'agent sportif au centre des intérêts", Cah. dr. sport n°32, 2013, 37.

2. In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies.
3. A Member which has authorized exceptions under paragraph 2 above shall, in its reports under article 22 of the Constitution of the International Labour Organization, provide information on such exceptions and give the reasons therefore”.

In other words, one of the principles within the meaning of this international convention<sup>104</sup> is that the costs of any placement are not charged to the employee, although a derogation may be agreed, but only if this is in the interests of the employee. In this case, it is difficult to see how it would be in the interests of a professional sportsman to bear the costs of his placement.

Similarly, the Code of Conduct of the International Confederation of Private Employment Agencies (CIETT) explicitly prohibits any requests for payment from workers:

“Principle 3 – Respect for free-of-charge provision of services to jobseekers”.

“Private employment services shall not charge directly or indirectly, in whole or in part, any fees or costs to jobseekers and workers, for the services directly related to temporary assignment or permanent placement”.

Above all, it has to be noted that Article 29 of the EU Charter of Fundamental Rights confers on this “free of charge” principle a fundamental workers’ right: “*Everyone has the right of access to a free placement service*”.

Finally, a free placement service is a principal from which there can be no derogation unless this is in the interests of the employee in question.

Once the placement has been completed, and when the employee has accepted by a binding and clear consent to pay all or part of the placement agent’s remuneration, it has to be assumed that he has realised that it is in his interest to do so. However, when the FIFA Regulations, or a law,<sup>105</sup> let it to be understood that the remuneration automatically constitutes a debt on the assets of a sportsman who appoints an agent to find him a contract, the interests of the sportsman can no longer be assumed. Even less so when practice demonstrates the contrary: sports persons refuse to bear the costs relating to their placement.

It would be preferable if the rules governing sports agents resembled those applicable to the business of artists’ agents, and mentioned that the agent’s commission will be paid by the employer.

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<sup>104</sup> This Convention was ratified by 30 countries including Spain, Belgium, Italy, Japan, Poland, and Uruguay. However it has still not been ratified by France, although it has to be said that France has ratified Conventions C2 on unemployment (1919), C88 on employment services (1948) and C96 on paid placement businesses (1949) which all set out the principal of employee placement services free of charge.

<sup>105</sup> See the French law: art. L.222-17, C. sport.

The view that sportspersons can largely afford the costs of their investment and must therefore bear the burden of the remuneration of their agent will certainly be opposed. However, those who put forward this argument only consider sportspersons to be the biggest stars, those who have the largest salaries. But the vast majority of sportsmen and sportswomen, who use an agent, are those with the greatest need (lower division footballers) and earn far from huge salaries. They have relatively short careers and it would significantly reduce their income if the costs of their placement were to be charged to them as a matter of principle. The sportsperson in general should be considered an employee like any other and deserves the same protection, and possibly even greater protection.

### *B.3 Non-disclosure and Privacy*

Is a private organisation able to require its members to publish economic and financial information on the contents of the agreements that they pass with their contracting parties outside the organisation? Can FIFA, as it is expecting to do under Article 6 of its Regulations on Working with Intermediaries, oblige players and/or clubs to disclose to their respective associations (cf. article 3 paragraphs 2 and 3) the full details of any agreed remunerations or payments whatsoever their nature made to an intermediary? Can FIFA impose on its national federations a requirement to publish the details of transactions involving the agents, the total amount of the remuneration or payment made to them by the players and the clubs, and the total cumulated amount involving all the players, and the total cumulated amount by each club?

This requirement may be considered legitimate in a society where transparency<sup>106</sup> appears to be a cardinal virtue. Since the footballing world is accused of money laundering, tax fraud and corruption, the transactions that take place in this world should be placed under the spotlight so that the public at large are informed of the sums that leave the clubs and the players only to pass into the hands of an agent. Ultimately, this measure will match the societal movement that multiplies the obligations for economic transparency in times of crisis and the measures to fight against a lack of transparency in the business world and particularly that of international finance.

But on the other hand would not the injunction confront the other facet of the law that allows an entity, whether an individual or corporation, to live and act in secret?

Indeed, although it is difficult to argue that a non-disclosure right, especially in business matters, can be directly guaranteed by EU law. It has to be recognised that a rather effective form of the law on non-disclosure can be found in the wake of the law on personal privacy.<sup>107</sup> Although transparency doubtless authorises the

<sup>106</sup> Rapport annuel de la Cour de cassation 2010 : Le droit de savoir.

<sup>107</sup> About this issue : P. Spinosi, « Le secret des affaires et le secret du patrimoine face aux droits et libertés individuels », *Dr. et patr.*, 2014, 233. – V. Magnier, *Transparence du patrimoine et société*,

right to information that can be broken down into a freedom of expression and a right to access information on the grounds of a public need, this cannot be taken as total or absolute. It has to have boundaries and these are formed by the laws on personal privacy, certainly not absolute, but just as fundamental.

On the one hand therefore the right to privacy including the right to business secrets<sup>108</sup> is one facet. It is guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union, it benefits both individuals and corporate entities and even breaks down according to the European Court on Human Rights into a right to the protection of the “*business*” domicile.<sup>109</sup> The European Court of Justice<sup>110</sup> has also recognised the right to the privacy of business premises. It has even considered that it cannot be considered that the notion of privacy has to be interpreted as excluding business activities of individuals as well as corporate entities.<sup>111</sup> It has already recognised “the legitimate interest of undertakings to prevent their business secrets from being revealed” and that “business therefore benefit from a special protection by the application of a European law ‘general principle’”.<sup>112</sup>

On the other hand, the right to information draws its strength from Article 10 ECHR, on the freedom of expression. This gives journalists the right to inform the public on any subject that might interest them and even obliges states to take positive actions in some areas (such as the environment) so that the public is properly informed, and the activities of private individuals and whistle-blowers are sufficiently protected.<sup>113</sup> In order to “*strike a fair balance when protecting two values guaranteed by the Convention*”,<sup>114</sup> it is now accepted that journalists and

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RLDA 2012/68, 107. – M.-C. de Lambertye-Autrand, *Transparence du patrimoine et droits fondamentaux*, RLDA 2012/68, 79.

<sup>108</sup> F. Moulière, « Secret des affaires et vie privée », D. 2012, 571.

<sup>109</sup> ECHR, 16 apr. 2002, Case 3797/97, *Société Colas Est et autres v/ France*, Rec. ECHR 2002, III, § 41. – ECHR, 4<sup>e</sup> sect., 16 oct. 2007, Case 74336/01, *Wieser et Bicos Beteiligungen GmbH v/ Austria*, § 45. – ECHR, 1<sup>e</sup> sect., 3 july 2012, Case. 30457/06, *Robathin v/ Austria*, § 39. – In France, this right was recognised by the Conseil constitutionnel (Cons. const., 29 dec. 1983, décis. n°83-164 DC, JCP 1984. II. 20160, R. Drago et A. Decocq) and by The Cour de cassation (Cass. crim., 23 mai 1995, Bull. crim. n°193 ; RTD civ. 1996, 130, J. Hauser ; Rev. sociétés 1996, 109, B. Bouloc).

<sup>110</sup> ECJ, 22 oct. 2000, Case C-94/00, *Roquette SA*, § 29.

<sup>111</sup> ECJ, 14 febr. 2008, Case C-450/06, *Varec SA v Belgique*, § 48. Note that European Directive (Dir. n°2002/58/EC dated 12 July 2002) concerning the processing of personal data and the protection of privacy in the field of electronic communications recommends that an identical protection of privacy and personal data should also apply to individuals and corporate entities (consid. 12).

<sup>112</sup> ECJ, 24 june 1986, Case 53/85, *AKZO Chemie BV & AKZO Chemie UK Ltd. v/ Commission*, § 28. – ECJ, 19 may 1994, *SEP v/ Commission*, Case C-36/92 P, [1994] ECR I-1991. – *Adde* : ECJ, 1 july 2008, *Chronopost & La Poste v/ UFEX e. a.*, Case C-341/06 P & C-342/06 P, [2008] ECR I-4777.

<sup>113</sup> ECHR, sect. 2, 10 jan. 2012, Case 30765/08, *Di Sarno et a. v/ Italia*. – ECHR, sect. 3, 30 march 2010, Case 19234/04, *B cil v/ Roumanie*. – ECHR, sect. 3, 27 jan. 2009, Case 67021/01, *T tar v/ Roumanie*. – ECHR, 5 dec. 2013, Case 52806/09 & 22703/10, *Vilnes & a. v/ Norvège*.

<sup>114</sup> ECHR, gr. ch., 7 febr. 2012, Case 39954/08, *Axel Springer AG v/ Germany*, § 84.

whistle-blowers can unveil secret practices if the information revealed “*contributes to a public discussion on an issue of general interest*”<sup>115</sup> or if “*citizens have a major interest in seeing*”<sup>116</sup> the said information<sup>117</sup> “*disclosed or published*”.

It is therefore appropriate to question the legitimacy of FIFA’s right to claim for itself a freedom that benefits journalists (unthinkable) and whistle-blowers (why not?). The question arises as to whether the information on the amounts paid by clubs to agents and correspondingly the amount collected by these agents is of sufficient public interest to justify the setting aside of the right to privacy. The question also arises as to whether such information results from sufficient public interest to require States to take positive transparency actions, such as on environmental matters.

The legal answer would appear to be obvious. FIFA does not have this authority. However, it has adopted a political standpoint: it has raised this question in order to place it in the spotlight, present it as a problem, place it at the centre of debates, etc., and in the longer term require the Court of Justice to rule and state with certainty that it is not for FIFA to deal with this problem but rather to confirm that the problem exists and has to be dealt with by the States, either directly or indirectly, with the assistance of private instances (the national sports federations) to which they will grant public power prerogatives.

However, this is to forget that although the right to privacy may also yield before the needs of the public authority, it will in any event enjoy the benefits of procedural safeguards. Even before public interests as imperative as the need for truth in criminal cases and the effectiveness of the tax legislation, the right to non-disclosure would only be waived when this becomes absolutely necessary (proportionality test) and that it is accompanied by the right to effective remedies<sup>118</sup> and the right to a fair trial.<sup>119</sup>

To the simple yardstick of the proportionality test, we can already answer that the transmission of contracts to a specialized supervisory authority (but held in secret) would seem to be more effective and less intrusive than the indiscriminate public disclosure of detailed financial information.

From all this it results that the 2015 FIFA Regulations do not fully comply with the legal requirement of a respect for privacy.

However, it can be further underlined that this regulation rightly stipulates that the agent has signed an “intermediary declaration” in which he agrees “*that the*

<sup>115</sup> ECHR, gr. ch., 21 jan. 1999, Case 29183/95, *Fressoz et Roire v/ France*. – ECHR, sect. 1, 1 march 2007, Case 510/04, *Tonsbergs Blad AS & Haukom v/ Norway*.

<sup>116</sup> ECHR, gr. ch., 12 febr. 2008, Case 14277/04, *Guja v/ Moldavia*. – ECHR, sect. 5, 21 july 2011, Case 28274/08, *Heinisch v/ Germany*.

<sup>117</sup> This search for a balance between the right to privacy in business matters and the freedom of expression can be found in the Directive Proposal on the protection of expertise and business secrets against the illegal obtaining, using and revealing information, COM(2013) 813 final. – *Adde* : J. Lapousterle, “Les secrets d’affaires à l’épreuve de l’harmonisation européenne”, D. 2014, 682.

<sup>118</sup> Art. 13, Conv. PHRFF.

<sup>119</sup> Art. 6, Conv. PHRFF.

*association concerned holds and processes all data for purposes of publication*". In fact, the right to privacy, in the wake of which is the right to non-disclosure, is a self-defining right, the extent of which is determined by the person himself who decides whether or not to include a particular item of information in his own sphere of privacy. This argument might have some force if the sports agent were perfectly free to define the boundaries of his private world, if he were not placed under an obligation, and if his signature were not a pre-requisite for him entering this market. Consequently, this pseudo-consent does not protect the system, the intrusiveness of which goes well beyond what is required.

### *Conclusion*

On completion of this paper, we believe that the new FIFA Regulations on Working with Intermediaries are not compatible with EU law for 3 reasons.

First, they are contrary to European competition law since they realize an hardcore restriction unjustifiable under Article 101 TFEU and an abuse of dominance under Article 102 TFEU.

Second, they cause intolerable harm to three freedoms: Free Movement of Capital, Workers Freedom of Movement and Freedom of Establishment and to Provide Services.

Third, they violate the fundamental rights guaranteed by the EU's Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Specifically, they undermine the Freedom to Work and Freedom of Enterprise, the right of workers to a free placement and the right to privacy.