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# Promoting and Supporting Good Governance in the European Football Agents Industry

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Europska komisija

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Europska komisija

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# *Promoting and Supporting Good Governance in the European Football Agents Industry*

# *FINAL REPORT*


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# *1.*

# *Preface*

The project, '*Promoting and Supporting Good Governance in the European Football Agents Industry*' received financial support from the EU's Erasmus+ Programme (Collaborative Partnerships). The project commenced in January 2018 and concluded in December 2019. We are grateful for the support provided by the Erasmus+ Programme.

The purpose of this Final Report is to present findings regarding the operation of the 2015 FIFA Regulations on Working with Intermediaries (RWWI), particularly in relation to the implementation of the regulations at National Association level across the territory of the EU. In this regard, this Final Report presents a comprehensive picture of how intermediary regulations have historically developed and how the 2015 RWWI have operated across the territory of the EU, encompassing 31 National Associations.

Our study supports key private stakeholders and public policymakers by providing evidence-based options and recommendations in terms of future regulatory initiatives in the sector informed by principles of good governance. In that regard, the scheduling of our work was adjusted to complement the work of the FIFA Transfer System Task Force that was established in order to consider reforming the RWWI. Therefore, this Final Report is, in large measure, an aggregated account of our Interim Report and Thematic Conclusions published throughout the duration of the project.

The content of this Report has been informed by primary research undertaken by the research team, a national expert questionnaire, a stakeholder survey and discussions held in a series of stakeholder workshops held throughout Europe, known as Multiple Sports Events – MSEs.

In order to improve the readability of this Report, we only provide a summary of the content of our National Reports which details the intermediary regulations in the 31 national football associations surveyed. Full copies of these Reports can be consulted at: www.ehu.ac.uk/eufootball

We have a large number of people and organisations to thank. They are acknowledged throughout this Report. Specifically, we wish to highlight the co-operation and support of the football stakeholders, namely the global and European governing bodies of football (FIFA and UEFA), the national football associations, the European Football Agents' Associations (EFAA) and its national affiliates, the European Club Association (ECA) and its national members, the European Leagues and its member leagues, and FIFPro, the world football players' union and its member associations. We owe gratitude to our national experts for providing details of the National Association intermediary regulations. They are listed in Appendix 1.

# 2.

# *Introduction*

The project, '*Promoting and Supporting Good Governance in the European Football Agents Industry*' received financial support from the EU's Erasmus+ Programme (Collaborative Partnerships). The project commenced in January 2018 and concluded in December 2019. The project is led by Edge Hill University in the UK (represented by Professor Richard Parrish and Dr Andrea Cattaneo) and the project partners are the University of Umeå in Sweden (Professor Johan Lindholm), the German Sport University of Cologne (Professor Jürgen Mittag), the Universidad Carlos III de Madrid (Professor Carmen Perez-Gonzalez) and the University of Rijeka, Faculty of Law in Croatia (Assistant Professor Vanja Smokvina). We are grateful to Maximilian Seltmann from the German Sport University for his assistance.

The focus of the project is to undertake evidence-based research in order to promote and support good governance in the context of the regulation of football players' agents (referred to as 'intermediaries' in the 2015 FIFA Regulations on Working with Intermediaries - RWWI) in the EU. Our research has informed how private actors (the football stakeholders) and public actors (national and EU level policymakers) approach the issue of players' agents regulation. By extension, our research will benefit other sports wanting to learn from the experience of football.

A football agent is a natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement. One might therefore observe that an agent is merely an intermediary ensuring that the supply and demand for labour within football is met. However, many agents offer related services, such as scouting, managing the career of the player and any other service the parties agree to. Not only can an agent help secure a player or a club a better 'deal' in contract or transfer negotiations, particularly if the player is at a disadvantage in terms of equality of negotiating arms with a club, but an agent can also help a player focus on his or her primary task of playing football by assisting with 'off-the-field' issues.

Agents have been a part of the football industry for many years, but their activity is currently at its height. Two reasons for this are the increase in the international migration of football players following the liberalisation of the European player market following the European Court's judgment in *Bosman*[1] in 1995 and the decision of FIFA in 2015 to reform the players' agents regulations, which resulted in an increase in their activity.

The work of some agents has attracted criticism. In particular, it has been observed that standards of professionalism within the sector can be poor. In its 2011 'Communication on Sport', the European Commission explained that these concerns tend to be of an ethical and legal nature including financial crime and the exploitation of young players.[2] Some stakeholders are also concerned that large sums of money are 'leaving the sport' through agent

[1] Case C-415/93, *Union Royale Belge Sociétés de Football Association and others* v *Bosman and others* [1995] ECR I-4921.
[2] European Commission (2011) Developing the European Dimension in Sport (the Communication on Sport), COM(2011) final.

fees and that these fees are undeserved in relation to the services provided by agents. Although criminal laws are applicable in each Member State and can act to deter illegal activities, it is a commonly held belief in football that the activities of agents require specific regulation so as to safeguard against poor practice within the sector.

The task of regulating football agents has historically fallen to the Fédération Internationale de Football Association (FIFA), the world governing body of football. In doing so, FIFA has, since the early 1990s, adopted a series of Players' Agents Regulations that placed qualitative restrictions on access to the profession, such as the need to hold a licence issued by the competent national football association following the taking of an examination.

In 2015, FIFA fundamentally adjusted its approach with the adoption of the FIFA Regulations on Working with Intermediaries (RWWI). The post-2015 system has dispensed with this licensing system, opening up access to the profession, and thereby causing some good governance concerns regarding standards of professionalism. At the same time, the RWWI have further shifted the regulatory emphasis from FIFA to the National Associations and this raises questions as to the functioning of the national markets including issues of consistency, uniformity, enforcement, and the compatibility of National Association regulations with EU law.

Our project is timely for a number of reasons including:

- Ongoing concern regarding the operation of some agents;
- A fundamentally different regulatory landscape being introduced in 2015 with the adoption of the RWWI;
- The obsolescence of the EU funded Study into Sports Agents in Europe which was published in 2009 and hence does not consider the effect of the 2015 FIFA RWWI;
- A sufficient number of transfer windows have elapsed since the adoption of the 2015 RWWI meaning that significant conclusions to be drawn.
- The decision of FIFA to replace the 2015 RWWI, with effect from 2020, and the need to have independent research informing that process.

***Project Aims***

1. Establish whether the RWWI, and its implementation at National Association level in the EU, promotes or reduces the effective regulation of agency work and therefore enhances or diminishes core good governance criterion such as professionalism, transparency, integrity, stakeholder representation, child protection, and ultimately the proper functioning of the sector.
2. Offer key private stakeholders and public policymakers evidence-based options and recommendations in terms of future regulatory initiatives in the sector informed by principles of good governance. Specifically, the project will establish whether the current system of self-regulation is the most appropriate model going forward or if new

forms of enhanced self-regulation or a public/private partnership (co-regulation and public regulation) can better promote good governance and effective regulation.

3. Promote dialogue between stakeholders and key actors with a view to promoting better understanding of the sector, sharing best practices and inculcating a culture of good governance within sports bodies. This approach is justified given that the promotion of dialogue is a key feature of EU sports policy as articulated by Article 165(2) TFEU and as stated in successive EU policy documents on sport.

***Project Methodology***

The five project partners were selected for their sports law and policy knowledge and their national and regional expertise. Each partner was assigned a region of responsibility covering up to 8 national football associations (National Associations). Each partner had responsibility for producing a regional report covering the legal and regulatory landscape in their respective regions given FIFA's requirement that each National Association adopt national regulations. These regional reports fed into the production of an Interim, published in August 2018, and this Final Report.

*Table 1. Project Partners Regions of Responsibility*

| **Participant:** | **Region of responsibility:** | **Countries included:** |
|---|---|---|
| Edge Hill University<br><br>Professor Richard Parrish, Jean Monnet Chair of EU Sports Law and Policy ('Project Lead'). Supported by Dr Andrea Cattaneo.<br><br>Expertise: Law, policy, governance. | North-western Europe | UK (Football Associations of England, Wales, Scotland, and Northern Ireland), Republic of Ireland, and the Netherlands |
| Universidad Carlos III de Madrid<br><br>Professor Carmen Perez-Gonzalez<br><br>Expertise: Law, policy, governance. | Iberia and Western Europe | Spain, Portugal, France, Luxembourg and Belgium |
| German Sport University Cologne<br><br>Professor Jürgen Mittag, Jean Monnet Chair of Political Science and Sport. | Central Europe | Germany, Austria, Hungary, Slovakia, Czech Republic, and Romania |

| | | |
|---|---|---|
| Expertise: Policy & governance. | | |
| University of Umeå<br><br>Professor Johan Lindholm<br><br>Expertise: Law, policy, governance. | Baltics | Denmark, Sweden, Finland, Estonia, Latvia, Lithuania, and Poland |
| University of Rijeka<br><br>Assist. Prof. Vanja Smokvina<br><br>Expertise: Law, policy, governance. | Southern and South-eastern Europe | Italy, Slovenia, Croatia, Malta, Cyprus, Greece and Bulgaria |

The specific research methods employed and outputs produced are:

- The project team produced a 'stakeholder survey' that was distributed for completion amongst the relevant stakeholders in professional football. The 'stakeholder survey' established the views of the stakeholders on the operation of the RWWI. For the purposes of our project, the key stakeholders in professional football are defined as the global and European governing bodies of football (FIFA and UEFA), the national football associations, the European Football Agents' Associations (EFAA) and its national affiliates, the European Club Association (ECA) and its national members, the European Professional Football Leagues (EPFL – now European Leagues) and its member leagues, and FIFPro – the world football players' union and its member associations.

- Complementary to the stakeholder survey, the project team also produced a 'national expert questionnaire' which was completed with the purpose of objectively evaluating the pattern of regulation at a national level for all 28 EU Member States (effectively 31 countries given that the UK comprises 4 National Associations). Where expertise allowed, this national expert questionnaire was completed by the partners. However, for some countries in the partners' allocated regions of responsibility, linguistic or other reasons necessitated the partners subcontracting this task to independent national experts.

- On the basis of the responses to the 'stakeholder survey' and 'national expert questionnaire', the project team produced an 'Interim Report' (published in August 2018) that compiled, analysed, and extrapolated all the key findings across a whole of EU level, and which in turn was distributed to the football stakeholders and published on the project website.

- Throughout the duration of the project, the partners organised five regional multiplier sport events (MSE) where the results of the Interim Report were presented and discussed amongst the assembled stakeholders and possible solutions to problems identified.

- Towards the end of the project and following the conclusion of the MSE seminars, the project team produced this Final Report. The Final Report was published on our website and launched at a final MSE flagship event to be attended by key European stakeholders in professional football.

***Summary of Stakeholder Workshops (MSEs)***

*London, September 27th 2018*

Our first event took place in Russell Square, London. After a welcome and a short overview of the Erasmus+ football agents project, Professor Richard Parrish handed over to James Johnson, Head of Professional Football at FIFA and chair of the FIFA Transfer System Task Force. Mr Johnson discussed the work of the FIFA Transfer System Task Force and outlined some proposals for agents regulation reform being discussed within it. Representatives from the football world reacted to the presentation, including Dr Roberto Branco Martins from the European Football Agents Association (EFAA), Mr Daan de Jong from the European Club Association (ECA) and Mr Wil Van Megen and Mr Tony Higgins from FIFPro. Nick de Marco QC then presented a number of legal issues for consideration should the new regulations opt for representation and remuneration restrictions. A very lively discussion then ensued with participation from sports governing bodies, academia and many of the leading sports law chambers and law firms from the UK and Europe.

*Madrid, December 14th 2018*

The second MSE was hosted by ISDE Madrid. After a welcome reception and an overview of the Erasmus+ Project given by Professor Carmen Pérez, Julien Zylberstein, Head of EU & Stakeholders Affairs at UEFA and member of the FIFA Transfer System Task Force, presented an update of the work of the FIFA Transfer System Task Force. Dr Alberto Palomar, Professor of Administrative Law and Associate at Broseta Lawyers, Dr Jose Rodriguez, Associate at R&C Lawyers, and Ms Laura Hernández, Secretary General of the Spanish Association of Football Agents, reacted to Mr. Zylberstein's analysis. The presentations were followed by a stimulating discussion with participation of Dr Roberto Branco Martins from the European Football Agents Association (EFAA), Mr Daan de Jong from the European Club Association (ECA), Wil van Megen (FIFPRO), and representatives of academia and sports law firms from Spain, Italy and France.

*Cologne, February 1st 2019*

The third MSE took place at German Sport University, Cologne. The event placed its emphasis on the issue of *professional standards: licensing and qualification*. After a panel with national experts from various Central and Eastern European countries shedding light on the implementation of and issues arising from the 2015 FIFA Regulations on Working with Intermediaries, the project team presented its thematic conclusions on this matter (Conclusion on Professional Standards: Licensing and Qualification). The results and future scenarios for the regulation of players' agents were commented by stakeholders from the national level, with some focus on Germany, and the international level. The intense discussion among the participating academics, representatives of clubs, associations and players' unions as well as

leading sports lawyers provided important incentives for the further course of the research project and the reform of the regulations alike.

*Malmö, April 24th 2019*

The fourth MSE took place in Malmö and was hosted by Umeå University in cooperation with Malmö University and Malmö FF. The event focused on minor players and consisted of three sessions. The first session focused on young football players, the protection of children's rights in football and best practice in the field on the basis of presentations by Dr Eleanor Drywood and Dr Serhat Yilmaz. The second session began by a presentation of the project and its interim conclusions regarding young players and agents. This was discussed by a panel consisting of Ondrej Zvara (EFAA), Jes Christian Fisker (DBU) and Tobias Tibell (SvFF) together with the other event participants. The third and final session concerned the role of clubs based on a presentation by Malmö FF regarding how they work with and protect the interests of minor players.

*Rijeka, June 10th 2019*

Our fifth MSE took place in Rijeka, Croatia. The focus of the event was sanctioning and dispute resolution. Professor Parrish provided an overview of the project and agent and former Croatia national team and German Bundesliga clubs' player, Jurica Vranješ, provided an insight into the work of an agent. A roundtable discussion place on arbitration involving Jacopo Tognon (University of Padova and CAS arbitrator), Fabio Iudica (University of Milano and CAS arbitrator), Petra Pocrnić-Perica (NOC of Croatia and CAS arbitrator), Georgios Elmalis (Basketball Arbitration Tribunal) and Tomislav Kasalo (FIFA DRC). A second roundtable discussion took place on the topic of the future of agents regulation involving: Stefano La Porta (FIGC), Vladimir Iveta and Tanja Peraković (HNS), Mladen Čičmir (NZS), Dejan Stefanović (WPA), Alexandra Goméz-Bruinewoud (FIFPro), Dr Roberto Branco Martins (EFAA) and ECA members HNK Rijeka and NK Maribor.

*Manchester, November 1st 2019*

Our final, and flagship, event took place at the Etihad Stadium, home of Manchester City FC. An audience of approximately 200 heard Professor Parrish and Emilio Garcia Silvero (FIFA Chief Legal Officer) discuss the operation of the 2015 RWWI and the proposed reform package to the regulations. A roundtable discussion place on the reforms including contributions from Patricia Silva Lopes (Senior Legal Counsel, Sporting Club de Portugal), Professor Stephen Weatherill (University of Oxford), Dr Roberto Branco Martins (EFAA) and David Newton (The Football Association).

# 3.

# *Intermediaries: The EU Dimension*

### *EU Sports Law and Policy*

EU law regulates economic activity. It does so in order to break down obstacles to free trade. The EU considers free trade essential to promote economic benefits which, in turn, serves to fulfil the EU's overarching mission to promote peace and stability in Europe. As was established in the case of *Walrave*, sport is subject to EU law "*only in so far as it constitutes an economic activity*".[3] The Court went on to find that the prohibition on nationality discrimination contained in EU law "*does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity*".[4] The *Walrave* judgment gave birth to the so called 'sporting exception' in European law in which the non-economic aspects of sport, or those aspects carrying economic effects but motivated by purely sporting interest, fell outside the reach of the Treaty prohibitions.[5]

The EU's treatment of sporting rules evolved with the judgment of the European Court in *Bosman* in 1995. In this case, the Court interrogated a number of justifications presented in support of certain elements of the international transfer system for players and the use of nationality quotas in European club football. In rejecting these justifications, the Court signalled a more hard-line approach to sporting rules that conflicted with EU law, although the Court did acknowledge that sport possessed certain specificities that were worthy of protection. In particular, the Court recognised that "*…the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate*".[6]

In 2000, the Court introduced new complexity into its sports jurisprudence. In *Lehtonen*, a case involving the use of transfer windows in basketball, the Court favoured an orthodox objective justification test to establish that transfer windows did indeed restrict a sportspersons freedom of movement. This restriction, however, could in principle, and subject to proportionality control, be justified so as to avoid late season transfers which could alter the sporting strength of a team, thus calling into question the proper functioning of the championship as a whole.[7]

The Court did not follow the same approach in *Deliège,* a case concerning selection criteria in judo.[8] The Court determined that certain sporting rules, such as the contested selection criteria, are "*inherent in the conduct of an international high-level sports event*" and therefore are

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[3] Case 36/74, *Walrave and Koch* [1974] ECR 1405, paragraph 4.
[4] Case 36/74, *Walrave*, at paragraph 8.
[5] For discussion on *Walrave* see, Parrish, R. (2012), *Walrave*, in Anderson, J. Landmark Cases in Sports Law, The Hague: TMC Asser Press. For wider treatment of the sporting exception see Parrish, R. & Miettinen, S (2008), *The Sporting Exception in European Union Law*, The Hague: TMC Asser Press and Weatherill, S. (2018), *EU Sports Law* in Anderson et al Research Handbook on EU Sports Law and Policy, Edward Elgar.
[6] Case C-415/93, *Bosman*, at paragraph 106.
[7] Case C-176/96, *Lehtonen v Federation Royale Belge des Sociétés de Basket-Ball ASBL* [2000] ECR I-2681.
[8] Joined cases C-51/96 and C-191/97, *Deliège* v *Ligue francophone de Judo et disciplines Associeés Asb* [2000] ECR I-2549, paragraph 41.

incapable of constituting a restriction of free movement even if they in fact involved some restrictive criteria being adopted.[9] So whereas in *Lehtonen* a contested rule could escape condemnation under EU law if it could be justified and remained proportionate, in *Deliège* the contested rule did not even amount to a restriction if it derives from a need inherent in the organisation of sport. *Deliège* was an expression of an approach favoured by the Commission in *ENIC*, an earlier competition case involving multiple club ownership rules in football.[10] It was also an approach favoured by the Court in its later, and seminal, case of *Meca-Medina*.[11]

In *Meca-Medina*, a case involving doping sanctions being applied to two swimmers, the Court dealt a near fatal blow to the *Walrave* approach by stating that "*it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down*".[12] In coming to a view on whether a contested sporting rule was prohibited by EU law, in this case EU competition law, the Court stated that "*account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives… and are proportionate to them*".[13] The contested anti-doping rules did not infringe the Treaty's competition prohibitions because they were considered "*inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes*".[14]

A combined reading of *Walrave*, *Deliège* and *Meca-Medina* is good authority for the proposition that should intermediary regulations be challenged under either free movement or competition law, the deciding body would first seek to establish if economic activity was being carried out, which is self-evident given that for a fee an intermediary assists in negotiating a transfer or a contract renewal. Second, it must then be established what the legitimate sporting objectives pursued by the contested rule are. Third, the deciding body would explore whether the consequential effects restrictive of free movement or competition are inherent in the pursuit of those objectives before finally assessing whether the rule remains proportionate in the pursuit of the stated objectives.

The *ISU* decision of the European Commission in December 2017 confirms that this approach is now favoured for sports cases.[15] In this case, the Commission found that the International Skating Union's eligibility rules created significant barriers for third parties wanting to attract skaters to events organised independently of the ISU and in doing so they limited skaters' commercial freedom to earn income from events that were not authorised by the ISU. According to the Commission, the system of sports arbitration, including the exclusive jurisdiction of the Court of Arbitration for Sport (CAS), reinforced these anti-competitive effects.

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[9] Joined cases C-51/96 and C-191/97, *Deliège,* paragraph 64.
[10] Case COMP/37 806: *ENIC/UEFA*. See Commission Press Release IP/02/942, 27. June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.
[11] Case C-519/04 P, *David Meca-Medina and Igor Majcen* v *Commission* [2006] ECR I-6991.
[12] Ibid., paragraph 27.
[13] Ibid., paragraph 45.
[14] Ibid.
[15] Case AT.40208 – *International Skating Union's Eligibility Rules*, 08/12/2017.

The increasing involvement of EU law to settle disputes in sport has generated much debate on whether the EU law protects or undermines the autonomy and specificity of sport. The jurisprudence of the Court on this matter is sufficiently developed to draw some conclusions. As was discussed above, even though *Bosman* was a defeat for the football authorities, the Court did acknowledge the legitimacy of sports bodies developing rules that promote competitive balance and youth development.[16] In *Lehtonen*, the Court recognised the need to protect the proper functioning of sporting competition.[17] In *Meca-Medina,* the Court recognised as legitimate the need to "*combat doping in order for competitive sport to be conducted fairly*", safeguard "*equal chances for athletes, athletes' health*", ensure "*the integrity and objectivity of competitive sport*" and protect "*ethical values in sport*".[18] In *Bernard,* it was decided that a system of training compensation in sport, which restricts the freedom of movement of players, could be justified with reference to the need to ensure that the objective of educating and training young players is secured.[19]

The above list of recognised legitimate sporting objectives is not a closed one and it is for the Court and the Commission to expand upon it through future jurisprudence and decisional practice. In that regard, the adoption of Articles 6 and 165 TFEU adds to the debate by granting the EU its first express powers in the area of sport. Article 6 TFEU establishes sport as a third tier supporting competence of the Union. Unlike in areas in which the EU has exclusive competence, or shares this competence with the Member States, supporting competences are limited to actions to support, coordinate or supplement the actions of the Member States. Sport is located in subsection (e): education, vocational training, youth and sport.

The first paragraph of Article 165 TFEU suggests that the list of sporting objectives can be expanded as it provides that the EU "*shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport…*" This wording does not unequivocally establish that, "*taking account of the specific nature of sport*" is a horizontal obligation, meaning that other EU powers such as free movement and competition law must be balanced against the sporting objectives. However, given the Court's treatment of sport in the cases reviewed above, which were decided prior to the entry into force of Article 165, it seems logical to assume that the Court will continue to recognise the specificities of the sector.

The second paragraph of Article 165 has relevance for intermediary regulations. It establishes that

> "*Union action shall be aimed at: developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*".

Fairness and openness are terms that can be used to both support and attack sporting rules.[20] For example, one concern relating to the operation of the RWWI at National Association level

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[16] Case 415/93, *Bosman*, at paragraph 106.
[17] Case C-176/96, *Lehtonen*, at paragraph 54.
[18] Case C-519/04 P, *Meca-Medina*, at paragraph 43.
[19] Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United* [2010] ECR I-2177.
[20] See for example, Weatherill, S. (2010), *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law*, The International Sports Law Journal, 2010/3-4: 11-17. Indeed, UEFA has already articulated such a plea: UEFA's Position on Article 165 of the Lisbon Treaty, accessed at: http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/57/91/67/1579167_DOWNLOAD.pdf, last accessed 27 September 2019.

is the fragmented nature of national intermediary regulations that potentially make the single market less open in terms of the provision of intermediary services. Reference to the protection of minors in Article 165(2) clearly has relevance to intermediary regulations as this is an issue central to the RWWI.

Article 165 provides for a supporting competence and its fourth paragraph specifically rules out the harmonisation of national laws and regulations relevant to sport. Throughout the EU, some Member States regulate the operation of intermediaries through national legislation. Article 165 cannot be used as the legal basis to harmonise these provisions. However, this does not exclude the possibility of the European Commission proposing sports related laws under other legal bases in the Treaty, such as Article 114 TFEU which concerns the adoption of legal measures necessary for the establishment and functioning of the internal market. Article 165(4) could be used as the basis for issuing a non-binding 'Recommendation' on intermediary regulations to the Member States.

In preparation for the entering into force of Article 165 in 2009, the Commission embarked on a process of identifying the European dimension in sport and how to address key issues facing sport, one of which was the promotion of good governance in sport, an issue closely connected with the regulation of intermediaries. In the 2007 White Paper on Sport, the EU's role in 'good governance' was described as:

> *"The Commission can play a role in encouraging the sharing of best practice in sport governance. It can also help to develop a common set of principles for good governance in sport, such as transparency, democracy, accountability and representation of stakeholders (associations, federations, players, clubs, leagues, supporters, etc.)*[21] [and]…*The Commission considers that most challenges can be addressed through self-regulation respectful of good governance principles, provided that EU law is respected, and is ready to play a facilitating role or take action if necessary".*[22]

In the 2011 EU Commission Communication on Sport: Developing the European Dimension in Sport, it was noted at 4.1 that common to all sports, good governance consists of:

> *"inter-linked principles that underpin sport governance at European level, such as autonomy within the limits of the law, democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders. Good governance in sport is a condition for addressing challenges regarding sport and the EU legal framework."*

The above statements reveal a progression in the Commission's thinking from one in which good governance was *encouraged* in 2007 to a position in 2011 that *conditions* sporting autonomy on adherence to good governance principles.

Following the Communication, good governance was included on the agenda of the EU Work Plan for Sport 2011-14 that delivered its findings re 'good governance' issues in October 2013.

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See also Parrish, R., García, B., Miettinen, S., & Siekmann, R., (2010), *The Lisbon Treaty and EU Sports Policy*, Report for the European Parliament Committee on Culture and Education, Brussels: European Parliament: chapter 3.

[21] European Commission (2007), White Paper on Sport COM(2007) 391 Final, p.12.

[22] Ibid., p.13.

Whilst a number of recommendations were noted,[23] at its core 'good governance' was described as;

> "[…]*it is important to underline that good governance essentially comprises a set of standards and operational practices leading to the effective regulation of sport. Therefore, whilst good governance must be distinguished from specific sports regulations, the application of good governance principles should facilitate the development and implementation of more effective sports regulation*."[24]

***The EU Dimension in Football Agents/Intermediaries***

The operation and regulation of football intermediaries has raised concerns regarding adherence to good governance principles, including possible incompatibilities between the various iterations of the football regulations governing intermediaries and EU law. Presented below is a chronology of EU activity in the area of player agent / intermediary activity.

*The Piau Litigation (1996-2006)*

The interest of the EU in the area of agents regulatiosn can be traced to complaints lodged before the European Commission in 1996 and 1998. The complaints, the second of which was by a French agent, Laurent Piau, alleged that the 1994 FIFA Players' Agents Regulations were incompatible with EU law. Eventually, via the Court of First Instance (now General Court) and the Court of Justice, FIFA's rule making authority in this area was approved, although the Commission did require some of the restrictive elements of the regime to be removed during its initial stage of enquiry.[25] The *Piau* judgment is discussed, at length, elsewhere in this Report.

*The Independent European Sport Review (2006)*

The activity of agents was discussed in the Independent European Sport Review, a report undertaken at the initiative of the UK sport minister, Richard Caborn.[26] The report, written by José Luis Arnaut, reviewed a number of sporting rules and concluded that sport should be afforded a wide margin of appreciation in terms of its relationship with EU law.

The Review was generally critical of the role of agents in sport, particularly highlighting poor professional standards, high remuneration and a lack of financial transparency. The Review highlighted the "*boom in the player agent industry, which adds little if any value to the sport*."[27]

On the question of agents regulation, the Review called for a "*more rigorous form of regulatory enforcement*" involving both the adoption of an EU Directive on agents and also a more

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[23] Expert Group "Good Governance", Deliverable 2 – Principles of Good Governance in Sport (2013), EU Work Plan for Sport 2011-14, December 2013.
[24] Ibid., p.5.
[25] Case T-193/02, *Laurent Piau v Commission of the European Communities* [2005] ECR II-209.
[26] Arnaut, JL., (2006), *Independent European Sport Review*, p. 33. Accessed at https://eose.org/ressource/independant-european-sports-review/Last accessed 27 September 2019.
[27] Ibid., p.97.

prominent regulatory role for UEFA, as opposed to FIFA, within the territory of the EU.[28] The Review claimed that a more effective system for regulating the activities of players' agents would "*assist in the fight against money laundering by ensuring the integrity of registered agents and monitoring financial flows*".[29] On the question of the compatibility of agents regulations with EU law, the Review considered that rules concerning players' agents are "*inherent to the proper regulation of sport and therefore compatible with European Community law.*"[30]

The main recommendation of the Review was the adoption of a

> "*European players' agents directive to be implemented foreseeing the tools for appropriate sporting regulations on players' agents at European level including, for instance, the following topics: strict examination criteria, transparency in the transactions, minimum harmonised standards for agents contracts, efficient monitoring and disciplinary system by European sports governing bodies, the introduction of an agents licensing system, no dual representation, payment of the agent by the player*".[31]

Accompanying this, the review also recommended that UEFA plays a more prominent role in agent matters by reviewing, improving and administering "*an effective system to govern the activities of players' agents in Europe…*".[32]

*European Parliament Resolution on the Future of Professional Football (2007)*

The European Parliament Resolution on the Future of Professional Football stressed the need for the football governing bodies, in consultation with the European Commission, to improve rules governing players' agents. On the basis of the so called 'Belet Report', the Resolution called on the Commission

> "*to support UEFA's efforts to regulate players' agents, if necessary by presenting a proposal for a directive concerning players' agents which could include: strict standards and examination criteria before anyone could operate as a football players' agent; transparency in agents' transactions; minimum harmonised standards for agents' contracts; an efficient monitoring and disciplinary system by the European governing bodies; the introduction of an 'agents' licensing system' and agents' register; and ending 'dual representation' and payment of agents by the player.*"[33]

Resolutions are not binding and are designed to suggest political action in a given policy area.

[28] Ibid., p.47.
[29] Ibid.
[30] Ibid, p7.
[31] Ibid, p.130.
[32] Ibid, p.135.
[33] European Parliament Resolution of 29 March 2007 on the Future of Professional Football in Europe, 2006/2130(INI),Paragraph 44.

*The EU White Paper on Sport (2007)*

The Commission published the White Paper on Sport as preparation for the adoption of Article 165 of the Lisbon Treaty. The White Paper was not a White Paper in the strict sense, as discussion on the scope for legislative activity was limited to public disorder at sporting events and the activities of sports agents. Ultimately, Article 165 provided for only a supporting competence and the provision of 'incentive measures' whilst specifically excluding any harmonisation of the laws and regulations of the Member States.

The fact that agents regulation was one of only two areas considered for EU legislative action indicated the depth of concern regarding the activities of agents and the distinctly cross-border nature of the industry. Although the White Paper did not enter into a detailed legal analysis of the legislative options should the EU decide to legislate, one must assume that other Treaty articles, such as Article 114 on the approximation of laws relevant to the functioning of the internal market, rather than the more limited Article 165, would have been the legal base for action. In this regard, the accompanying Commission Staff Working Document did acknowledge that the issue of recognition of professional qualifications of players' agents is already covered by Directive 2005/36/EC on the recognition of professional qualifications in cases where the profession of players' agent is subject to national qualification requirements by regulation.[34]

In section 4.4, the Commission highlighted reports of bad practice in the activities of some agents which have resulted in instances of corruption, money laundering and the exploitation of minors. The Commission considered that these practices damage sport and raise serious governance questions. It considered that the health and security of players, particularly minors, has to be protected and criminal activities fought against.

In light of the above, the Commission committed itself to carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options.

*European Parliament Resolution on the White Paper on Sport (2008)*

On the basis of the so-called 'Mavrommatis Report', the Parliament's Resolution addressed issues relating to the White Paper including the question of agents regulation. The Resolution noted the increase in agent activity and the need for "*specific training of sports managers and players' agents*".[35] The report condemned:

> *"…bad practices in the activities of some representatives of professional sports players which have resulted in instances of corruption, money laundering and the exploitation of under-age players and sportsmen and sportswomen, and takes the view that such practices harm sport in general; believes that the current economic reality surrounding players' agents requires that sport governing bodies at all levels, in consultation with the Commission, improve the rules governing players' agents; in this respect calls on the Commission to support the efforts of sport governing bodies to regulate players' agents, if necessary by presenting a proposal for a directive concerning players'*

[34] Commission Staff Working Document, The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport COM(2007) 391 Final, SEC2007.
[35] European Parliament Resolution on the White Paper on Sport (2007/2261(INI)), paragraph AF.

*agents; supports public-private partnerships representative of sports interests and anti-corruption authorities, which will assist in the development of effective preventive and repressive strategies to counter such corruption".*[36]

The report also suggested that agents "*should have a role within a strengthened social dialogue in sports, which, in combination with better regulation and a European licensing system for agents, would also prevent cases of improper action by agents*".[37]

*Study on Sports Agents in the European Union (2009)*

As a follow up to the White Paper, in 2009 the Directorate General for Education and Culture commissioned a 'Study on Sports Agents in the European Union'.[38] The study examined all sports in which agents were active across the (then) 27 Member States of the EU. Due to these broad terms of reference, some of the study's recommendations were already common practice in football.

The study argued that due to difficulties associated with the implementation and enforcement of agents regulations, the activities of sports agents are liable to give rise to ethical issues. For example, the study mentioned: dual-agency or conflict-of-interest situations; the payment of secret commissions in connection with transfer deals; the economic exploitation of young footballers from third countries; unregulated headhunting/recruitment among training clubs; and the lack of transparency vis-à-vis the sportsperson during the negotiations between the sports agent and the club or the organiser of a sport event.[39] Although the study identified agents themselves as a source of the ethical problems in sport, it argued that "*in fact in many cases it is the whole 'sport employment system' that lacks transparency*."[40]

In terms of its main findings, the study argued that good governance should lie at the heart of agents regulations, specifically, compatibility with EU law; complementarity between the rules of sport federations and public policies; transparency of financial flows in sport; simplicity of the measures adopted; adaptability to the peculiarities of each sport discipline; and trust in sports agents and actors.[41]

The study argued that rules adopted by sport federations can better reflect the specificities of sport than public regulation by governments or the EU. However, self-regulation should be supported by public authorities and in this connection, the study argued that the EU "*has a key role to play in changing behaviours, harmonising existing practices, promoting the best of them – and introducing regulations, if and when appropriate*."[42] Consequently, a lack of ethical standards and transparency damages the whole of a sport and all its stakeholders.

The study made a series of recommendations directed at public authorities and sports bodies. To public authorities, the study highlighted the role, complementary to sports bodies, to be

[36] Ibid., paragraph 100.
[37] Ibid., paragraph 107.
[38] KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.
[39] Ibid., p.5.
[40] Ibid., p.172.
[41] Ibid., p.6.
[42] Ibid.

played by governments in combatting illegal practices. The EU was identified as a body that could promote dialogue within and between sport as a means of countering problems in the agency industry, for example, with a view to developing common standards and principles that can serve as a basis for the adoption of at least a minimum set of rules by sport federations and countries throughout Europe. The European Social Dialogue was identified as one such tool, supported by structured dialogue, such as multilateral meetings, thematic discussions and consultations between the EU and sport bodies and stakeholders.

The recommendations made to sports bodies were premised on the notion that sport should self-regulate in the area of agents regulations, supported by public authorities. The study recommended, subject to compliance with EU law, the adoption of voluntary licensing systems to join the profession with an examination designed to ensure that successful candidates possess the necessary knowledge of the legal, economic and social environment and the minimum qualifications required to practice the profession.[43] One justification advanced by the study in support of licensing is that it creates a link between the bodies responsible for the organisation of sport at national level and the agents active in the sports concerned, thus institutionalising dialogue in this area.

In addition to the licensing recommendation, the study advocated better dialogue within the sports sector. It argued that agents should be organised through representative bodies and involved in the framing of regulations governing their activities, including establishing minimum qualitative requirements for acting as an agent. Federations were encouraged to provide training schemes for candidates preparing for agent examinations and include on-going education for them. Federations were also encouraged to publish guides for players/sportspersons, coaches, clubs, sports agents and organisers of sport events to inform them of the applicable regulations on the employment of sportspersons and to educate and advise sportspersons on the role of sports agents, provided that the sportspersons' representative body does not itself offer placement services. The study suggested that a tax on transfers could be introduced to finance these schemes.

To promote transparency, the study encouraged the reporting of any abuses and unlawful practices as well as any sanctions imposed by sport bodies or public authorities involving sportspersons, agents, clubs, organisers of sport events or federations. It recommended publishing more information, such as a list of sports agents and their clients including the duration of the contracts signed with the clients and the qualifications and experience of the agents.

As the study recommended self-regulation, it noted the importance of ensuring high ethical standards within that system. To advance this, it recommended the use of mandatory terms and conditions in standard contracts, with the aim of providing better protection for the parties and stakeholders. Sports bodies should establish binding codes of conduct drawn up jointly by sports agents, federations, clubs and sportsmen, particularly with the aim of preventing conflicts of interests.

On the question of supervision and sanctions, the study recommended the establishment of a centralised financial system or "clearing house" for transfer deals involving financial rewards or compensation between two clubs or teams.

[43] Ibid, p.7.

*Group of Independent Sports Experts 2010*

In 2010, European Commissioner Vassiliou appointed ten experts to a Group of Independent European Sports Experts. The Group produced a report advising the Commission on the general themes and specific priorities that should be contained in the Commission's forthcoming `Communication on Sport'. The recommendations made by the Group were accepted by the Commission and formed the basis of the subsequent Communication on Sport, discussed below.

The Group claimed that "*[t]here is a general lack of transparency regarding financial flows, especially in connection with transfers. The Group does not argue in favour of regulation but strongly supports demands for more transparency within the sport movement*". Regarding sports agents, the Group argued that the "*EU should promote self-regulation by both sport organisations and associations of agents. There is no need to regulate the work of sports agents at EU level at this stage*".[44]

*European Parliament Resolution on Players' Agents in Sport (2010)*

On 17th June 2010, the European Parliament adopted a Resolution on Players' Agents in Sports.[45] The Resolution endorsed many of the findings of the 2009 Study on Sports Agents in the European Union but it stressed "*that doing away with the existing FIFA licence system for player's agents without setting up a robust alternative system would not be the appropriate way to tackle the problems surrounding player's agents in football*".[46] The Resolution called for an EU initiative on agents focussing on:

- strict standards and examination criteria before anyone could operate as a players' agent;
- transparency in agent's transactions;
- a prohibition for remuneration to players' agents related to the transfer of minors;
- minimum harmonised standards for agents' contracts;
- an efficient monitoring and disciplinary system;
- the introduction of an EU wide 'agents licensing system' and agents' register;
- the ending of the 'dual representation';
- a gradual remuneration conditional on the fulfilment of the contract.

[44] European Commission (2010), Group of Independent European Sport Experts. Report on EU Priorities in the Field of Sport.
[45] European Parliament Resolution on Players' Agents in Sports, P7_TA(2010)0233, Strasbourg.
[46] Ibid., paragraph 10.

*Communication on Sport - Developing the European Dimension in Sport (2011)*

In order to implement the Lisbon Treaty's sport provisions, in 2011 the Commission published its Communication on Sport.[47] As detailed above, a key theme developed in the Communication was a more forceful assertion that sporting autonomy is conditioned on sports bodies adhering to principles of good governance, of which respect for EU law and stakeholder representation through mechanisms such as the European Social Dialogue were highlighted.

Specifically on agents regulation, the Communication briefly reviewed the 2009 Study on Sports Agents and then committed itself to launching a study on the economic and legal aspects of transfers of players and their impact on sport competitions and to organise a conference to further explore possible ways for EU institutions and representatives of the sport movement (federations, leagues, clubs, players and agents) to improve the situation with regard to the activities of sports agents.

*EU Conference on Sports Agents 2011*

As announced in the Communication, the Commission organised an EU conference on sports agents in November 2011. Androulla Vassiliou, European Commissioner responsible for Education, Culture, Multilingualism, Youth and Sport, opened the conference by stressing the role of the Commission in facilitating the dialogue among stakeholders in order to provide a platform for the exchange of good practices.

The presentation by FIFA rejected the suggestion made by some stakeholders that the proposed reform of the FIFA agents regulations amounted to a 'de-regulation' of the sector. The FIFA representative explained that the driver for reform was that only 25-30% of transfers are managed by official FIFA licensed agents.

The representative from the EPFL claimed that the current situation (in 2011) posed a threat to the integrity of sport and therefore a robust framework was needed to address the challenges in this field. The representative noted that transparency issues were central to any new regulatory framework. Coherent registration mechanisms, the publication of payments and of representation contracts as well as a clearing-house system could contribute to more transparency in the field. The clearing-house idea was endorsed by a representative of FC Porto and the English FA, where such a system operates.

The representative from EFAA was critical of the lack of consultation between FIFA and his association. The representative stressed that the agents wanted to regulate their own profession, but this could only be successfully achieved if the concerns and best practices of agents were considered by the other stakeholders. EFAA advocated a stronger framework which would contribute to more transparency and lead to the professionalisation of agents' activities and therefore to better services for players. A second representative from EFAA stressed the need for recognition of EFAA as a means of it participating in Social Dialogue. In the absence of global solutions, he argued that a European approach should be pursued.

[47] European Commission (2011), Developing the European Dimension in Sport (the Communication on Sport), COM(2011) final.

The ECA highlighted that the current system did not work effectively due to a lack of consistency. Agreeing with EFAA, the representative from the ECA stated that any discussion on a new framework should involve representatives of the agents, a position endorsed by the representative from the German Football League (DFL). The ECA explained that it favoured self-regulation through the establishment of simple and enforceable rules. It was observed that the fees for agents had to be reasonable, that agents should be paid by the club or the player (but not both), and that fees for minors should not be allowed.

FIFPro expressed considerable concern on behalf of the players with regard to conflicts of interest among agents, in situations where multiple agreements existed with more than one party at the negotiation table. FIFPro recognised that players needed advice due to the complexities of the business but stressed that it should be entirely up to the player how and by whom he would like to be represented. Therefore, a regulatory framework without a distinctive licensing system as envisaged by FIFA was favoured by FIFPro. FIFPro argued that a main problem with the current system was the limited possibility of enforcement and that a stronger regulatory system would face even more severe enforcement problems.

The conference proceeded to discuss the operation of agents in other sports. The representative from FIBA, the international governing body of basketball, emphasised the close cooperation between FIBA and the players' agents and the importance of the voluntary Basketball Arbitral Tribunal (BAT) which provides arbitration services to resolve disputes between clubs, players, and agents.

The representative from EU Athletes highlighted the difficulty some young athletes face selecting an agent. In that regard, a qualification or licensing scheme would provide athletes with a minimum reference framework on how to choose an agent. EU Athletes suggested that the social partners should be at the centre of any solution regarding the activities of agents. A former manager of leading Spanish basketball clubs argued that an educational system for agents was important to ensure quality within the profession.

On the question of agent remuneration, the representative from FC Porto argued that the remuneration of agents differs according to the work done in every transfer and should therefore be kept flexible, possibly in the range of 5% to 10% of the value of the transaction. Furthermore, there was a need that sports agents only represented one party in the negotiation and fees should not be paid to agents in case of transfers of minors.

The representative of UEFA stressed that any amendment to agents regulations needed to consider the enforcement of the rules and that public-private partnerships might be considered in this respect. Regarding the different types of possible EU action, UEFA expressed doubts about whether EU legislation was an adequate mechanism in order to tackle the problems at stake. UEFA also stressed that the Social Dialogue had been a valuable tool for professional football in the past and could be used in the context of discussions on agents in future.

The European Commission closed the event by stating that whilst it recognised the right of self-regulation by the sports movement, an internal market directive could not be ruled out if serious problems regarding the free provision of services or establishment came to light. The Commission highlighted that a Recommendation on the basis of Article 165 TFEU was also a possibility as a way of bringing the different approaches in the Member States closer together. Referring to the substantive problems to be addressed with a view to some form of standardisation, approximation or harmonisation, the Commission mentioned the transparency

of financial transactions, the level of fees, the protection of minors and dual agency issues. The Commission also highlighted the work of European Committee for Standardisation (CEN) as a possible model for developing European and international standards for sports agents. EFAA found favour with this approach although UEFA pointed out the recurring issue of enforcement.

*EU Work Plans for Sport 2011-2020*

Another follow up to the Communication was the Council's adoption of the first European Union Work Plan for Sport which ran until 2014.[48] A second Work Plan was adopted for the period 2014-17,[49] and a third was agreed running from 2017-2020.[50] In order to progress priority themes contained in the Work Plans, the Member States asked the Commission to work through a number of channels including establishing expert groups, holding seminars and conferences and commissioning studies. Indeed, sports agents have been discussed at successive annual EU Sport Forums, most notably in Malta in 2017 in which agents were discussed in a panel session attended by most of the football stakeholders, and in Bulgaria in 2018 where agents were discussed in a panel on the transfer of players.

One of the priority themes established in the 2011-14 Work Plan concerned "transfer rules and the activities of sport agents". In order to progress this theme, an Expert Group on Good Governance in Sport was established comprising national experts appointed by the Member States. This Group was asked to, inter alia, follow up the EU Conference on Sports Agents discussed above. In doing so, it produced 'Deliverable 3', a report on the Supervision of Sports Agents and Transfers of Players, Notably Young Players.[51] In the report, the Group made 11 recommendations, 6 of which directly concerned the operation of agents with the remainder being focussed on the operation of the transfer system. The key recommendations on agents were:

1. The Group considers that the current legal framework applicable to the activities of agents is appropriate; as a consequence, the Group estimates that the relevant sporting bodies are best placed to introduce any needed changes in the supervision of the profession of agents, in accordance with good governance principles such as democracy and inclusion of stakeholders. The Group also recalls that national rules and sporting regulations should remain in line with EU law having regard to the specificity of sport, notably in the field of Internal Market and competition.

2. The Group recommends that certain aspects of the system put in place by FIBA, together with relevant basketball stakeholders, in order to supervise the activities of agents is, as may be appropriate, taken into account by other sports disciplines, such as football, when addressing similar issues. Specifically, the Group cited the operation of

[48] Resolution of the Council of the European Union and of the Representatives of the Governments of the Member States, European Union Work Plan for Sport for 2011-2014 [2011] OJ C162.
[49] Resolution of the Council of the European Union and of the Representatives of the Governments of the Member States, European Union Work Plan for Sport for 2014-2017 [2014] OJ C183.
[50] Resolution of the Council of the European Union and of the Representatives of the Governments of the Member States, European Union Work Plan for Sport for 2017-2020 [2017] OJ C189.
[51] Expert Group "Good Governance", Deliverable 3, Supervision of Sports Agents and Transfer of Players, Notably Young Players, EU Work Plan for Sport 2011-14, December 2013.

the Basketball Arbitral Tribunal and improvements in relations between agents and FIBA.

3. The Group considers that mechanisms for the supervision of sports agents should be aimed at increasing transparency in the transactions involving agents (thus covering club-agent, player-agent, club-player and club-club transactions); they should also aim at strengthening the necessary protection of the youngest players, notably when they are involved in international transfers. The overall goal of such mechanisms should be to set higher standards for the activity of agents, to establish clear and universal rules, whilst taking into account the diversity existing in sporting structures, and to ensure an efficient monitoring, enforcement and compliance framework, with dissuasive and proportionate sanctions as well as equitable disciplinary measures in place.

4. In light of 3, the Group recommends that sports bodies consider the opportunity of establishing gradual and stricter rules for sports agents, taking into account the age of players involved in transactions managed by agents/intermediaries:

    - Rules on ethics, transparency, conflict of interest, disclosure of information and payment of intermediaries should be the strictest when the player signing a contract with the club is a minor (e.g. by restricting or eliminating fees for transfers of under-18 players);

    - For transactions involving minor players, it is proposed that particular scrutiny is exercised on the credentials of agents/intermediaries, e.g. by requesting proof of criminal records or other means of testing the aptitude of agents to work with underage players including their ability to provide specific careers advice that would be appropriate for the relevant sports discipline;

    - Rules on ethics, transparency, conflict of interest, disclosure of information, the ability to dispense specific careers advice and payment of intermediaries should also be particularly strict when the young player is considered as being in the training phase of his/her career (this phase may vary according to the characteristics of each sport);

    - Although high ethical standards must be maintained at all times, it may be possible for certain rules to be made more flexible for agents working with players who can be considered in the main stage of the careers (to be determined by each sport in accordance with its specificities).

5. The Group recommends establishing universal systems of *registration*, with the same standards regarding disclosure of information and necessary requirements applicable at global level.

    The Group considers that minimum standards should be adopted at international level in order to guarantee a level playing field for all the interested parties. At the same time, the Group recommends, subject to the structures of the sport, leaving the possibility to national and/or continental organisations to introduce higher standards according to local contexts and needs.

In the views of the Group, *certification* of agents or similar mechanisms should ideally take place at national/continental level as well, with international bodies acting as guarantors that local schemes respect some common basic principles, whilst leaving local bodies responsible for the main task of supervising the process of validation of skills and competencies needed to be certified as an agent.

The Group further estimates that the process of acquisition of these competencies, either through training programmes, examinations and other instruments, should also be implemented at local level. International sporting organisations should be in charge of providing common guidelines and of ensuring consistency in the way programmes are managed by national and/or continental bodies.

The Group recommends that stakeholders seek to adopt a system for the mutual recognition of certification mechanisms.

The Group recommends and encourages that agents promote and take responsibility for applying high ethical standards such as developing and adhering to codes of conduct, continued professional development and best practices.

6. The Group recommends to sports bodies the establishment of a system of effective, dissuasive and proportionate sanctions. Sanctions should target all the relevant stakeholders having been proven in breach of the rules (such as agents, clubs, players and National Associations). Sanctions may be applied by international and/or national organisations. A system for the recognition of sanctions at cross-border level would be necessary to ensure uniform and universal application of the rules.

Although not directly addressed under the 2017-20 Work Plan, the activity of agents is pertinent to one of the Work Plan's themes – 'the integrity of sport' which encompasses inter alia, the promotion of good governance, the safeguarding of minors, the specificity of sport and combatting corruption.

*Study on the Economic and Legal Aspects of Transfers of Players (2013)*

In the 2011 Communication on Sport, the Commission committed itself to commission a study on the economic and legal aspects of the transfer of players. The study was published in 2013 by KEA European Affairs and the Centre for the Law and Economics of Sport (CDES). The study highlighted five key challenges facing European sport:

1. Increase transparency in transactions (to prevent fraudulent activities and to support better governance and implementation of rules). For example, in terms of agent issues, the study recommended making compulsory the publication online for each national federation of a standardised annual report on transfers with minimum information including name of parties and agents;[52]

2. Maintain competitive balance through better redistribution mechanisms;

[52] KEA, CDES, (2013), The Economic and Legal Aspects of Transfers of Players, A study commissioned by the European Commission, January 2013. Available at https://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf.

3. Sustain the social functions of sport (youth development);

4. Establish a fair and efficient dispute resolution system (to ensure equal representation, limit costs and delays);

5. Increase cooperation with law enforcement authorities to police unlawful activities (money laundering, undue investment in sport).

*European Parliament Resolution on an Integrated Approach to Sport Policy: Good Governance, Accessibility and Integrity (2016)*

The activity of agents was discussed in the 2016 'Takkula Report' and subsequent Resolution of the European Parliament. The Resolution stated that "*bad practices linked to agents and players' transfers have led to cases of money laundering, fraud and exploitation of minors*".[53] In respect of sporting integrity and good governance stated it called for:

> *"the establishment of transparency registers for the payment of sports agents, underpinned by an efficient monitoring system such as a clearing house for payments and appropriate sanctions, in cooperation with relevant public authorities, in order to tackle agent malpractice; repeats its call for the licensing and registration of sports agents, as well as the introduction of a minimum level of qualifications; calls on the Commission to follow-up on the conclusions of its "Study on sports agents in the European Union", in particular with regard to the observation that agents are central in financial streams that often are not transparent, making them prone to illegal activities."*[54]

*EU Sectoral Social Dialogue Committee for Professional Football: Resolution on Intermediaries/Agents*

The use of social dialogue is a tool long advocated by the European Commission as a means for the stakeholders in sport to seek solutions to labour related disputes. Located in Articles 152-155 TFEU, social dialogue refers to discussions, consultations, negotiations and joint actions involving organisations representing employers and workers (the social partners). With the support of the Commission, a Social Dialogue Committee for European Professional Football was established in 2008 and in 2012 it concluded its first agreement on minimum conditions in player contracts.[55]

The Social Dialogue Committee for Professional Football is a tool that could potentially be used to discuss agents regulation, although a number of obstacles exist. First, EFAA requires wider recognition from stakeholders than previously afforded, although developments in 2018 (through the FIFA Transfer System Task Force) indicate that FIFA is increasingly willing to consult with the agents themselves. Second, and connected to this, agreements within the Social

[53] European Parliament Resolution on an integrated approach to sport policy: good governance, accessibility and integrity, (2016/2143(INI)), paragraph Z.
[54] Ibid., paragraph 42.
[55] Agreement regarding the minimum requirements for standard player contracts in the professional football sector in the European Union and the rest of the UEFA territory, 19 April 2012, https://fifpro.org/news/minimum-requirements-for-standard-player-contracts/en/ accessed 27 Oct 2019.

Dialogue Committee must relate to the employment relationship between employers (clubs) and workers (players). Agents do not fall within these two categories although they are clearly connected to both.[56] However, it must be noted that UEFA sits on the Social Dialogue Committee as an Associate Party. In the same way, a collective representation of Agents could participate in the discussion of the Committee. Finally, agents regulation is a matter of FIFA regulatory oversight and currently it is UEFA that chairs the Social Dialogue meetings for professional football. Clearly, FIFA and UEFA have different jurisdictional reaches (global and European respectively) and the social dialogue committee is very much a European initiative.

Agents regulation was discussed at a meeting of the EU sectoral social dialogue committee for professional football in November 2017. Present at the meeting was UEFA (as chair of the committee), FIFPro Division Europe (as the social partner representing employees), the ECA and the EPFL (both as social partners representing employers). In 2016, the parties established a working group to discuss football labour market regulations, including agents regulation. The November 2017 meeting discussed the operation of the 2015 RWWI and it reported the following issues:

- the implementation process did not consistently seek out the views and input of the relevant national stakeholders (i.e. clubs, players, leagues);

- transparency in financial transactions involving intermediaries/agents had not improved as a consequence of the new FIFA regulations;

- the number of individuals or companies acting as intermediaries/agents had increased substantially, which may have had the effect of pushing demand for ever younger players;

- the quality of the services provided to clubs and players by intermediaries/agents had generally decreased;

- the new FIFA regulations had little impact on slowing down the inflation of fees paid to intermediaries/agents (who, it was felt, were disproportionately well-remunerated for their services) but actually contributed to further disproportionate growth of such payments;

- the new FIFA regulations and the concept of the "intermediary" contributed to manifesting business practices, which could lead to conflicts of interest;

- a lack of consistency in the implementation of the rules from one territory to another had made some national "markets" more attractive than others for intermediaries/agents;

- the administrative burden on all parties (i.e. National Associations, National Leagues, clubs and players) had increased unnecessarily and to no positive effect;

[56] The European Parliament Resolution on the White Paper on Sport recommended that agents be brought within the Social Dialogue structure, see European Parliament Resolution on the White Paper on Sport (2007/2261(INI)), paragraphs 99 - 101.

- the sanctions provided for under the new rules did not appear to be far reaching enough;
- the rules could be circumvented too easily (and a high number of intermediaries/agents remained unregistered).

Due the above stated deficiencies in the RWWI, the resolution highlighted the need for reform which should include: "*a harmonised, uniform European approach*" incorporating:

- a reasonable, proportionate cap on fees for intermediaries/agents;
- enhanced transparency, disclosures and accountability;
- appropriate and dissuasive sanctions in case of non-compliance;
- stronger provisions to protect minors in their relations with intermediaries/agents;
- an efficient monitoring and enforcement framework.

*Study on An Update on Change Drivers and Economic and Legal Implications of Transfers of Players (2018)*

In 2018, a second study was published by the European Commission to provide an update on developments in the transfer market since the publication of the 2013 study.[57] The study reviewed the reasons behind FIFA's adoption of the 2015 RWWI and highlighted a number of criticisms on the regulations including:[58]

- Concern that the 2015 regulations amount to de-regulation and lowers standards.
- A rise in transfer activity, contractual instability and agent fees.
- Concern that the recommended fee cap could destroy some agencies and result in less incentives to agents to negotiate the best deal for their clients.
- A lack of uniformity in regulations across Europe thus making the working conditions of agents more difficult.
- Potential legal problems with a fee cap, specifically conflicts with EU law.
- Concern that intermediaries can now be companies and this de-personalises a player's representation.
- Concern that the prohibition on intermediary work with minors will result in intermediaries signing as many young players as possible in order to increase opportunities to make profits in future transfers.

[57] KEA European Affairs & ECORYS (2018), An update on change drivers and economic and legal implications of transfers of players: Final Report to the DG Education, Youth, Culture and Sport of the European Commission. Accessed at: https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf
[58] Ibid., p.47.

- Concern that the RWWI do not prescribe maximum duration of representation contracts and this will lead to more disputes.

Based on these criticisms, the study argued that the regulations need to be "*re-assessed*"[59] and in that connection, the study highlighted 'good practice' from the US National Basketball Players Association (NBPA) which, as a player union, plays a central role in agents regulation.[60] Specifically, the study claims that the NBPA adopts stricter requirements for granting the agents with a mandatory licence than FIFA, including: having to have completed a four-year accredited university or college education or having had relevant negotiating experience, agree to have background investigations carried out, the requirement to be approved by the NBPA and the need to pass an examination.

The key recommendations of the study concerning intermediary regulation are:

1. Make the 3% voluntary cap on intermediary fees mandatory for all the transactions, or in case of potential non-compliance with the European Union Law, making the cap mandatory over a certain threshold. Such a cap should however be properly discussed with agents to reflect market practices.

2. Dividing the payment of the intermediary fees into different instalments to be paid along the duration of the player contract, in order to incentivise the players' contractual stability, and thus avoid incentives for the intermediaries to multiply transfers for their players;

3. Licensing system: consider the opportunity to have a centralised and harmonised mandatory licensing system, following the example of the NBPA system for agents in US basketball. The system should also include a uniform mechanism for the legal proceedings and sanctions.

[59] Ibid., p. 48
[60] Ibid.

# 4.

# *The Regulation of Football Agents: Historical Background*

### *Early Regulation*

FIFA's first attempt at regulating the work of football agents came with the introduction of the Players' Agents Regulations (PAR) in 1991 and 1994. The decision of the FIFA Executive Committee to adopt these regulations was recognition that the volume of agent activity in the modern game was such that agents needed bringing into the 'football family', at least in regulatory terms. Just over twenty years later in 2015, FIFA enacted a set of regulations that acknowledged the failure of this approach and agents were effectively ejected from the family.

The 1994 PAR required that an individual wanting to provide agent services must be in possession of a licence issued by the competent National Association. Clubs and players were under an obligation to only engage the services of such licensed agents during transfer or contract negotiations. Agents in receipt of a licence were referred to as FIFA Licensed Agents.

The occupation was reserved for natural persons, as opposed to legal entities such as businesses, another situation amended by the 2015 regulations. However, relatives of the player and qualified lawyers were deemed exempt individuals and did not require a licence, the logic being that family members were trusted by the player and lawyers were subject to state professional body requirements and state regulation.

To be in receipt of a licence, the individual was required to undertake an interview to ascertain the candidate's knowledge, particularly of sport and the law. The candidate was also required to satisfy certain conditions, such as having no criminal record and depositing a bank guarantee of 200,000 Swiss Francs (CHF). Contractual relations (representation agreement) between the agent and the player was for a maximum period of two years, which was renewable. Agents, players and clubs found to be in breach of the regulations faced being sanctioned. Agents could face a caution, censure or warning, a fine of an unspecified amount, or withdrawal of their licence. Players and clubs could be fined up to CHF 50,000 and CHF 100,000 respectively. Players could also be liable to disciplinary suspensions of up to 12 months. Suspension measures or bans on transfers could also be applied to clubs. Disputes were heard by FIFA's Players' Status Committee.

### *The 2001 Regulations and the Laurent Piau Case*

The 1994 regulations were the subject of a complaint lodged before the European Commission in 1996 by Multiplayers International Denmark. The complaint alleged incompatibility of the regulations with EU competition law. In 1998, the French agent Laurent Piau also lodged a complaint, adding that the 1994 PAR were also contrary to EU laws on freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union (TFEU), ex 49EC). Specifically, Piau objected on three grounds. First, the licensing conditions unfairly restricted access to the market. Second, the regulations were likely to give rise to discrimination between

citizens of the Member States. Third, the regulations did not include any legal remedies against decisions or applicable sanctions.

In 1999, the Commission opened an investigation into the 1994 regulations and issued a statement of objections. The Commission considered that the 1994 PAR constituted a decision by an association of undertakings within the meaning of Article 81 EC (now Article 101 TFEU) and that the licence requirement, the exclusion of legal persons from the award of a licence, the prohibition on clubs and players using unlicensed agents, the requirement of a bank guarantee and the sanctions were incompatible with EU competition law. In doing so, the Commission rejected FIFA's argument that the regulations could not be classified as a decision by an association of undertakings and that, in any event, the regulations could qualify for an exemption under Article 81(3) EC (now Article 101(3) TFEU) because they sought to raise ethical standards and professionalism within the sector.

In response to the statement of objections, FIFA introduced a new set of regulations that entered into force in 2001. The 2001 FIFA Players' Agents Regulations retained the obligation for natural persons who wanted to offer agent services to hold a licence issued by the competent National Association. For a licence to be issued, the candidate was required to have an "impeccable reputation" and instead of undergoing an interview, he/she had to take a written multiple-choice examination testing the candidate's knowledge of sport and the law. The agent was also required to take out a professional liability insurance policy or, failing that, deposit a bank guarantee to the amount of CHF 100,000. As before, the relationship between the agent and the player must be the subject of a written contract for a maximum period of two years, which could be renewed. The contract had to stipulate the agent's remuneration, which was calculated on the basis of the player's basic gross salary and, if the parties could not reach an agreement, was fixed at 5% of the salary.

The contract had to be lodged with the National Association, whose register of contracts had to be made available to FIFA. Once licensed, the agent was required to respect FIFA's statutes and regulations and to refrain from approaching a player who was under contract with a club. Clubs, players and agents who breached the regulations were subject to sanctions. An agent could have his or her licence suspended or withdrawn and could face a fine. The regulations provided that disputes be heard by the competent National Association or FIFA's Players' Status Committee. A code of professional conduct and a standard representation contract were also annexed to the 2001 regulations. In 2002, FIFA made a technical amendment to the regulations by stating that nationals of the EU/EEA must make their application for a licence to the National Association of their home country or the country of domicile without any condition relating to length of residence and that they could take out the required insurance policy in any country of the EU/EEA.

As a result of the introduction of the 2001 regulations, the Commission notified Piau and Multiplayers International Denmark that the main restrictive effects contained in the 1994 regulations had been removed and that there was no remaining EU interest in continuing the case. Multiplayers International Denmark did not respond to the Commission's position but Piau retained his objection to the examination requirement and the requirement to take out professional liability insurance. Furthermore, he argued that the new regulations introduced new restrictions by way of the rules on professional conduct, the use of a standard contract and the rules on the determination of remuneration. These, he argued, were in breach of EU competition law, specifically Articles 81 and Article 82 (now Articles 101 and 102 TFEU). It seems that Piau ceased his complaint relating to Article 49 (now Article 56 TFEU).

The Commission rejected Piau's complaint and closed the case.[61] In doing so, the Commission restated its view that the most restrictive provisions had been removed by FIFA and that whilst the licence requirement could be justified, the remaining restrictions could satisfy the exemption criteria under Article 81(3) EC (now Article 101 TFEU) given that the regulations promoted the better operation of the market and therefore contributed to economic progress. The Commission added that Article 82 EC (now Article 102 TFEU) was not applicable in the present case although the Commission did not state reasons why this was the case.

In April 2002, Piau lodged an appeal before the European Court of First Instance (CFI), since renamed the General Court. The Court commenced by assessing whether the FIFA regulations amounted to a decision of an undertaking or an association of undertakings, thus potentially bringing its decision making within the scope of review of EU competition law. In this regard, the Court established that FIFA, as an association grouping together National Associations, constitutes an association of undertakings within the meaning of Article 81 EC (now Article 101 TFEU).[62] The Court also established that the regulations amount to a decision of an association of undertakings and as such one that must comply with EU competition law. The regulations are binding on National Associations that are members of FIFA, which are required to draw up similar rules that are subsequently approved by FIFA. They are also binding on clubs, players and players' agents. The regulations therefore reflect FIFA's resolve to coordinate the conduct of its members with regard to the activity of players' agents and cannot be considered a matter of internal sporting regulation unrelated to economic activity.[63] The Court therefore considered the regulation of players' agents as an issue that does not fall within the scope of the specificity of sport as defined in the sports related jurisprudence of the European Court.[64]

Piau contested the legitimacy claimed by FIFA to regulate the economic activity carried out by agents. By rejecting his complaint, the Commission had, according to Piau, gone beyond the powers conferred upon it by the Treaty by implicitly delegating to FIFA a power to regulate an activity of providing services. On this point, the Court came close to agreeing with Piau. It stated that FIFA's legitimacy to regulate agents is "*open to question*".[65] FIFA's self-proclaimed statutory purpose is to promote football and the 2001 PAR, which the Court had established do not have a sport-related object, regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms. Regulating a profession, such as the activity of agents, would normally fall to a public authority and not a private entity such as FIFA and this situation "*cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties*".[66]

However, the Court choose to limit its assessment to the compatibility of the regulations with EU competition law and not assess the legal basis that allows FIFA to regulate agents. This was due to "*the almost complete absence of national rules*" on agents regulation[67] and because "*collectively, players' agents do not, at present, constitute a profession with its own internal*

[61] See European Commission, Press Release IP/02/585, 18 April 2002, 'Commission closes investigations into FIFA rules on players' agents.'
[62] Case T-193/02, *Piau*, at paragraph 72.
[63] Ibid., at paragraph 75.
[64] Ibid., at paragraphs 73-74 & 105.
[65] Ibid., at paragraph 76.
[66] Ibid., at paragraph 77.
[67] Ibid., at paragraph 78.

*organisation*".[68] FIFA's need and legitimacy to regulate this profession is therefore strengthened by the absence of external regulatory control and a representative trade body to consult with.

The Court's assertion that FIFA's regulation of agents was partly justified with reference to the absence of national laws on agents regulation and the absence of a collective body of players' agents has been questioned.[69] At the time of the judgment, nine Member States of the EU had ratified an International Labour Organisation (ILO) Convention on Private Employment Agencies (Convention 181).[70] The Convention defines a private employment agency as any natural or legal person, independent of the public authorities, which provides agent related services (Article 1). FIFA's definition of an agent is consistent with their activities falling within the scope of the Convention. Amongst other things, the Convention is designed to allow the operation of private employment agencies as well as to protect the workers using their services (Article 2). This means that, contrary to the view of the Court, nine Member States had a legal base for regulating players' agents through their ratification of the Convention. In addition to these states, and as recognised by the Court, France adopted national legislation on the regulation of sports agents.[71] Greece and Portugal had adopted more general sports specific acts and elsewhere, general employment legislation was applicable to the activities of agents. On the question of the absence of a collective body of players' agents, the International Association of FIFA Agents (IAFA) was in fact established, but largely dormant. Since then, the European Football Agents Association (EFAA) has emerged as a recognised umbrella organisation of national agents' associations.

On the substance of the claim, that the FIFA regulations affected competition in the single market, the Court rejected Piau's submissions.[72] First, it found no error on the part of the Commission to find that the most restrictive elements contained within the 1994 PAR had been removed in the 2001 version. In this regard, the Court found that the examination offered satisfactory guarantees of objectivity and transparency, the professional liability insurance obligation and the code of professional conduct did not impose disproportionate obligations on players' agents and the remuneration provisions of the regulations referred to an objective, transparent criterion (the player's basic gross salary) with the 5% cap merely a subsidiary mechanism for the settlement of disputes. Neither did the Court agree with Piau's remaining objections. The content of the amended regulations, which concerned the obligation under the regulations to comply with FIFA rules such as transfer rules, was not the subject of Piau's complaint and so could not be assessed in relation to competition law. The content of the standard contract, and its limited duration, was found not to restrict competition, but in fact stimulate it. The sanctions system could not be considered manifestly excessive for a system of professional sanctions. Finally, the Court disagreed with Piau's assessment of the regulations that denied him access to ordinary courts in case of a dispute. The Court pointed out that interested parties can access ordinary courts, in particular in order to assert their rights under national or EU law, and actions for annulment can also be brought before the Swiss Federal Court against decisions by the Court of Arbitration for Sport.

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[68] Ibid., at paragraph 102.

[69] Branco Martins, R. (2007), *The Laurent Piau Case of the ECJ on the Status of Players' Agents*, International Sports Law Journal, 2007/1-2, pp.43-51.

[70] C181, Private Employment Agencies Convention, 1997 (No.181).

[71] Case T-193/02, *Piau*, at paragraph 102. The French law in question is Article 15-2 concerning sports intermediaries, Loi No. 84-610 du Juillet 1984 relative à l'organisation et à promotion des activités physiques et sportives.

[72] Case T-193/02, *Piau*, at paragraphs 83 -121.

Second, the Court concluded that the Commission committed no error in finding that the compulsory nature of the licence might be justified and that the amended regulations could be eligible for an exemption under Article 81(3) EC (now Article 101 TFEU). In this regard, the Court considered that the licence system did not result in competition being eliminated, as the system resulted in a qualitative selection process, rather than a quantitative restriction on access to that occupation. This was necessary in order to raise professional standards for the occupation of a players' agent, particularly as players' careers were short and they needed protection.

Third, although the Court disagreed with the Commission's assessment that FIFA did not hold a dominant position in the market of services of players' agents, the Court went on to find no abuse of market dominance. The position of dominance was established as FIFA operates as an emanation of the clubs and in that role holds a collectively dominant position on the market for players' agents' services. However, no abuse of dominance could be established as the system resulted in a qualitative selection process, rather than a quantitative restriction on access to that occupation.

On appeal, and dispensed with by Order of the Court, the European Court of Justice upheld the judgment of the Court of First Instance.[73]

### *The 2008 FIFA Players' Agents Regulations*

The 2001 regulations were amended in 2007 with a new set of regulations entering into force in 2008. The 2008 FIFA Players' Agents Regulations (2008 PAR) defined an agent as "a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations". This definition meant that once again, only natural persons, as opposed to legal entities such as a corporate entity, could act as an agent. Article 3(2) did permit a players' agent to organise his or her occupation as a business as long as his employees' work was restricted to administrative duties and the agent himself carried out the actual agency work. The regulations also made clear that the work of an agent was "strictly limited"[74] to the employment related matters of negotiating or renegotiating an employment contract or introducing two clubs to one another with a view to concluding a transfer agreement. Other services offered by agents, such as imagine rights work, was not covered by the 2008 PAR. This activity is regulated by the laws applicable in the territory of the association (Article 1).

National Associations were required to implement and enforce the regulations and, in doing so, they were permitted to establish their own national regulations which must incorporate the principles established in 2008 PAR with these national rules only deviating from the FIFA regulations if the latter did not comply with the national law applicable in the territory of the association. The association was required to submit its regulations to the FIFA Players' Status Committee for approval (Article 1(4)). An agent, once licensed, was required to respect and adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the associations, as well as applicable national law (Article 23(1)).

[73] Case C-171/05 P, *Laurent Piau v Commission of the European Communities*, Order of the Court (Third Chamber) of 23 February 2006, ECR 2006 I-37.
[74] FIFA Players' Agents Regulations, 2008, Article 1.

The 2008 PAR stipulated that clubs and players could only call upon the services of agents who are licensed by National Associations (Articles 25 and 27). This prohibition, however, did not apply if the agent acting on behalf of a player is an "exempt individual" meaning a parent, a sibling or the spouse of the player in question or if the agent acting on behalf of the player or club is legally authorised to practise as a lawyer in compliance with the rules in force in his country of domicile (Article 4).

The individual wanting to become a licensed agent was required to submit a written application for a players' agent licence to the relevant association. They had to be a natural person with an impeccable reputation, which meant having no criminal sentences for a financial or violent crime (Article 6(1)). Applicants were debarred if they held any position at FIFA, a confederation, an association, a league, a club or any organisation connected with such organisations and entities (Article 6(2)). By applying, the applicant agreed to abide by the statutes, regulations, directives and decisions of the competent bodies of FIFA as well as of the relevant confederations and associations (Article 6(4)).

On receipt of the application, and subject to the prerequisites being met, the applicant was invited to undertake a written multiple-choice examination designed to test knowledge of relevant football regulations and national laws (Article 8). If the candidate passed the examination, the applicant was required to either conclude professional liability insurance with an insurance company in their country (Article 9) or deposit a bank guarantee to the amount of CHF 100,000 (Article 10). The applicant was then required to sign a Code of Professional Conduct (Article 11 and Annex 1). If the above requirements were met, the competent National Association issued a personal and non-transferable licence (Article 12(1)) and the agent was entitled to use the title "Players' agent licensed by the football association of [country]" (Article 12(2)). The National Association was required to keep a register of licensed agents and share this with FIFA (Article 13). As the licence expired after five years, agents wishing to continue to offer their services were subject to re-examination. If the re-examination was unsuccessful, the licence was suspended until such a time as the examination was passed (Article 17).

The 2008 PAR established not only the conditions of access to the profession but also the standards of conduct expected of those subject to them. In this regard, only on the conclusion of a written representation contract between the agent and the player or club could an agent represent a party in negotiations (Article 19(1)). This contract was for a maximum duration of no more than two years, although it could be extended for a further two (Article 19(3)). If the player was a minor, the player's legal guardian(s) was also required to sign the representation contract in compliance with the national law of the country in which the player is domiciled (Article 19(2)).

The representation contract had to contain details of who was responsible for paying the players' agent and in what manner. In that regard, the regulations required, subject to national law, payment to be made exclusively by the player. However, the player could give his written consent for the club to pay the player's agent on his behalf (Article 19(4)). Article 19 ended with a statement on conflicts of interest. Players' agents were required to avoid all conflicts of interest in the course of their activity and they could only represent the interests of one party per transaction. In particular, a players' agent was forbidden from having a representation contract, a cooperation agreement or shared interests with one of the other parties or with one of the other parties' players' agents involved in the player's transfer or in the completion of the employment contract (Article 19(8)).

The remuneration of an agent acting for a player was calculated on the basis of the player's annual basic gross income, including any signing-on fee that the players' agent had negotiated for him in the employment contract (Article 20(1)). This excluded the player's other non-guaranteed benefits such as a car, accommodation and bonuses. Payment could be made by way of a lump sum at the start of the employment contract that the players' agent had negotiated for the player or through annual instalments at the end of each contractual year (Article 20(2)). In the event that the payment was structured annually, and the player's employment contract negotiated by the agent extended beyond the representation contract, the agent was entitled to annual remuneration even after expiry of the representation contract. This entitlement lasted until the relevant player's employment contract expired or the player signed a new employment contract without the involvement of the same players' agent (Article 20(3)). In the absence of agreement on the amount of remuneration, the agent was entitled to a payment of 3% of the player's basic income (Article 20(4)). In terms of an agent's services rendered to a club, the agent was entitled to payment of a lump sum agreed upon in advance (Article 20(4)). Article 29 made clear that no compensation payment, including transfer compensation, training compensation or solidarity contribution, that was payable in connection with a player's transfer between clubs, could be paid by the club to the agent.

Article 22 of the 2008 PAR established two 'tapping up' prohibitions. First, an agent could not approach a player who already held an exclusive representation contract with another agent (Article 22(1)). Second, the agent was prohibited from approaching any player who was under contract to a club with the aim of persuading him to terminate his contract prematurely or to violate any obligations stipulated in the employment contract. The regulations presumed, unless established to the contrary, that any agent involved in a contractual breach committed by the player without just cause had induced such breach of contract (Article 22(2)). Once an agent had acted in any transaction for a player or a club, his or her name, and that of the client, must appear in that contract (Articles 26 and 28). This was the proof required to demonstrate that an agent took part in a relevant transaction.

Under the 2008 PAR, agents were required to abide by the principles described in the Code of Professional Conduct annexed to the regulations. This code required an agent, inter alia, to perform his activities conscientiously, professionally, truthfully and fairly whilst protecting the interests of his client in compliance with the law. The agent was required to conduct a minimum of bookkeeping on his/her business activity and provide any authorities conducting an investigation into disciplinary cases and other disputes with information directly connected with the case in point (Annex 1).

Domestic disputes arising from the activity of an agent were not to be heard by FIFA but had to be resolved by independent arbitration at national level, albeit taking into account FIFA Statutes and national law. International disputes could be referred to the FIFA Players' Status Committee with disciplinary matters being referred to the Disciplinary Committee (Article 30).

Violations of the 2008 PAR could give rise to sanctions being imposed on agents, clubs, players and associations. In domestic transactions, the relevant association was responsible for imposing sanctions, although the FIFA Disciplinary Committee could impose additional sanctions. In international transactions, the FIFA Disciplinary Committee was responsible for imposing sanctions in accordance with the FIFA Disciplinary Code (Article 32). Sanctions that may be imposed for violating the regulations were a reprimand or a warning, a fine of at least CHF 5,000 (CHF 30,000 for associations), a suspension or withdrawal of the licence for up to

12 months (for an agent), a match suspension (for players), exclusion from a competition (for associations), a ban on taking part in any football-related activity and for clubs, a transfer ban, points deduction or relegation (Articles 33-35). An agent was prohibited from taking a dispute to ordinary courts of law as stipulated in the FIFA Statutes and was required to submit any claim to the jurisdiction of the association or FIFA (Annex 1).

***Reforming the 2008 PAR***

The apparent deficiencies of the 2008 PAR were revealed when only a year after their enactment, FIFA embarked on another reform process. According to FIFA, these deficiencies were:

- Inefficient licensing of players' agents, resulting in the conclusion of many international transfers without the use of licensed agents.

- Even transfers concluded with the use of licensed agents were often not transparent and thereby not verifiable.

- Confusion regarding the differences between club representatives and players' agents and their respective financial obligations.[75]

FIFA's aim was to adopt a new, more transparent system that would be easier to administer and implement, resulting in improved enforcement at national level. The FIFA Committee for Club Football established a sub-committee composed of key football stakeholders including member associations, confederations, clubs, FIFPro and professional football leagues. Not included within the sub-committee's membership was a body representing agents, such as the European Football Agents Association.

The outcome of these deliberations saw the FIFA Executive Committee approve new regulations in March 2014. Following amendments to the FIFA Statutes at the 64th FIFA Congress in June 2014, a new set of Regulations on Working with Intermediaries entered into force on 1 April 2015 thus replacing the 2008 PAR.

The key changes in the 2015 RWWI are:

- The regulations no longer speak of agents but refer to intermediaries.

- An intermediary can be both a natural or legal person.

- Intermediaries no longer require a licence. They now have to certify that they have no conflicts of interest (unless declared) and that they have an impeccable reputation.

- Each time an intermediary is involved in a transaction, they must be registered with the National Association to which the club is affiliated. National associations are required to maintain the register.

- FIFA has recommended remuneration caps on the services provided by intermediaries.

[75] Working with Intermediaries – reform of the players' agents system, www.fifa.com

- Intermediaries cannot be remunerated in terms of employment contracts and/or transfer agreements if the player concerned is a minor.

- Breaches of the RWWI are enforced by National Associations and any sanctions imposed may be extended by the FIFA Disciplinary Committee.

# 5.

# *The 2015 FIFA Regulations on Working with Intermediaries*

### *Reforming the 2008 Players' Agents Regulations*

Shortly after the introduction of the 2008 PAR, FIFA embarked on a reform process with a view to replace the regulations with a new version. Much of the justification for the need to reform the 2008 PAR stemmed from a statistic produced by FIFA. Marco Villiger, Director of Legal Affairs at FIFA stated at the EU Conference on Sports Agents in 2011 that "*only 25-30% of transfers are managed by official FIFA licensed agents*".[76] If accurate, this figure is concerning as it raises the possibility that a large number transactions have been undertaken by either "exempt" individuals, or more worrying, unregulated individuals. If unregulated individuals are parties to transactions, this means that clubs and players were not discharging their duties under the regulations, suggesting that a culture of non-compliance is evident within the sector.

However, the headline FIFA figure is not sufficiently sensitive to illuminate whether the source of this problem lies within or outside the territory of the EU and whether amending the existing regulations risks undermining good practice evident in a number of the large football markets within the EU. As Lombardi argued, whereas some National Associations, particularly the large National Associations in the EU, adopted a high level of regulation, others merely paid "lip service" to the 2008 PAR and adopted either minimal or no regulation of agents' activity in their territory.[77] Lombardi observed a correlation between those National Associations with a culture of regulation who returned low pass rates for the agent's examination, and those associations with lower standards who returned high pass rates.[78]

FIFA presented a more formal critique of the 2008 PAR at its 59th Congress in 2009. Here FIFA identified three problems with the 2008 version. First, a recognition that the system was inefficient and had resulted in many international transfers being concluded without the use of licensed agents. Second, even transfers concluded with the use of licensed agents were often not transparent and thereby not verifiable. Third, the regulations led to confusion regarding the differences between club representatives and players' agents and their respective financial obligations.[79]

In light of the above, FIFA initiated a reform process leading the adoption of a new set of agents regulations. The FIFA Executive Committee approved the new regulations in March

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[76] Marco Villiger speaking at the EU Conference on Sports Agents, 9-11 November, Brussels. Available at: http://ec.europa.eu/assets/eac/sport/library/studies/final-report-eu-conference-sports-agents.pdf

[77] Lomardi, P., (2015), *The FIFA Regulations on Working with Intermediaries*, in Colucci, M. (ed), The FIFA Regulations on Working with Intermediaries: Implementation at National Level, International Sports Law and Policy Bulletin, 1/2015, p.25.

[78] Ibid.

[79] FIFA (2015), Working with intermediaries – reform of FIFA's players' agent system, background information. Available at: http://resources.fifa.com/mm/document/affederation/footballgovernance/02/58/08/50/backgroundpaper-workingwithintermediaries-reformoffifasplayersa..._neutral.pdf

2014 and the amendments to the FIFA Statutes were approved at the 64th FIFA Congress in June 2014. The new Regulations on Working with Intermediaries entered into force on 1 April 2015 replacing the 2008 PAR. FIFA's stated objectives with the new regulations were four-fold. First, FIFA wanted to promote transparency by securing full disclosure and publication of the remuneration and payments made to intermediaries as a result of transactions in which they are involved. Second, they wanted clarification regarding the payment of intermediary fees and identification of which party, clubs or players, are responsible for paying intermediary fees and what percentage intermediaries are paid. Third, FIFA sought proper disclosure of any conflicts of interest by all parties involved and, finally, they wanted to safeguard minors by prohibiting payment of commission if the player concerned is a minor.[80]

The main, and some would say revolutionary, departure from the 2008 PAR is that FIFA is no longer regulating access to the agent's profession. Instead, the new regulations require National Associations to adopt a registration system underpinned by new minimum standards; the focus, however, lies not in regulating the agent but the transaction between the club and the player.

### *The 2015 RWWI*

#### *Definition of an Intermediary*

The first notable change contained within the 2015 RWWI is that agents are now referred to as intermediaries and are no longer required to hold a licence. The 2015 regulations define an intermediary as "A natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement". Intermediaries can now be natural or legal persons, whereas, under the 2008 PAR, an agent had to be a natural person. The provision of free agent services, as opposed to only paid for services, is also now brought with the scope of the regulations. The definition also reveals that an intermediary can now represent a player and a club in the same negotiation which marks another significant departure from the 2008 PAR.

#### *Preamble*

The preamble to the regulations states that "…. one of FIFA's key objectives is to promote and safeguard considerably 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". In this connection, the regulations aim to protect players and clubs from being involved in unethical & illegal practices. However, unlike the previous PAR, the RWWI serve only as 'minimum standards / requirements' that must be implemented by each National Association, with each Association able to adopt higher standards.

#### *Art.1. Scope*

The RWWI are aimed at National Associations in relation to engagement of an intermediary by players and clubs with a view to conclude an employment contract or transfer between the

[80] Ibid.

two. The National Associations are required to draw up regulations that incorporate the principles established in the RWWI, although they can go beyond these minimum standards. This means that the requirements to become an agent under the 2008 PAR have been dispensed with and with the entry into force of the RWWI, the previous licensing system was abandoned, and all existing licences lost validity with immediate effect and must be returned to the associations that issued them (see Art.11).

*Art.2. General Principles*

Article 2.2 states that "In the selection and engaging process of intermediaries, players and clubs shall act with *due diligence*. In this context, due diligence means that players and clubs shall use *reasonable endeavours* to ensure that the intermediaries sign the relevant Intermediary Declaration and the representation contract concluded between the parties". The phrase *reasonable endeavours* implies a less stringent standard than a requirement to use *best endeavours*. Regardless of wording, the reference to *endeavours* carries with it an expectation of performance and a possible sanction for non-performance.

*Art.3. Registration of intermediaries*

Each time an intermediary is involved in a transaction, the RWWI state that they must be registered with the National Association to which the club is affiliated. The National Association must keep an intermediary register which is publicly available. It is the responsibility of the club or player who engages the intermediary to register the relevant documents with the National Association and this must include at least the Intermediary Declaration.

*Art.4. Requisites*

Before the relevant intermediary can be officially registered, the National Association concerned is required to be satisfied that the intermediary involved has an *impeccable reputation*. If the intermediary concerned is a legal person, the association responsible for registering the transaction will also have to be satisfied that the individuals representing the legal entity within the scope of the transaction in question have an impeccable reputation. National associations must ensure that the intermediary has no connection with football stakeholders that could lead to a conflict of interest. The above duties are discharged when the National Association receives the signed Intermediary Declaration. A failure to submit the Declaration could lead to a sanction for a failure to act with *due diligence* as per Art.2. The representation contract that the intermediary concludes with a player and/ or a club must also be deposited with the association when the registration of the intermediary takes place.

*Art.5. Representation Contract*

Prior to working on behalf of a player or a club, an intermediary must have in place a representation contract which must be deposited with the association when the registration of the intermediary takes place. The representation contract must contain the names of the parties, the scope of services, the duration of the legal relationship, the remuneration due to the

intermediary, the general terms of payment, the date of conclusion, the termination provisions and the signatures of the parties. The 2008 PAR contained a similar list, but the 2015 version added the requirement to specify the nature of the legal relationship, the scope of the services and the termination provisions. Under the 2008 PAR, a standard representation contract was provided for in the annexes and the duration of the representation contract was restricted to two years. Both these elements have been withdrawn under the 2015 RWWI.

If the player is a minor, the player's legal guardian(s) must also sign the representation contract, in compliance with the national law of the country in which the player is domiciled.

*Art.6. Disclosure and Publication*

In another departure from the 2008 PAR, players and clubs are now under a duty to disclose to the National Association all agreed payments to intermediaries. They must also disclose other information upon request for the purpose of investigations, such as by leagues, associations and FIFA. Clubs or players must also ensure that any transfer agreement or employment contract concluded with the services of an intermediary bears the name and signature of the intermediary and if the club / player have not used an intermediary, they must declare this.

National Associations are required to publish, for example on a website, a list of intermediaries they have registered (by end of March). They must also publish the total amount of payments to intermediaries. National Associations must also make available to clubs and players any information relating to transactions that have been found to be in breach of the provisions.

*Art.7. Payments to Intermediaries*

One of the most controversial elements of the new regulations is its approach to the capping of the remuneration of intermediaries. An intermediary's remuneration, when engaged to act on a player's behalf, is calculated on the basis of the player's basic gross income for the entire duration of the contract. If a club engages the services of an intermediary, remuneration is by way of a lump sum agreed prior to the conclusion of the relevant transaction, paid in instalments if agreed by the parties.

Article 7 makes the *recommendation* to National Associations that if the intermediary is engaged by a player, a 3% remuneration cap of the player's income for the duration of the contract should be imposed. If the intermediary is engaged by a club in order to conclude an employment contract, a 3% remuneration cap of the player's eventual income for the duration of the contract should be imposed. Finally, if the intermediary is engaged by a club in order to conclude a transfer, a 3% remuneration cap of transfer fee should be imposed. Payments for the services of an intermediary must be made by the client of the intermediary although a club can pay the intermediary on behalf of the player with the agreement of the parties.

Clubs must ensure that payments made by one club to another club in connection with a transfer, such as transfer compensation, training compensation or solidarity contributions, are not paid to intermediaries and that the payment is not made by intermediaries.

Article 7 prohibits 'officials' from receiving payment and also prevents any payments being paid to an intermediary in relation to an employment contract or transfer of a minor.

*Art.8. Conflicts of Interest*

One recurring concern with agency work is the issue of conflicts of interest. One such practice in agency work that potentially amounts to a conflict of interest is dual representation, whereby an agent represents both a player and a club in the same transaction. This practice was prohibited under the 2008 PAR. Under the 2015 RWWI, prior to engaging the services of an intermediary, players and/or clubs are required to use 'reasonable endeavours' to ensure that no conflicts of interest exist or are likely to exist either for the players and/or clubs or for the intermediaries. No conflicts exist when they have been disclosed in writing by the intermediary and consent has been given in writing by the parties. In a departure from the 2008 PAR, clubs and players are now permitted to engage the services of the same intermediary in a transaction by giving written consent. They must disclose to the National Association who will pay the intermediary.

*Art.9. Sanctions*

Under the 2008 PAR, domestic disputes arising from the activity of an agent had to be resolved by independent arbitration at national level, whilst international disputes could be referred to the FIFA Players' Status Committee with disciplinary matters being referred to the Disciplinary Committee. Under the RWWI, National Associations are now responsible for the imposition of sanctions on any party under their jurisdiction that violates the provisions of the 2015 regulations, their statutes or regulations. It appears that National Associations are to decide on what sanctions can be applied as the FIFA regulations are silent on this. National Associations are required to publish and to inform FIFA of any disciplinary sanctions taken against any intermediary. The FIFA Disciplinary Committee will then decide on the extension of the sanction to have worldwide effect in accordance with the FIFA Disciplinary Code.

*Art.10. Enforcement*

FIFA's role is to monitor the implementation of these RWWI and take steps if they are not complied with. FIFA's Disciplinary Committee is competent to deal with such matters in accordance with the FIFA Disciplinary Code.

*Art.11. Transitional Measures*

The entry into force of the 2015 RWWI means that the previous licensing system was abandoned, and all existing licences lost validity with immediate effect and had to be returned to the associations that issued them.

***Conclusions***

The headline developments in terms of the adoption of the 2015 RWWI are as follows:

- The regulations no longer speak of agents but refer to intermediaries.

- An intermediary can be both a natural or legal person.

- Intermediaries no longer require a licence. They now have to certify that they have no conflicts of interest (unless declared) and that they have an impeccable reputation.

- Each time an intermediary is involved in a transaction, they must be registered with the National Association to which the club is affiliated. National Associations are required to maintain the register.

- FIFA has recommended remuneration caps on the services provided by intermediaries.

- Intermediaries cannot be remunerated in terms of employment contracts and/or transfer agreements if the player concerned is a minor.

- Breaches of the RWWI are enforced by National Associations and any sanctions imposed may be extended by the FIFA Disciplinary Committee.

# *6.*

# *2015 RWWI: Summary of Key Findings and Reform Agenda*

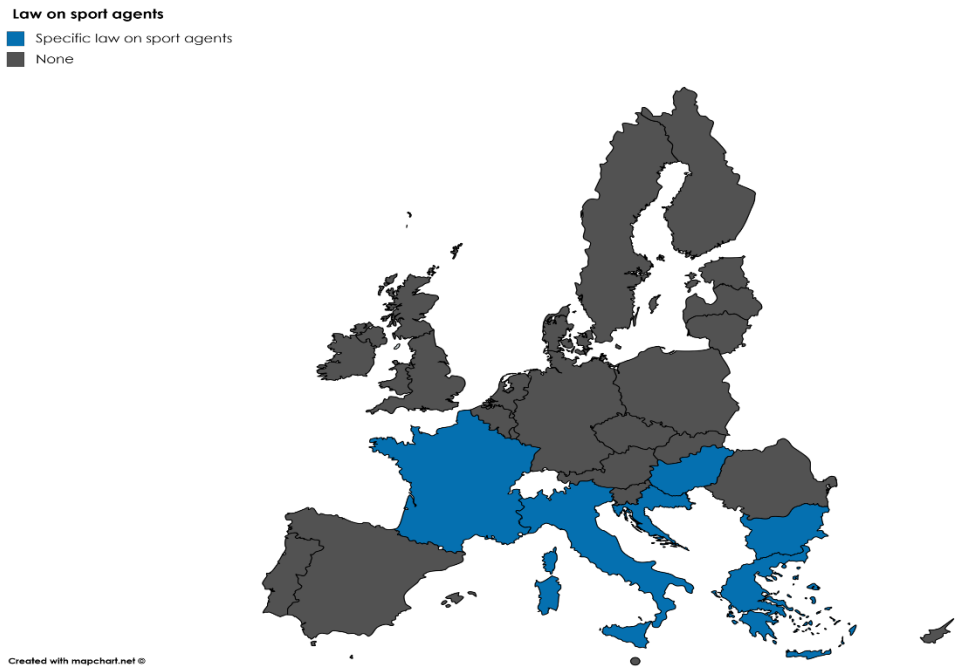
The 2015 RWWI establish minimum standards and require National Associations to adopt national intermediary regulations that can go beyond these minimum standards. An important element of the assessment undertaken by the research team has therefore focused on the scope of the RWWI mandatory requirements, and the extent to which their implementation at national level has led to market fragmentation and regulatory inconsistency within the industry. Our National Associations Reports highlight considerable variations in approaches to intermediary regulations across the territory of the EU, in relation to registration requirements, definitions of 'impeccable reputation', remuneration, approaches to minors, conflicts of interest and dispute resolution mechanisms.

The section below gives a brief overview of the implementation of the RWWI 2015 in the 31 National Associations within the EU territory, as of 2018. Full versions of the original National Associations Reports and a summarising table can be located at: www.ehu.ac.uk/eufootball

*National Legislation*

In a small pool of EU Member States, national legislation regulates the access to the profession of football intermediary and other aspects of the activity. Whether this reflects an historical preference for an interventionist approach, or it is a reaction to a perception of lack of effectiveness of the RWWI, this further adds to the inconsistency of the regulatory framework. While countries such as Portugal have adopted general sports acts, and other countries may simply apply general employment legislation to the activities of agents, a set of other countries, including Bulgaria, Croatia, France, Greece, Hungary and Italy have adopted a specific national legislation on the regulation of sports agents.

The impact of national legislation may of course affect all the area regulated by the RWWI. France and Italy, in particular, impose further requirements that are not mandated under FIFA RWWI, such as the holding of a licence subject to the passing of an examination.

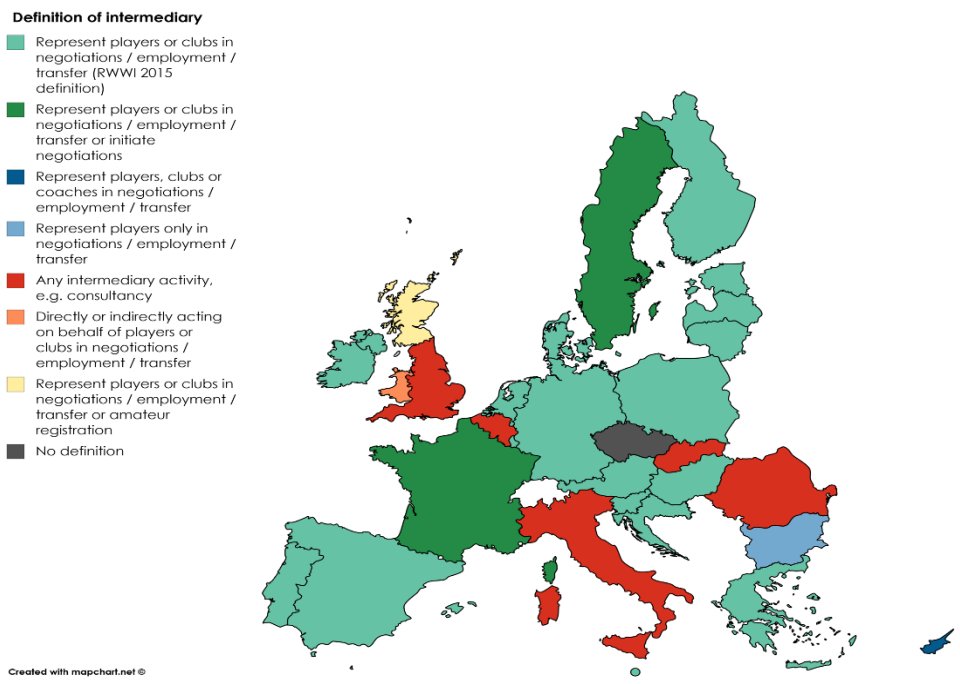



*Map 1: National Legislation on Sport Agents*

*Definition of Intermediary*

In relation to the scope of the mandatory requirements, one first aspect to consider is the definition of the intermediary, whose activity will be subject to the Regulations. While this may appear as semantic, the use of different definition has an impact on which type of activity will be subject to the rules of the governing body, its enforcement mechanism and the jurisdiction of sporting dispute resolution bodies. While 18 out of the 31 National Associations have transposed the definition of intermediary contained in the RWWI, the regulations adopted in *Bulgaria*, *Cyprus*, *France* and *Romania* provide that intermediaries may represent coaches/trainers as well as players.

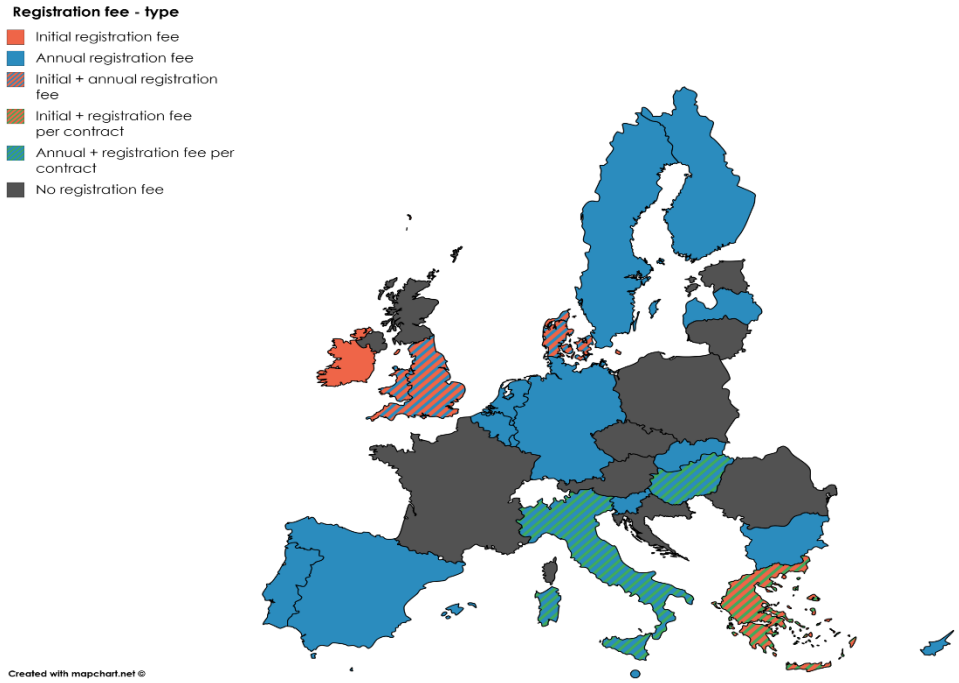
The intermediary activity itself is also defined in a range of different ways, with the French National Legislation only referring to the activity of bringing together parties with a view to conclude an employment contract, as opposed to the Regulations of the English and the Welsh National Associations, which define the intermediary activity as acting directly or indirectly in relation to any matter relating to a transaction, and the Belgian National Association, which specifically mentions consultancy as a regulated activity.




*Map 2: Definition of Intermediary*

*Registration Cost*

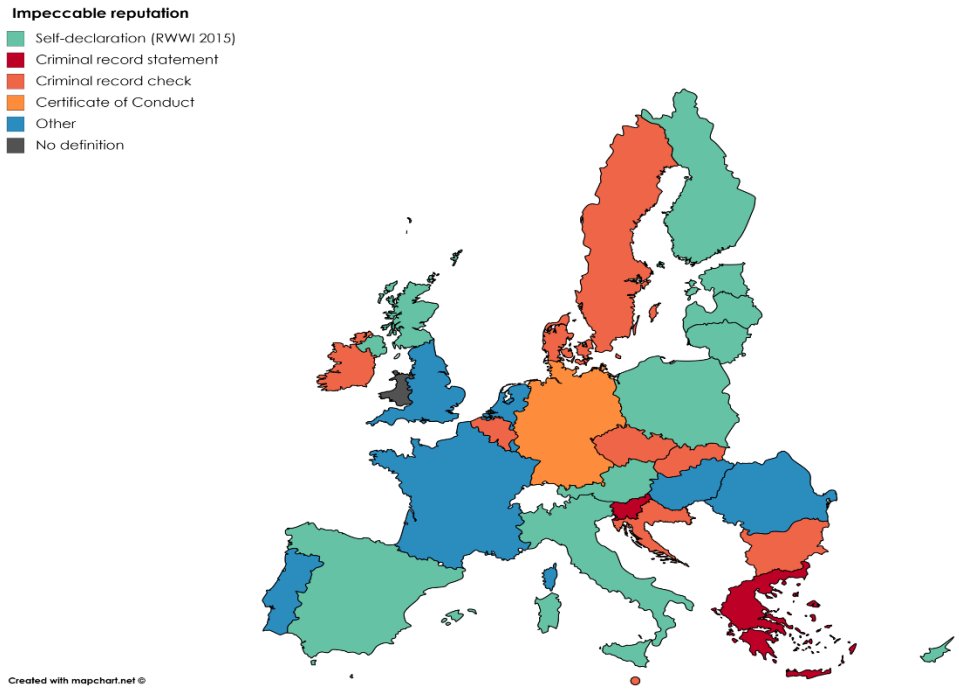
The registration fee imposed to intermediaries varies considerably from one association to the other, with National Associations in which the registration is free of charge, such as *Austria*, *Croatia*, *Czech Republic*, to associations that charge thousands of Euros for the annual registration, *Greece* and *Portugal*, and others that impose a fee for any representation contract registered.




*Map 3: Registration Fee*

*Impeccable Reputation*

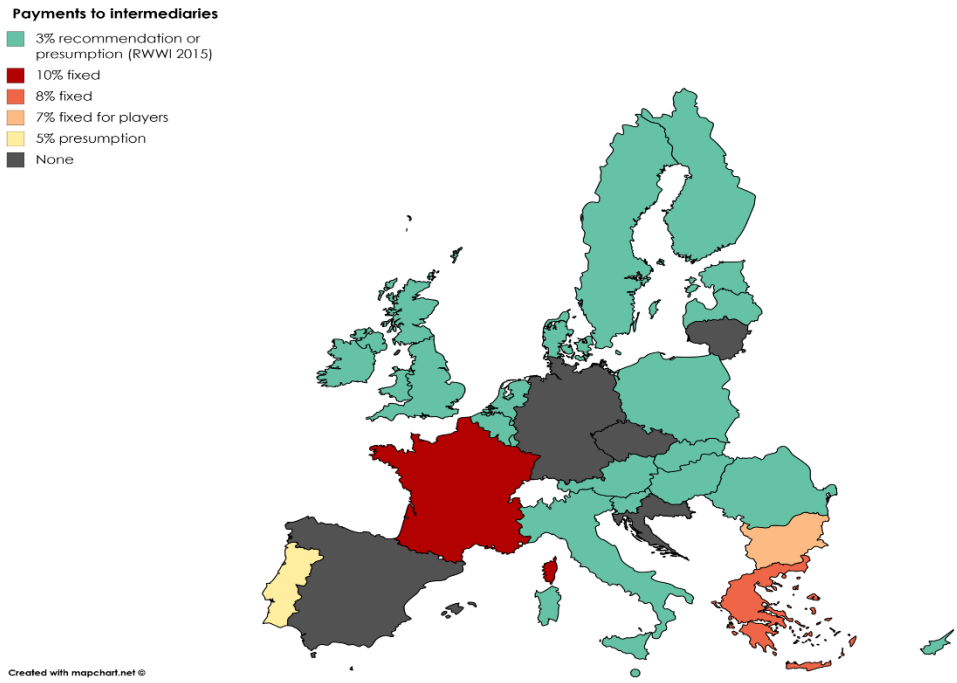
The FIFA RWWI require that National Associations must be satisfied that intermediaries registered with them have an impeccable reputation. However, no definition is provided of what impeccable reputation should mean and how this requirement should be satisfied. The National Associations Reports show remarkable differences also in this area. Again, some National Associations have simply transposed the RWWI minimum requirements into their regulations, which may be satisfied by the intermediary through a self-declaration. In a relevant number of countries, including *Sweden*, *Denmark*, *Republic of Ireland*, *the Netherlands*, *Bulgaria*, *Croatia*, *Slovakia* and *Czech Republic*, the intermediary is subject to a criminal record check, while in *Croatia* and *Greece* a Court statement must be obtained. Finally, a number of other countries (e.g. *Portugal*) demand agents to be vetted by an Intermediary Committee.




*Map 4: Impeccable Reputation*

*Agents Remuneration*

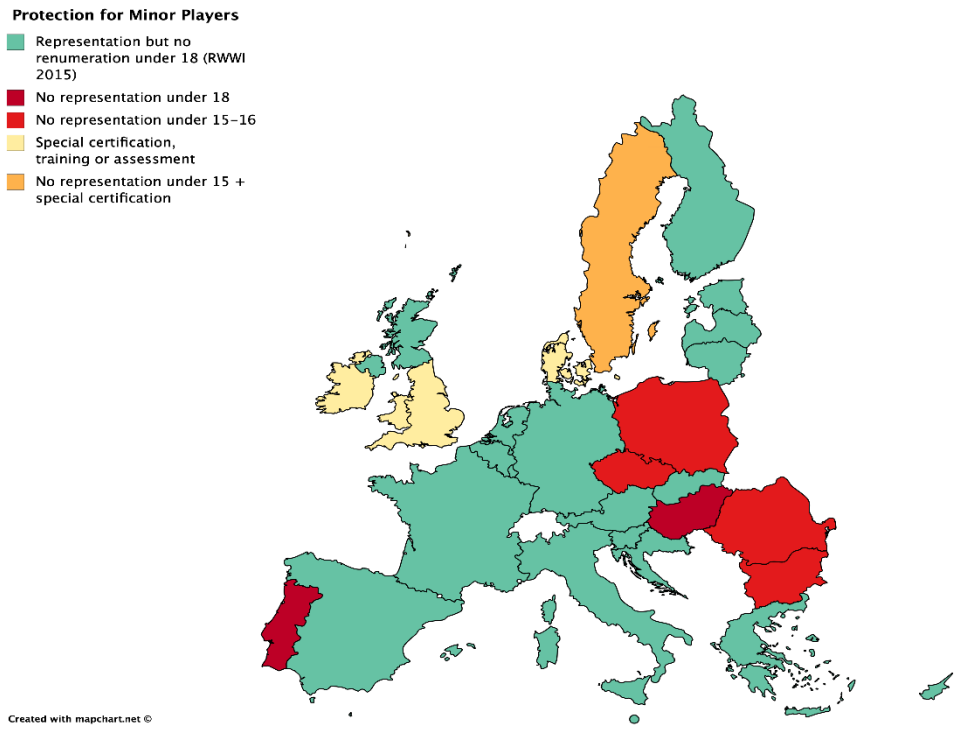
FIFA RWWI recommended National Associations that a 3% cap should be imposed on the remuneration of Agents, respectively calculated on the basis of the player's basic gross income for the entire duration of the contract, or on the value of the transfer fee paid, depending on whether the agent has been engaged by the player, or the club. As seen in relation to other aspects, the majority of National Associations simply transposed the recommendation into their own regulations. However, other National Associations depart significantly from it, with some not imposing any cap whatsoever (*Spain*, *Germany*, *Czech Republic* and *Lithuania*), and other imposing restrictions ranging from 5% (Portugal), to 8% (*Greece*). Finally, French National Legislation imposes a cap of 10%, calculated on the basis of the amount of the contract signed by the parties the intermediary has brought together.




*Map 5: Agents Remuneration*

*Intermediary Activity with a Minor*

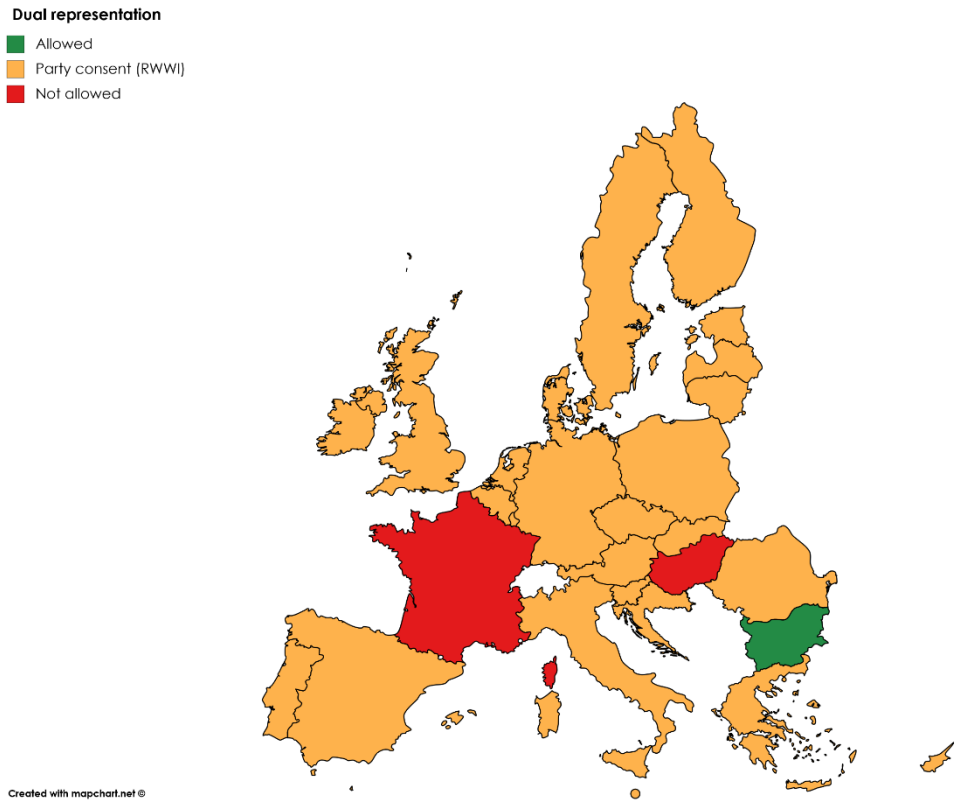
The requirements imposed on Agents in relation to intermediary activities involving minor players are wide ranging. FIFA RWWI mandated National Associations to prohibit payments to intermediaries in relation to an employment contract or transfer of a minor, and required the signature of the minor's parent or legal guardian on the representation contract between player and intermediary. On top of these requirements, a number of National Associations have imposed restrictions on any intermediary activity involving players younger than a certain age (*England*, *Sweden*, *Poland*, *Czech Republic*, *Hungary*, *Romania*, *Bulgaria* and *Portugal*), with mandatory training or special certificate required in *Sweden*, *Republic of Ireland*, *Denmark*, *England* and *Wales*.




*Map 6: Intermediary Activity with Minors*

*Conflicts of Interest*

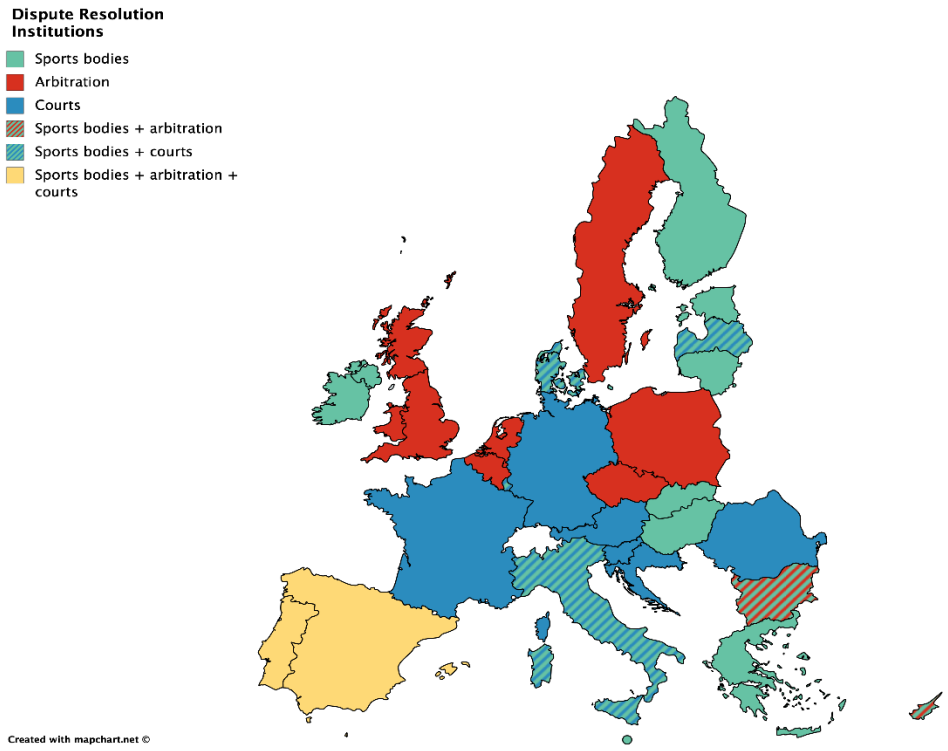
One main area that attracts concerns is the issue of conflicts of interest and, in particular the regulation of dual (and triple) representation. Under the 2015 RWWI, players and/or clubs are required to use 'reasonable endeavours' to ensure that no conflicts of interest exist or are likely to exist prior to engaging an intermediary. Furthermore, it is established that no conflicts exist when they have been disclosed and written consent has been given by the represented parties. The quasi-totality of the National Associations surveyed have replicated the provision within their Regulations, with the notable exception of *France*, where under National Legislation dual representation is prohibited, and *Bulgaria*, where dual representation is allowed under National Legislation on mediation.




*Map 7: Conflicts of Interest*

*Dispute Resolution*

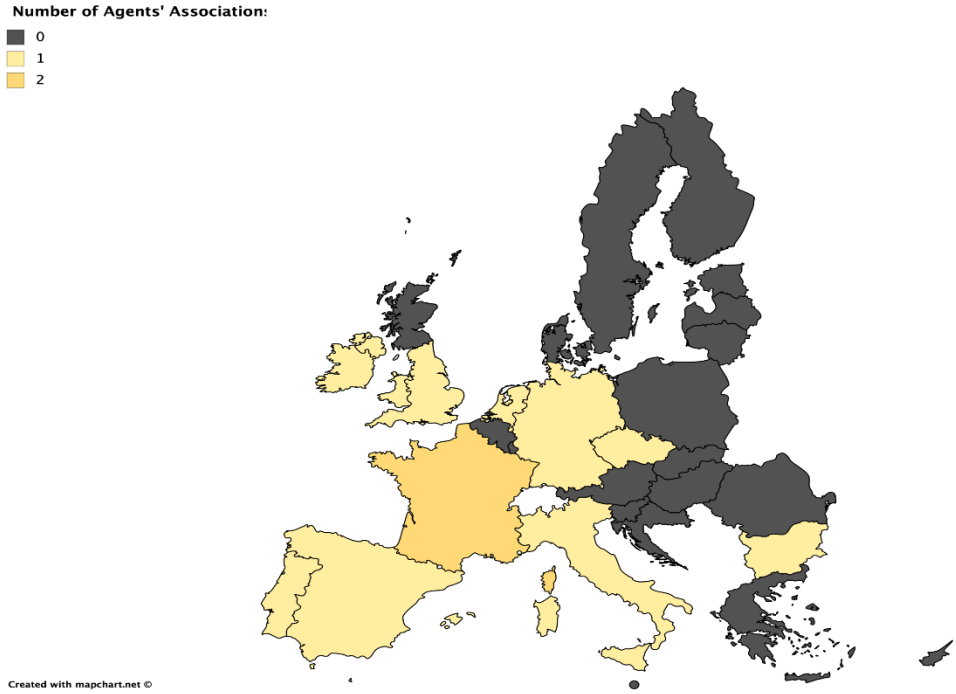
Effective mechanisms of dispute resolution and enforcement of sanction are of paramount importance in the regulation of the industry. Under the 2015 RWWI, this area has been completely delegated to National Associations. The National Associations Reports therefore highlight inconsistencies as to dispute resolution bodies and their ability to exercise their jurisdiction over all the stakeholders involved. A number of National Associations, including E*ngland* (to some extent), Sweden, the *Netherlands, Belgium, Poland* and *Czech Republic*, impose referral of any disputes to their own arbitration bodies, and excludes any possible referral to ordinary courts. Other Associations, such as Italy, have set up dispute resolution bodies to specifically deal with disputes between intermediaries, to the exclusion of any other stakeholders. Finally, a number of National Associations, including *Croatia, France, Slovenia* and *Spain* have not claimed any jurisdiction over the resolution of disputes involving intermediaries, which are therefore bound to be taken to ordinary courts.




*Map 8: Dispute Resolution Bodies*

*National Collective Body*

The final issue that the National Associations Reports considered was the level of collective representation of agents/intermediary at national level. The findings of the National Associations Reports were complemented by the answers collected in our stakeholder survey. When asked whether *"your organisation was appropriately consulted by the competent National Association when it was developing and implementing the regulations on working with intermediaries within its territory"*, 25% agreed (2.5% strongly agreed) and 47.5% disagreed or strongly disagreed. This response must be considered in a context of low level of representation at national level, as national representative bodies for agent exist only in 12 out of 31 National Associations, with *France* notably having 2 Agents' associations.




*Map 9: National Agents' Associations*

The picture painted by the National Associations Reports raise a number of issues. First, there is a concern that the 2015 RWWI approach has resulted in a lack of consistency in terms of its implementation at National Association level. Only 12.5% of respondents to our stakeholder survey agreed with the statement that *"the RWWI and the national association regulations have brought consistency to standards in terms of intermediary regulations across the EU"*. 60% disagreed or strongly disagreed with this statement and 27.5% neither agreed nor disagreed. Second, concern has been expressed that the variation of approaches and regulatory requirements at National Association level raises legal issues and questions of compatibility with national and EU laws, particularly concerning whether intermediaries are unlawfully having their economic activity restricted and whether an uneven playing field in the EU exists.[81] Third, a lack of uniformity risks increasing the administrative burden on stakeholders

[81] The most recent study on this is: Colucci, M., (2016) *The FIFA Regulations on Working With Intermediaries: Implementation at National Level*, International Sports Law and Policy Bulletin, Issue I-2016, pp. 23-40.

(national associations, leagues, clubs, players and intermediaries) but it is unclear if this effort is proportionate to the benefits secured.

The problem with such a varied regulatory landscape is that simplicity and transparency is compromised and the incentives for regulatory circumvention are increased as stakeholders navigate the complex system. 77.5% of respondents to our stakeholder survey either strongly agreed or agreed that *"current intermediary regulations are easily circumvented"* and only 5% disagreed. Football is an inherently international business but the current system (2015 RWWI) partitions the single market into national markets with different standards, thus making some markets more or less attractive to do business in. The varying standards make the work of an agent more difficult and frustrate the provision of his/her services across frontiers. This complexity also raises the potential for agents (and indeed clubs and players) to commit technical regulatory offences despite having acted in good faith.

### *Reforming the 2015 RWWI*

The origins of the reform process can be traced to November 2017 when FIFA and FIFPro concluded a six-year co-operation agreement which formed part of the settlement to FIFPro's legal challenge regarding the operation of the transfer system.[82] FIFPro had lodged a complaint with the European Commission in September 2015 alleging incompatibilities between the FIFA transfer system and EU law. As part of the settlement seeing the withdrawal of the complaint, FIFA established a Transfer System Task Force with a view to conduct a review of the transfer system, including the role played by intermediaries within it. The Task Force operated as a sub-committee to FIFA's newly established Football Stakeholders Committee.

In what the authors of this Report consider to be the first initiative of its kind, FIFA invited intermediaries to participate within the Task Force process, not as members but as part of a consultative workshop held in Zurich in April and May 2018.[83] As is outlined elsewhere in this Report, the agents are not entirely satisfied with this level of consultation.

The Task Force deliberated throughout 2018 and 2019, and in September 2019 a final package of reforms was sent to and approved by the Football Stakeholders Committee.[84] Taken together, the reforms regarding agents include:

- establishment of a cap on agents' commissions (10% of the transfer fee for agents of releasing clubs, 3% of the player's remuneration for player agents and 3% of the player's remuneration for agents of engaging clubs, and under a dual representation scenario involving the player and engaging club, the cap on commission set at 6% of the player's salary which amounts to 3% from each party);

[82] FIFA and FIFPro sign landmark agreement and announce measures to enhance professional football, FIFA.com, 06/11/17. Accessed here https://www.fifa.com/about-fifa/who-we-are/news/fifa-and-fifpro-sign-landmark-agreement-and-announce-measures-to-enhan-2918747

[83] FIFA holds talks with agents on possible revision of football intermediaries system, FIFA.com, 20/04/18. Accessed here: https://www.fifa.com/about-fifa/news/y=2018/m=4/news=fifa-holds-talks-with-agents-on-possible-revision-of-football-intermediaries-sys.html

[84] FIFA and football stakeholders recommend cap on agents' commissions and limit on loans, FIFA.com, 25/09/19. Accessed here: https://www.fifa.com/about-fifa/who-we-are/news/fifa-and-football-stakeholders-recommend-cap-on-agents-commissions-and-limit-on-

- limitation of multiple representation to avoid conflicts of interest.

- reintroduction of a mandatory licensing system for agents, which will include further education measures and a requirement for continuing professional development;

- all agents' commissions to be paid via the FIFA Clearing House which is currently being developed;

- an effective FIFA resolution system to solve disputes between agents, players and clubs.

These reforms were subsequently approved by the FIFA Council meeting at the end of October 2019.[85]

Early, in 2018, in response to the fast-moving regulatory environment, the European Football Agents Association (EFAA) organised a series of workshops to discuss the reform agenda. Meetings were held in Paris (12/04/18) and Lisbon (30/05/18) and the English Association of Football Agents (AFA) hosted a meeting at Barnet FC on 06/06/18. Professor Parrish from the research team attended these meetings and noted that the following key issues of concern were highlighted by the EFAA and the AFA:

1. A general lack of representation in the framing of regulations that materially affect intermediaries.

2. The need for a standardised set of regulations that facilitate rather than frustrate the provision of intermediary services in an international labour market.

3. The need for transparency in financial transactions.

4. The need for regulations that promote high standards of professionalism including qualitative requirements to practice as an intermediary.

5. The need for enforceable regulations with proper sanctioning and dispute resolution procedures.

6. Opposition to a cap on remuneration unless enacted in national legislation.

7. The need for regulations to protect minors, but opposition to limitations on the payment of fees to intermediaries who represent minors.

8. Opposition to a prohibition on clearly disclosed dual representation.

[85] FIFA Council unanimously appoints China PR as hosts of new Club World Cup in 2021, FIFA.com, 24/10/19. Accessed here: https://www.fifa.com/about-fifa/who-we-are/news/fifa-council-unanimously-appoints-china-pr-as-hosts-of-new-club-world-cup-in-202

*Contribution of this Study*

The research team scheduled its activities (release of Interim Report, Thematic Conclusions and MSEs) to complement the activities of the Task Force. Although this Final Report was completed in October 2019, the vast majority of its contents had already been our shared with the key stakeholders so as to inform their deliberations. The Interim Report was published in August 2018 and the Thematic Conclusions published throughout 2018/19: Remuneration & Representation Restrictions (November 2018); Professional Standards (March 2019); Intermediaries and Minors (April 2019) & Sanctions and Dispute Resolution (September 2019). The key findings from these thematic conclusions are detailed in the next four chapters of this Report.

# *7.*

# *Professional Standards: Licensing & Qualification*

## Introduction

The main objective of a set of rules regulating the activity of football agents must be to ensure the quality of the service provided to the market. Although the public debate has not focussed on the issue of licensing and qualification of agents, this is an aspect of vital importance for all the stakeholders involved in the area. Formal standards of knowledge and specific levels of experience prepare agents to become qualified representatives of individuals or collectives in professional football and ensure the overall integrity and legitimacy of the system. In practice, the service of football agents may cover a broad range of activities, from financial, legal and tax services, to assistance on matters such as education, dual careers, foreign language, media presence and cultural integration. In order to respond to the growing demands and challenges of an ever-complex football environment, the implementation of certain standards is largely considered as inevitable.

Against this backdrop, this section of the Report provides an overview on the issue of licensing and qualification of football agents. The second part of this section shows how the matter has evolved through the various versions of FIFA Regulations. Previous issues and debates around licensing and qualification are also addressed. A third part deals with the 2015 RWWI and the way the regulations have been implemented at national level. The fourth part is dedicated to an assessment of the 2015 RWWI with special regard to licensing and qualification. The fifth addresses objectives and requirements of a licensing and qualification system, followed in the sixth part by a discussion of four possible models of licensing and qualification, with regard to the range of stakeholders involved and the interest they represent. The seventh part examines agents licensing requirements in other sports. Finally, the Report offers some conclusions and recommendations on core elements and requirements of licensing and qualification.

This study expounds recommendations from a specific standpoint: considering requirements of good governance as a normative backdrop, it is argued that an efficient licensing system, supported by an examination and ongoing educational requirements, will help to promote a high level of professionalism in the football agents' industry and reduce instances of abuse.

The FIFA TMS Report on Intermediaries reveals that agents have been involved in only 29.3% of international transfers in 2018.[86] It is expected that a reform of the current regulations and the incorporation of formal standards will foster transparency and a culture of client care in the industry, which are key components of good governance. In addition, a system bound to a certain set of standards and requirements may also ensure greater accountability and control.

[86] FIFA TMS, Intermediaries in International Transfers, Period Jan 2013-Nov 2018, 2018 Edition. Accessed at: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2018/12/Intermediaries-2018.pdf

**Changes and Development: The Provisions on Qualification and Licensing**

As previously mentioned, between 1991 and 1994 FIFA responded to the increase in cross-border transfers of players and the growing number of players' agents being active in this field by adopting the first set of regulations on players' agents (PAR).

Under the 1994 PAR, National Associations were to issue a licence to natural persons that applied to become players' agents in their territory.[87] For a licence to be issued, the candidate had to undergo an interview, aiming to assess his/her knowledge of law and sports related matters.[88] In addition, applications by individuals with a criminal record or a "bad reputation" would have been rejected. Having met these requirements, the applicant had to deposit a bank guarantee of CHF 200,000.

Following a number of complaints before the European Commission, FIFA amended the regulations on players' agents in 2001. The new FIFA regulations maintained the obligation to hold a licence issued by the respective National Association (Articles 1, 2 and 10). The candidate should have had an impeccable reputation, and pass a multiple-choice questions exam, aiming to assess his/her knowledge of law and sport. The players' agent was also required to take out a professional liability insurance policy or, failing this, deposit a bank guarantee of CHF 100,000 (Articles 6 and 7).

In 2007, the European Commission published the White Paper on Sport in preparation for the implementation of Article 165 in the Lisbon Treaty.[89] In this regard, the accompanying Commission Staff Working Document[90] acknowledged that the issue of professional qualifications of players' agents was already covered by Directive 2005/36/EC on the recognition of professional qualifications in cases where the profession of players' agent was subject to national qualification requirements. In section 4.4, the European Commission highlighted reports of bad practice in the activities of some agents which resulted in instances of corruption, money laundering and exploitation of minors.

The European Parliament addressed the question of players' agents in its Resolution on the White Paper on Sport.[91] The Resolution critically refers to "*bad practices in the activities of some representatives of professional sports players which have resulted in instances of corruption, money laundering and the exploitation of under-age players and sportsmen and sportswomen, and takes the view that such practices harm sport in general*".

In January 2008, another revision of the regulations (FIFA Player's Agents Regulations) was adopted. Clubs and players were prohibited from using non-licensed players' agents and the system of sanctions was tightened. The 2008 version provided for a 5-year licence, which would have had to be renewed through a "refresher test" for those holding a licence.

After lengthy preparatory work, in June 2014 the 64th FIFA Congress in Sao Paulo adopted the *FIFA Regulations on Working with Intermediaries* (RWWI), which came into force on

[87] Articles 1 and 2 of the PAR.
[88] Ibid., Articles 6-8.
[89] European Commission (2007), White Paper on Sport COM(2007) 391 Final.
[90] European Commission (2007) Staff Working Document, The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport COM(2007) 391 Final.
[91] European Parliament, Resolution of 8 May 2008 on the White Paper on Sport (2007/2261(INI).

April 1st, 2015. In addition to abandoning the previous examination and licensing procedure in favour of a registration procedure, the parties involved in a transfer are subject above all to considerable disclosure and publication obligations.

The 2015 Regulations put an end to the licensing system, offering easier access to serve as a player agent/intermediary. The role of the National Associations was again reinforced. A first review of the 2015 regulations reveals that major targets have not been achieved. Accordingly, in 2018 FIFA started a revision of the existing regulations.

**Licensing and Qualification: The 2015 RWWI and its National Implementation**

All the National Associations surveyed have adopted the minimum requirements for the registration of intermediaries. However, several countries went beyond the requirements of the RWWI. By January 2019, three countries, namely *Czech Republic*, *France* and *Italy*, require players' agents to hold a licence. To receive the licence, candidates must pass an exam or an interview. Further requirements differ among the three countries and may also include liability insurance (*Czech Republic*).

In two of the three countries, the upholding (*France*) or re-introduction (*Italy*) of a licensing system stems from national legislation which requires that the National Association (*France*), or the National Olympic Committee and the National Association (*Italy*) issue licences for intermediaries.

While most countries have renounced to the licensing system, some have imposed certain registration conditions additional to those defined by the RWWI. These requirements include a University degree (*Bulgaria*), a personal interview (*Slovakia, Spain*), liability insurance (*Portugal*) or the recommendation by a bank (*Malta*).

Additional measures to the RWWI requirements have been adopted by some National Associations: the Danish and the Swedish National Association issue certificates and provide training for intermediaries on a voluntary basis. The Dutch National Association has implemented a system to certify intermediary organisations. These measures are commonly well accepted by intermediaries, as they may be seen as a marketing tool for their services.

The requirements to act as intermediary in the EU are therefore relatively heterogeneous, as several countries have departed from the minimum requirements adopted by FIFA RWWI.

**Assessment of the 2015 RWWI Regulations on Licensing and Qualification**

The RWWI are akin to a delicensing and deregulation of the sector. Whilst our National Reports and the stakeholder survey indicated that transparency increased in terms of the information that is being published by the National Associations, the market in fact became more opaque when looking at the individual transactions and constellations of representation.

The de-regulation resulted in an increase in the number of registered intermediaries, seemingly accompanied with a decrease in professional standards and the quality of services provided. Under the current RWWI, players who, generally, are young, have short careers and hold a

weak position in negotiating transfer deals, are more likely to be exposed to unqualified intermediaries. Minors are particularly vulnerable to poor practice.

As the current RWWI focus on regulating the transaction as opposed to the individual agent, one could say that intermediaries are no longer part of the regulated football system, notwithstanding that some National Associations continue to regulate agents' activities, sometimes in conjunction with national law requirements. Nevertheless, to retain some regulatory authority over intermediaries, the intermediary self-declaration includes a paragraph in which the signatories declares their acceptance of the statutes and rules of the governing bodies. This situation was legally challenged in Germany. Sanctioning and enforcement have therefore become problematic within the framework of the current regulations.

On the cross-national level, different national requirements for licensing and qualification caused a fragmentation of the European market, counteracting endeavours to establish a common European market for the provision of football agents' services. Differing standards and requirements incentivise forum shopping, causing intermediaries from countries with strict rules to move to markets with more loose requirements.

One country (*Italy*) reacted to the rising criticism associated with the de-regulation of the intermediary sector by adopting national legislation which establishes a licensing system. If more countries were to follow, this would further lead to a national fragmentation of the market.

Taking into account the results of our stakeholder survey, it becomes evident that the current situation is not satisfactory. Considering the effects of the 2008 PAR, 35% of respondents agree that "*Prior to the introduction of the FIFA RWWI, the FIFA Players' Agents Regulations were working effectively*"; 45% disagree, 20% neither agree nor disagree. Whilst the old licensing system was flawed, many respondents argued that it was underpinned with sound principles and a return to it, or a similar system, is necessary in order to ensure that players and clubs are engaging a professional agent.

The counter argument is that under the RWWI, players and clubs are free to choose someone close to them and who they trust to represent them, and not just because they hold a licence.

In terms of ensuring standards of professionalism, the respondents to the stakeholder survey favoured the following requirements:

- Ongoing education: 97.5% (strongly) agree
- Insurance: 85%
- Registration: 82.5%
- Training + exam: 75%
- Background checks: 70%
- Self-declaration on good character: 32.5%
- Bank deposit: 27.5%
- Training programme: 17.5%
- Exam: 10%

## Objectives and Requirements of a Licensing and Qualification System

The future licensing and qualification system must serve the following objectives and meet certain requirements which arise from the criticism of the current system and principles of good governance. A licensing and qualification system must:

- guarantee a high baseline of professional standards and ensure a certain level of quality,
- increase transparency on all levels of the market,
- provide sanctioning power to the relevant authority and ensure enforcement of the rules,
- increase standardisation among EU members in order to prevent forum shopping,
- be in line with both EU and national law.

## Future Scenarios of Licensing and Qualification

This study analyses four possible models for regulating the professional standards of football agents: (1) the international federation model (2) the national federation model (3) the harmonise national legislation model and (4) the collective bargaining model.

The scenarios take previous studies into consideration: in March 2018, a study commissioned by the European Commission further identified issues which arise from the de-regulation of the intermediary market. The study concludes that "*representatives of players (FIFPro) and agents (e.g. EFAA) should be involved in improving this regulation in the future*."[92] Such involvement could potentially lead to a Collective Bargaining Model for the regulation of players' agents akin to that found in American Basketball.[93] Those concepts will be considered in detail.

Member States and the EU could move beyond a complementary role by adopting binding legislation and thus set up national or EU-wide licensing systems. It must be recalled that in *Piau*, the European Court established that any regulation of the intermediary market may only impose qualitative, as opposed to quantitative, restrictions on the market.[94]

### *Model 1: The "International Federation Model"*

In 2009, an independent study on sport agents carried out on behalf of the European Commission concluded that the sport movement should continue to play a leading role in the implementation of regulations applicable to sports agents.[95] At the same time, the study

[92] KEA European Affairs & ECORYS (2018), An update on change drivers and economic and legal implications of transfers of players: Final Report to the DG Education, Youth, Culture and Sport of the European Commission. Accessed at: https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf.
[93] NBPA Regulations Governing Player Agents, Available at: https://cosmic-s3.imgix.net/e3bb4d60-7b1a-11e9-9bf5-8bad98088629-NBPAAgentRegulations.pdf.
[94] Case T-193/02, *Piau*, at paragraph 103.
[95] KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.

advocated a complementary role for states.[96] Similarly, the recommendations on the supervision of the activities of agents and on transfers of players adopted in December 2013 by the EU Expert Group on Good Governance affirmed that "*the relevant sporting bodies are best placed to introduce any needed changes in the supervision of the profession of agents, in accordance with good governance principles such as democracy and inclusion of stakeholders*".[97]

Under the international federation model, FIFA would retain the competence for regulating the conditions of licensing and qualification of agents and national federations would implement the Regulations in their domestic settings. Traditionally, football agents have been regulated under this model although, with the 2015 RWWI, "*FIFA receded from any attempt to regulate the access to the profession of intermediaries at global level*".[98] Nevertheless, even now, FIFA establishes minimum conditions that must be applied at National Association level. In principle, a devolution of competence from FIFA to the Continental Confederations is also possible.

Our study has highlighted deficiencies in terms of how the international federation model has traditionally been negotiated with stakeholders. When introducing the RWWI, FIFA's consultation with stakeholders was limited and consultation between National Associations and national stakeholders at implementation level was deficient. Should the international federation model be retained, which is a central recommendation of this study, stakeholder consultation must be improved. In this regard, the research team note positive developments in terms of stakeholder engagement within the context of the FIFA Transfer System Task Force and FIFA's Football Stakeholders Committee.

The advantages of the international federation model are:

- Longstanding experience of this model operating in football.

- As football is a global sport, the model helps establish a consistent harmonised system designed at improving professional standards and ethics, which, if flexible enough, could respect National Associations' margin of appreciation to take into account possible domestic specificities and reconcile practical and legal differences.

- Should agents be subject to uniform rules, and not just the transaction they facilitate, the model acknowledges agents as part of the football system and recognises that agents have rights and responsibilities within the football eco-system.

- Taking into account the cross-border nature of the market, should uniform regulations be applied, the model allows easier movement of agents and their services.

[96] "States must play a complementary role by supervising the measures implemented by national federations and imposing criminal penalties for offences against public order". Ibid., p. 172.
[97] Expert Group "Good Governance", Deliverable 2 – Principles of Good Governance in Sport (2013), EU Work Plan for Sport 2011-14, December 2013. Available at https://ec.europa.eu/sport/policy/cooperation/expert-groups-2014-2017_en
[98] Colucci M. (2018), *FIFA Regulations on Working with Intermediaries: an update comparative analysis*, in M. Colucci et al. (eds.), The FIFA Regulations on Working with Intermediaries. Implementation at national level, 2nd ed., Sports Law and Policy Centre, p. 593.

The disadvantages of the international federation model are:

- The existence of state legislation applicable to agents in some countries (e.g. France and Italy) could complicate its general application.

- At European regional level, FIFA Regulations should take into account EU law obligations imposed upon Member States.

- Our stakeholder meetings have raised concerns regarding the legality of a re-introduced licensing and qualification system by FIFA/the National Association in some national contexts (e.g. *Spain*).

- Improper implementation by member federations may not solve the issue of differing standards and may uphold the fragmentation of the market.

- Stakeholders and the public have lost confidence in the current regulations (albeit a hybrid between the international federation model and the National Association model). New regulations need to regain this confidence and be materially different to the RWWI.

*Model 2: The "National Federation Model"*

Under this model, National Associations are instructed by FIFA to implement a licensing and qualification system that best suits their national settings. Thus, national systems would take the form of regulations adopted by national football associations. To a large extent, this has been the practical result of the current FIFA RWWI, since, as our study has revealed, the approaches of National Associations to intermediary regulation vary considerably across the territory of the EU.

The advantages of the National Association model are:

- The model acknowledges agents as part of the football system and grants sanctioning power to the National Associations.

- As the responsibility of issuing a licence and establishing professional standards would rest with the National Associations, they would have the possibility of considering limits or conditions imposed by state legislation to avoid possible difficulties.

- It is clear that under the current RWWI, some National Associations have developed extensive and well-functioning agents regulations, such as in England. National specificities can be taken into account.

The disadvantages of the National Association model are:

- Given the globalised character of football and the volume of international transactions, it seems contradictory to regulate the profession of agents at national level.

- The absence of a global regime would lead to normative heterogeneity, lack of uniformity and possibly varying levels of rigour in the application of the rules, thereby further partitioning the market for agents' services. Disparities between national systems could make the work of an agent more difficult or less attractive in some markets.[99] This may also be construed as a restriction on the freedom of establishment and provision of services within the EU. Forum shopping is a negative consequence of this model as standards in some markets are lower than in others.

- Lack of uniformity risks increasing the administrative burden on stakeholders (national associations, leagues, clubs, players and intermediaries) but it is unclear if this effort is proportionate to the benefits secured. The administrative burden would be particularly challenging for small associations.

*Model 3: The "Harmonised National Legislation Model"*

In the EU, the regulation of employment relations and access to a profession is a matter for national legislation.[100] In football, some Member States regulate the activity of sports agents through national law. For example, under French Law,[101] an agent must hold a licence which is obtained under strict conditions, they must comply with certain good practice rules and they must submit to the disciplinary procedures of the sport association. The system devolves authority to the French National Association to regulate the profession of football agents, facilitating sanctioning and enforcement. However, whilst the adoption of national law on the regulation of intermediaries may be effective in increasing transparency, quality and enforcement, the adoption of law by individual countries may cause further fragmentation on the European market and a lack of uniformity. Thus, a harmonised national legislative approach might be considered in which all EU/European countries adopt legislation with similar requirements.

At EU level, Article 165(4) TFEU specifically excludes the harmonization of national laws applicable to sport, but Article 114 TFEU could be employed as a harmonizing tool should harmonization of agent laws be considered necessary for the establishment and functioning of the internal market.

The advantages of the harmonised national legislation model are:

- It solves issues regarding the legality of regulating the agents' profession.

- Transparency, quality and the effectiveness of enforcement are enhanced under national legislation.

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[99] As has been said: "It is unequivocal that FIFA's RWI advent has had as a main repercussion the deregulation of the industry, or better put, the granting of autonomy to the FAs to regulate said industry using the minimum standards as the cornerstone. The case study, though, evidences that important disparities exist between crucial provisions of the various European FAs' RWI, which leads to compounding practical and ethical problems and to higher risks of forum shopping": Roumeliotis, P. (2018), *Football intermediaries: Would a European centralized licensing system be a sustainable solution?* Asser International Sports Law Blog, available at http://www.asser.nl/SportsLaw/Blog/post/football-intermediaries-would-a-european-centralized-licensing-system-be-a-sustainable-solution-by-panagiotis-roumeliotis/

[100] Under Article 153 TFEU, the Union has only the competence to support and complement the activities of the Member States.

[101] Loi No. 84-610 du Juillet 1984 relative à l'organisation et à promotion des activités physiques et sportives.

- A harmonised approach across the EU/Europe establishes a common market and provides no incentives for forum shopping.

The disadvantages of the harmonised national legislation model are:

- The prospects of this model being adopted are remote. The model requires considerable political action and will. The adoption of binding EU law is complex, time consuming and requires the agreement of many different political actors.

- EU legislation only applies within the territory of the EU. The UK, being one of the major markets, will, subject to the Brexit outcome, not be bound by such legislation in the future.

- Football stakeholders are not willing to shift authority to state actors. This is reflected in the result of our stakeholder survey. On the question of whether "*Member States of the EU should regulate intermediaries through national legislation*", only 22.5% strongly agreed or agreed whilst 50% disagreed or strongly disagreed. A higher percentage (42.5%) either strongly agreed or agreed that "*the EU should regulate intermediaries through EU legislation*" whilst 30% either disagreed or strongly disagreed with this statement. In turn, 90% of respondents either strongly agreed or agreed that "*The football stakeholders should find solutions to issues concerning intermediaries (self-regulation)*".

*Model 4: The "Collective Bargaining Agreement (CBA) Model"*

The European Commission report "An update on change drivers and economic and legal implications of transfers of players"[102] indicates the regulation of the National Basketball Players Association (NBPA) as a 'best practice' example to regulate players' agents and to administer a licensing and qualification system. Under the Collective Bargaining Agreement signed between the players' union and the league, the NBPA has power to regulate agents.

Transposed into the football sector, under the CBA model, the players' union FIFPro, or its national affiliates, would assume authority to regulate agents and issue licences. Alternatively, another existing stakeholder or a new body could receive authority to carry out this function. For example, EFAA could, in time, emerge as a body equivalent to a bar association for lawyers.[103] In order to become such a body, EFAA would require significant investment and it would need to expand its membership so as to become more representative of the agent market.

This CBA model could be agreed under the auspices of the EU social dialogue committee for European professional football with the participation of FIFPro, the ECA, European Leagues (EL) and potentially EFAA.

Alternatively, the social dialogue committee could endorse FIFA's new agents regulations once agreed by FIFA thus, in Europe at least, closing the consultation loop, albeit without the

[102] KEA European Affairs & ECORYS (2018), An update on change drivers and economic and legal implications of transfers of players: Final Report to the DG Education, Youth, Culture and Sport of the European Commission. Accessed at: https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf.
[103] See Rossi G. et al (2016), *Sports Agents and Labour Markets*, Abingdon: Routledge, p.190-191.

participation of EFAA, who is not a member of the committee. The committee has already been active in shaping the debate on agents regulation. As already discussed, the EU Sectoral Social Dialogue Committee for Professional Football released a Resolution on Intermediaries/Agents.

While a collective agreement may be construed as a decision by an association of undertakings restricting the market under Article 101 TFEU, EU law exempts those agreements reached between employers and employees which aim at improving the working conditions, in light of the social policy objectives they pursue.[104] This model would also solve the issue of FIFA's legitimacy, as a private organization, in regulating a profession, while shifting the competence to the parties involved in the transaction (players, clubs, intermediaries).

The advantages of the CBA model are:

- Collective consultation / negotiation is an important aspect of good governance and a means of avoiding top-down governance models that can lead to conflict and litigation.

- The model follows the principles generally applied in employment relations and grants competence to the representatives of the interested parties to autonomously regulate the market. Hence, in case of legal challenge, the model might offer a better argument for the legitimacy of keeping competence within the autonomous, private football system than the international federation model. The autonomy and specificity of sport is, therefore, better protected.

- Implemented on the international level, the model produces a harmonious system across Europe.

- As the model envisages a cooperation between the relevant stakeholders' bodies, strong sanctioning and enforcement is possible.

- The stakeholders are presumed to have high interest in transparency and quality measures.

The disadvantages of the CBA model are:

- Linked to an EU social dialogue committee, the approach suffers from a Euro-centric focus.

- A complex stakeholder constellation is present as football agents represent both clubs and players, sometimes within the same transaction.

- Football is a global sport and regulating football agents through the CBA model places very burdensome administrative requirements on the side of the players' union(s) or the competent authority.

- Questions exist regarding the capacity and representativity of (inter-)national agents' associations (out of 31 National Associations surveyed, only in 12 an agents'

[104] Case C-67/79, *Albany International v Stichting* [1999] ECR I-5751, at paragraph 59, and Case C-115/97, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-06025, at paragraph 56.

association exists). Currently EFAA would struggle to act in the capacity of an international trade association akin to a bar council for lawyers.

- Questions of the representativity of ECA exist (representing 230 clubs in Europe) and EL (27 leagues are full members). The World League Forum currently sits within the FIFA Transfer Taskforce.

- Potential conflicts of interest arise if the authority responsible for issuing licences is also active in the agents' services and education market.

- Measures agreed under the auspices of the EU social dialogue committee have not undergone democratic scrutiny by the EU's legislative bodies.

**Examples from Other Sports**

In the context of this discussion, it is worth mentioning how other sports have approached this issue. While the requirements and the assessments vary considerably between sports, this overview demonstrates that at international level a range of Sports Governing Bodies have felt the need to subject the activity of a sport agent to a form of licensing.

In Handball, the International Handball Federation establishes that individuals wishing to become agents must hold a licence, which expires 5 years after its date of issue. In order to be licensed, the candidate must pass a multichoice questions test, aiming at assessing the knowledge of the Handball Regulations, and in particular those related to the transfer of players, and national law of the candidates' country. The test is composed by 30 questions to be answered in 60 minutes.[105] The Regulations, however, leaves open to National Associations the possibility to impose further professional requirement.

In Basketball, FIBA Regulations prescribe that the candidate must undertake a personal interview and a test in which he will have to demonstrate knowledge of Basketball Regulations and his suitability as an agent. Once licensed, the agent must attend FIBA Seminars in order to remain up-to-date with developments concerning agents' activities. Finally, FIBA exempts from licensing requirements those individuals who hold a licence to practice law in the country of permanent residency.[106]

In the US, under the National Basketball Players Association (NBPA) Regulations on Agents, the candidate must hold a university degree, although relevant negotiation experience may be considered equivalent. Furthermore, the candidate must pass a written examination, focusing on the key provisions of the Collective Bargaining Agreement, the Agents Regulations and any other relevant matters. Prior to this, the NBPA offers preparation courses for the applicant, and candidates are allowed to bring prepared notes in the exam. The exam is open book and composed by 50 multiple choice questions and must be completed in three hours. While the NBPA Regulations do not formally prescribe attendance to Seminars and on-going education, it is expected that the Agents achieve and maintain knowledge of the NBPA's structure, the

[105] See International Handball Federation, Regulations for Players' Agents, available at https://www.ihf.info/sites/default/files/2019-06/0_PlayerAgentRegulations_GB.pdf..
[106] See FIBA, Regulation Governing Players' Agents, available at http://www.fiba.basketball/downloads/training/agents/Regulation%20Governing%20Players'%20Agents.pdf

economics of the industry, the applicable Collective Bargaining Agreement, basic negotiating techniques and relevant areas of law.[107]

Finally, the rules of the Rugby Football Union prescribe that the candidate must pass a written test and, upon request, sit an interview with the National Union registering him. Furthermore, the licensed agent must attend a mandatory Professional Development training every year organised by the Governing Body.[108]

From this brief overview, it appears clear that numerous governing bodies in the sporting world, as opposed to what FIFA has done in 2015, have felt the need to impose qualitative requirements on agents through the adoption of a licensing system administered at international level.

**Recommendations**

In light of the above, it is recommended that the international federation model be adopted. FIFA is encouraged to take the lead in developing a licensing system. Its role will facilitate the development of a uniform approach and central record keeping. FIFA should set the global standards and work with other bodies, particularly National Associations, to ensure the effective administration of the system. The practical effect of this system is that the licence is a FIFA licence issued by National Associations.

As previously discussed, it could be envisaged that a licensing system could be administered by FIFPro. The problem with this approach is that given that FIFPro and some prominent national players' unions are active in the agents' services market, potential conflicts of interest could arise. Court of Justice jurisprudence and Commission decisional practice has taken a dim view of regulators that use regulatory functions to advance commercial interests.[109]

Continental federations, such as UEFA, could also play a role within the licensing system, but for practical and constitutional reasons, the system is better administered at FIFA and National Association level. The relevant football statutes would require revision in order to facilitate this and from a logistical perspective, agents would struggle to present themselves at a central testing centre at the seat of each association (for example Nyon in Europe). Continental federations could, however, be consulted in terms of the content of testing requirements (discussed below).

Other bodies are inapt at administering a licensing system. For example, EFAA is insufficiently representative of agents globally to, at this stage, play a leading role in the licensing system. It is, however, more representative of the European landscape and given its expertise, it should be consulted on the system and play a prominent role in terms of requirements to retain licences, such as continuing competence requirements.

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[107] NBPA Regulations Governing Player Agents, available at https://cosmic-s3.imgix.net/e3bb4d60-7b1a-11e9-9bf5-8bad98088629-NBPAAgentRegulations.pdf,.

[108] RFU Agents Regulations are located in Regulations 8 of the RFU Rules and Regulations, available at https://www.englandrugby.com/dxdam/aa/aa6c359d-2ae0-42f8-873f-8e8c66488904/RFUHandbook2018-19_English.pdf,.

[109] See Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] ECR I-4863 and Case AT.40208 – *International Skating Union's Eligibility Rules*, 08/12/2017.

In order to improve standards of professionalism in the industry, to be issued with a licence, an agent should be required to fulfil certain criteria including confirmation that the applicant:

- Is of good character and free from conflicts of interest. This should not simply be via self-declaration but also through formal verification such as criminal records check issued by the competent public authority.

- Has the necessary skills, verified by way of an examination, to operate as an agent.

- Has professional liability insurance.

- Has agreed to be bound by a code of conduct.

Fulfilment of these requirements can be evidenced through uploading relevant documentation onto an online portal, such as within the domestic and international Transfer Matching System (TMS). A series of green and red flags would alert parties to non-compliance with the above.

*The Examination*

To avoid subjective assessment, it is advisable that a written examination, as opposed to an interview, is adopted. The examination could require candidates to answer multiple choice questions, either based on short questions or short scenarios. The examination should test knowledge and understanding of all applicable FIFA statutes, regulations, codes and accompanying papers and statements that are relevant to the business of an agent including:

- FIFA Statutes
- FIFA Disciplinary Code
- FIFA Code of Ethics
- FIFA Regulations on the Status and Transfer of Players
- FIFA Agents Regulations (new version)

In order to give the examination regional specificity, a section testing knowledge and understanding of equivalent confederation (e.g. UEFA) regulations could be added. This approach would require co-ordination between FIFA and the confederations.

As a matter of quality assurance, it is questionable that the examination should test knowledge and understanding of National association regulations and law. Our study identified varying practice and cultures at National Association level and, in order to retain confidence in the system, the examination should be as centralised as possible. Knowledge of National Association regulations and applicable national law should be acquired via a system of permanent on-going education which should be required in order for an agent to retain a licence.

The examination should be taken within a globally standardised time period. Due to differing time zones and the risk caused to the integrity of the system of questions being ‘leaked’, a randomly selected percentage of a large bank of questions could be set by each National Association testing centre. It would be advisable that, notwithstanding the random selection, certain topics could not be avoided, such as knowledge of transfers, working with minors, arbitration etc. Questions should be refreshed annually by FIFA. A suitable pass rate should be

established by FIFA which should be informed by qualitative considerations as opposed to establishing a quantitative limit on the number of licences issued.

*On-going Education and Training (Continuing Competence)*

Retention of a licence should be partly dependent on an agent satisfying on-going permanent education requirements (continuing competence). Regulated professions, such as lawyers, have been required to undergo such a scheme, for example by acquiring a minimum number of training points or hours. Whilst a number of models can be envisaged for on-going agents education, some of the following principles should be considered:

*Identifying learning needs*: It is important that agents are able to identify their learning needs. This can be established prescriptively by the relevant football bodies (FIFA, national associations, EFAA etc) or by agents themselves. For solicitors in England and Wales, the second approach is now favoured.[110] Regardless of the method, one would anticipate a number of key skills pertinent to the activity of an agent to be identified such as client care, business skills, people skills and legal and regulatory compliance. Agents can identify their own needs (1) following specific activities, such as facilitating a transfer of contract re-negotiation (2) holistically, reflecting on their own business activity generally (such as following the closure of a transfer window) (3) via client feedback and (4) via appraisal / performance review if they practice within an agency.

*Planning and addressing needs*: Once learning needs have been established, an agent must take steps to address them. First, an agent must identify which providers can satisfy the needs, for example through identifying conferences, workshops or training sessions. Minimum requirements in terms of hours could be stipulated by FIFA or an alternative assessment of training undertaken could be established, such as an auditing system. It is important that FIFA reflects on which providers are able to meet the learning needs – private providers,[111] FIFA, continental federations, national associations, EFAA, national agents' bodies, private agencies, FIFPro etc – and what type of accreditation / monitoring system should operate in order to ensure quality assurance, including who acts as the accrediting body. It seems logical that National Associations are best placed to fulfil this accrediting / monitoring function, but FIFA should guard against establishing a system whereby the National Association has the potential to act in both a regulatory and commercial (provider) context and possibly use this function to restrict access to the provider market or to frustrate the ability of agents to acquire necessary skills. FIFA and/or the continental federations must also ensure quality assurance of national measures. The Court of Justice has assessed similar schemes in *Wouters*[112] and *OTOC*[113] under Article 101 and 102 TFEU. While the authority to regulate the profession was accepted as a means to ensure the quality of the service, it was held that the system had to allow access to the market to any provider satisfying the requirements.[114] In particular, the Court considered

[110] See Solicitors Regulation Authority (SRA) requirements at: www.sra.org.uk
[111] The research team note a proliferation in the number of private providers offering agent education and training services.
[112] Case C-309/99, *Wouters and others* [2002], ECR I-01577.
[113] Case C-1/12, *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência* [2013], ECLI:EU:C:2013:127
[114] Mataija, M. (2016), *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law*, Oxford University Press, Oxford, p. 94.

that an acceptable regulation would have consisted of a monitoring system, implementing selection criteria clearly defined, transparent, non-discriminatory and reviewable.[115]

*Recording and Evaluation*: Once the training needs have been met, an agent should satisfy recording requirements which could be achieved via uploading details of training onto an online portal, viewable by the monitoring authority and indeed the parties (players and clubs) engaging the agent. Red and green flags would alert parties to compliance. Alternatively, the agent should retain evidence of his/her training record which can be audited. The recording of training undertaken should be accompanied by reflection on the part of the agent which then feeds back into the identification of learning needs as discussed above.

*Scope*

In previous iterations of the regulations, uncertainty has been caused by the existence of exempt individuals. The application of universal standards, applicable to all agents, including family members and lawyers, will help improve standards of professionalism. It is therefore recommended that no individuals should be exempt from the licensing requirements.

In order to prevent conflicts of interest, applicants for a licence should not hold positions within FIFA, continental federations, national associations, leagues or clubs.

Agents licensed under the pre 2015 RWWI could be considered for an exemption from the examination, but not the continuing competence requirements. In order to promote the highest standards of professionalism, it must be considered that all agents should undertake the new licensing requirements, perhaps with former licensed agents being subject to a transitional period.

Once an agent has been issued with a licence, intermittent re-examination could be considered (for example every five years) although for administrative efficiency a licence could be issued for an indefinite period, subject to compliance with continuing competence requirements.

Re-examination and/or compulsory engagement with continuing competence requirements should fall within the range of sanctioning powers of relevant disciplinary bodies. This is because some agents have been sanctioned for technical regulatory offences as opposed to bad faith conduct.

Failure to satisfy continuing competence requirements should result in withdrawal of the licence. Re-examination should then take place prior to an agent being authorised to act once again.

Previous iterations of FIFA players' agents regulations have suffered from an enforcement deficit. The research team acknowledge the central importance of effective disciplinary and dispute resolution measures. These are discussed in a separate set of thematic conclusions.

[115] Case C-1/12, *OTOC*, at paragraph 99.

# *8.*

# *Remuneration and Representation Restrictions*

## Introduction

The issue of agent remuneration is the most controversial aspect of agents regulation and the topic that receives most media attention. Most of this reporting is critical of the fees earned by agents, but that reporting almost exclusively focusses on a number of high-profile, high-value deals and largely ignores the vast majority of transactions facilitated by agents. The language used in media reporting is often very emotive with agent fees being described as "*immoral*"[116] and that agents have "*raked in money*"[117] and are "*sucking tons of money out of football*".[118]

Closely connected to the question of agent remuneration is the practice of dual representation whereby an agent is able to represent more than one client (player and club) in the same transaction. Dual representation also generates much debate and concern, specifically with regard to the issue of potential conflicts of interest. However, it must be recalled that under the current iteration of the FIFA Regulations on Working with Intermediaries (RWWI), the practice is permitted and has become an industry norm.[119]

In line with the title of our project, our starting point is that amendments to the RWWI should follow high standards of good governance, specifically: evidence-based decision making; involvement of stakeholders; the pursuit of legitimate sporting objectives; a reasonable and proportionate approach; a concern for the effectiveness of measures (implementation and enforcement); and compliance with prevailing legal requirements subject to the application of the specificity of sport principle.

In this connection, we acknowledge in our previous section, *Intermediaries: The EU Dimension*, that the sport system functions under conditions that are not always found in other industries, such as the need to: ensure competitively balanced competitions; train young professionals; preserve the integrity and proper functioning of competitions; balance contract stability with workers' rights.

We also take as a starting point the principle that in all principal/agent relationships, the agent should always act in the best interest of his/her client (the principal) and that conflicts of interest should be avoided save for very limited exceptions.

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[116] "Backlash grows over 'immoral fees' after claim Paul Pogba's agent made £41m from transfers", The Daily Telegraph, 10/05/17, accessed at: https://www.telegraph.co.uk/football/2017/05/10/backlash-grows-immoral-fees-claim-paul-pogbas-agent-made-41m/

[117] "Agents raked in money from both club and player in four out of five Premier League deals last season with chairmen set to clamp down on huge windfalls for Mino Raiola and Co, Mail Online, 13/10/18, accessed at: https://www.dailymail.co.uk/sport/football/article-6163211/Premier-League-chairmen-set-clamp-agents-fees-huge-windfalls-Mino-Raiola-Co.html

[118] "West Ham's David Gold says agents are 'sucking tons of money' out of football, The Guardian, 13/09/18, accessed at: https://www.theguardian.com/football/2018/sep/13/west-ham-david-gold-agents-money-football-fifa-uefa

[119] Dual or triple representation accounted for approximately 18% of all international transfers between 2013 and 2017. Source: FIFA TMS, Intermediaries in International Transfers, Period Jan 2013-Nov 2017, 2017 Edition. Accessed at: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2017/12/Intermediaries-2017.pdf

We also acknowledge that whilst agents often receive 'bad-press', they are an important part of the football industry. Their presence can help rebalance the inequality of arms often found in the negotiating relationship between a player and a club and through their assistance, players and clubs can achieve jointly shared objectives in a mutually beneficial way.[120]

**Agent Fees: The Evidence**

According to FIFA figures,[121] since 2013, there has been a total of 69,505 international (as opposed to domestic) transfers worldwide, and 19.7% of those transfers (13,672) involved at least one agent. In 47.8% of transfers where there is a transfer fee, there is at least one agent acting for one of the clubs or for the player. In the same period, a total of $1.59 billion was paid to agents.

The TMS Report referenced above reveals that the number of transfers with agents representing the engaging club has increased from 726 in 2013 to 1190 in 2017, the latter figure accounting for 7.7% of all international transfers. From 2013-2017, England and Italy are reported as being the two markets having the highest incidence of engaging clubs employing agents.

The incidence of releasing clubs employing agents in international transfers is much lower, with only 318 reported cases in 2017 which amounts to 5.9% of all transfers. Italy is the market where a releasing club is most likely to employ an agent, with 15.1% of their outgoing transfers since 2013 involving at least one agent.

In terms of agent remuneration, the TMS Report reveals that the total spending on commissions paid to agents from both releasing and engaging clubs has risen from $218 million in 2013 to $446 million in 2017. 63% of this was paid to agents representing engaging clubs with the remainder (37%) paid by releasing clubs. In total, between 2013 and 2017, $1.59 billion has been spent on agents' commissions worldwide, with the UEFA territory accounting for 97.2% of this sum. England, Italy, Portugal, Germany, Spain and France account for 83.4% of global spend on commissions paid to agents.

In the 2015 RWWI, FIFA recommended that National Associations adopt an agent remuneration cap of 3% of either the player's basic gross income for the duration of the relevant employment contract or 3% of the transfer fee paid. The TMS Report highlights that between 2013 and 2017, commissions paid by engaging clubs tend to be higher than those paid by releasing clubs. For transfers between January 2013 and November 2017, FIFA reported:

- Where a transfer fee was less than $1million, the average commission as a percentage of the transfer fee paid by the engaging club to agents was 27.3% and that paid by the releasing club 15.3%. In terms of median figures, which may be more accurate given that a few very high commissions as a percentage of the transfer fee can skew average figures, the median was 15.8% paid by engaging clubs and 9.6% paid by releasing clubs.

[120] For further discussion see some leading authorities on the matter such as Lewis, A., & Taylor, J. (2014), *Sport: Law and Practice*, 3rd edition, Bloomsbury and De Marco, N. (2018), *Football and the Law*, Bloomsbury.
[121] FIFA TMS, Intermediaries in International Transfers, Period Jan 2013-Nov 2017, 2017 Edition. Accessed at: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2017/12/Intermediaries-2017.pdf

- For transfers valued between $1-5million, the average commission as a percentage of the transfer fee paid by the engaging club to agents was 12.3% and that paid by the releasing club 9.0%. The median was 8.5% paid by engaging clubs and 6.5% paid by releasing clubs.

- For transfers valued over $5million, the average commission as a percentage of the transfer fee paid by the engaging club to agents was 7.0% and that paid by the releasing club also 7.0%. The median was 5.2% paid by engaging clubs and 5.4% paid by releasing clubs.

- Agent involvement is more common in transfers with fees. Nonetheless, agents involved in transfers without fees often still receive a commission. Between 2013 and 2017, there have been 3,077 free transfers with club agents involved, and total spending on commissions was $276 million.

- In sum, for all transfers with a fee attached, the average commission as a percentage of the transfer fee paid by the engaging club to agents was 15.5% with the median figure being 9.8%.

- For all transfers with a fee attached, the average commission as a percentage of the transfer fee paid by the releasing club to agents was 10.4% with the median figure being 7.2%.

Obviously, players as well as clubs engage the services of agents. The TMS Report revealed that 14.6% of all international transfers in 2017 included the involvement of players' agents and this rose to 30.9% where a transfer fee was present. These figures have been quite stable since 2013. The Report also highlights that players tend to dispense with the services of an agent the older they are. Players under 18 years old used agents in 17.6% of their international transfers. Between 18 and 25 years of age, this percentage decreases to 15.2%, and between 26 and 32 a further decrease to 14.5%. Finally, players over the age of 33 only use agents in 10.9% of transfers. The Report also revealed that out of contract players use agents twice more often than in any other type of transfers (21.9% vs. 11.3%).

**Limiting Agent Fees under the 2015 RWWI**

In the 2015 RWWI, FIFA *recommended* that National Associations impose a 3% remuneration cap on agent fees. Our National Associations Reports revealed that the majority of National Associations duplicated the 3% cap recommended by FIFA, but that only Cyprus and Malta provided that the 3% cap be mandatory. Other National Associations adopted caps above that recommended by FIFA with five National Associations not implementing any cap. Within those associations to have adopted the 3% recommendation, evidence presented above suggests that the market has disregarded it. Table 1 below presents the pattern of agents' commission regulation across the territory of the EU.

**Table 1: Remuneration of Agents under Regulations of National Associations**

| Rules on Remuneration | National Associations |
|---|---|
| FIFA RWWI – Recommended 3% cap | Austria, Belgium, Denmark, England, Estonia. Finland, Hungary (*plus solidarity contribution)*, Italy, Latvia, Luxembourg, Poland, Northern Ireland, Republic of Ireland, Romania, Scotland, Slovakia, Sweden, Wales |
| 3% Cap if not agreed otherwise | Netherlands, Slovenia |
| 3% Cap fixed (not recommended) | Cyprus, Malta |
| 5% Cap | Portugal (unless otherwise agreed) |
| 7% Cap | Bulgaria (but no cap for remuneration paid by Clubs) |
| 8% Cap | Greece |
| 10% Cap | France |
| No Remuneration Cap | Croatia, Czech Republic, Germany, Lithuania, Spain |

The reform process initiated by FIFA in 2018 includes a reassessment of the 3% cap recommendation contained in the 2015 RWWI. Throughout 2018, the FIFA Transfer System Task Force has been discussing the reform of the transfer system and the system of agents regulation. In September 2018, a set of reform proposals were approved by FIFA's Football Stakeholders Committee, composed of representatives from clubs (ECA), leagues (the World Leagues Forum), players (FIFPro) and member associations and confederations. Two broad sets of outcomes from this package are relevant to the issue of agent remuneration[122]:

- "Creation of a clearing house to process transfers with the aim of protecting the integrity of football and avoiding fraudulent conduct. This will ensure the good functioning of the system by centralising and simplifying the payments associated with transfers such as solidarity, training compensation, agents' commissions and, potentially, transfer fees".

[122] Football stakeholders endorse landmark reforms of the transfer system, FIFA.com, 25/09/18. Accessed at: https://www.fifa.com/governance/news/y=2018/m=9/news=football-stakeholders-endorse-landmark-reforms-of-the-transfer-system.html

- "New and stronger regulations for agents to be established with agreement on the principle of introducing compensation and representation restrictions, payment of agents' commissions through the clearing house and licensing and registration of agents through the Transfer Matching System. The development of these proposals also followed a lengthy consultation process with a representative group of agents".

**Remuneration Restrictions: Objectives**

The general criticisms of the 2015 RWWI are discussed in detail elsewhere in this Report. Concerns specifically relating to intermediary remuneration are:

*Agent spending is too high:* Spending on agents remuneration has increased considerably and there are concerns that the reward received by agents is out of proportion to the level and quality of the services rendered.[123] The FIFA TMS Report cited above highlights that commissions to club agents increased by 105% between 2013 and the end of 2017. As a player can discharge his liability to an agent through a club, he *might* not have an investment in the quality or cost of the services the agent is effectively charging to the club. This could give rise to inflationary effects for agents fees. Whilst clubs are theoretically free to refuse such payments or negotiate them down, in reality, as long as the player acquisition / contract renewal falls within the specified budget allocated by the club, a club is likely to foot the bill, particularly if the agent can exert influence over future deals.

*Agent spending is out of balance with solidarity and training compensation payments:* Spending on agents remuneration comfortably outstrips payments made to clubs via the solidarity and training compensation schemes. For example, in 2017, whereas club spending on agents' commissions reached $446 million, solidarity payments totalled $64 million and training compensation $20.3 million. This is set in the context of rising agents' commissions since 2013, yet stable solidarity and training compensation sums.[124] Critics argue that this trend illustrates how some of the underpinning principles of the current transfer system, namely encouraging the development of young players through effective solidarity and training compensation schemes, are becoming secondary to the economic interests of some agents and clubs. The claim is that it is unfair that clubs receive considerably less compensation for the efforts they expend in training players, in comparison to the remuneration an agent receives for facilitating a transfer. Specifically, this risks disincentivising the investment decisions of clubs in relation to the development of new players and it risks severing the elite level from the grassroots. In our chapter, *Intermediaries: The EU Dimension*, we explain how the European Court of Justice has recognised as legitimate, proportionate attempts by sports bodies to promote the development of young players.

*Agents' commissions foster speculative activity and it damages contract stability:* The allegation is that high fees received by agents encourages speculation and fosters contractual instability, particularly given the (alleged) increasing influence agents exert within the market. The prospect of receiving a high commission potentially compromises an agent's professional requirement to act in the best interest of his/her client. Professional standards are further compromised as conflicts of interest are evident within the industry with agents often

[123] Resolution on intermediaries/agents, EU Sectoral Social Dialogue Committee for Professional Football, 17/11/17.
[124] FIFA Football Stakeholder Committee (2018), Task Force Transfer System, White Paper – Transfer System Reform 2018, p.48.

representing more than one party in the transaction. Proponents of curbs on agents' commissions argue that a cap is required to protect the interests of the party engaging the services of the agent, particularly the player whose career is short and who, in order to focus on his playing career, invests considerable trust in the agent. The value of a player's salary can also be negatively affected by high commissions.

*Curbing agent fees and influence is welcomed by stakeholders:* At meetings organised or attended by the research team, some stakeholders highlighted the need to curb agent fees and agent influence. The EU Sectoral Social Dialogue Committee for Professional Football highlighted these concerns as well as pointing out that transparency in financial transactions involving agents has not improved since the new RWWI were introduced.[125] In response to our stakeholder survey, 42.5% strongly agreed or agreed that *"intermediary remuneration has increased since the introduction of the 2015 RWWI"*, but only 17.5% disagreed or strongly disagreed (40% neither agreed or disagreed). 62.5% strongly agreed or agreed that *"intermediary remuneration is too high"* with 10% disagreeing or strongly disagreeing. 17.5% of respondents favoured no cap, 15% favoured a 3% cap, 32.5% favoured 5%, 22.5% favoured 10%, 7.5% favoured a cap between 10-15% and 2,5% favoured 20-25%. No-one supported a cap higher than 25%.

*The agent market is an oligopoly and this risks undermining the integrity of the sector:* It is often claimed that the agent industry is not structured effectively and takes the form of an oligopoly where a small number of agents control the market. The result, it is claimed, is that agents exert a very strong influence over clubs and players resulting in commission levels not reflecting the actual value of the service offered. The result is that fees far outstrip solidarity and training compensation sums, and this contributes to a diminution of contractual stability in the sector. It also raises concerns that new agents who are struggling to enter the market, due to the oligopoly structure, will focus their efforts on the search for ever younger players to sign.

At some of the meetings organised or attended by the research team, a frequently heard complaint concerned the influence agents exercise as a result of their position as a 'gate-keeper' to a transaction. In other words, if a club wishes to recruit a player, an agent can insist agreeing his/her fee in advance of any discussions with the player. Without agreement, the agent blocks access to the player. If this scenario is accurate, action to curb the excessive influence of agents could be justified with reference to the need to (1) protect players so that they get to hear of all offers made to them (2) preserve fair competition amongst clubs seeking to recruit labour by ensuring a fairer allocation of playing talent and (3) protect the integrity of competitions in so far as clubs' decision making is not compromised by agents.

The oligopoly argument requires a little more attention. Under EU law, dominance is defined as a position of strength in the relevant market such that it allows the undertaking to prevent effective competition from rival undertakings and to act to an appreciable extent independently of its competitors and consumers.[126] In this relation, while large market shares may be considered evidence of the existence of a position of dominance, a correct analysis of the relevant market requires a comparison with the shares held by other undertakings as well.[127] It must also be recalled that a position of dominance can be held by a single undertaking, or a

[125] See Resolution on intermediaries/agents, EU Sectoral Social Dialogue Committee for Professional Football, 17/11/17.
[126] See Case 27/76 *United Brands v Commission* [1978] ECR 207, at paragraph 65.
[127] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, [1979] ECR 00461, at paragraph 41.

group of undertakings.[128] In the latter, there must be a sufficient connection between the companies in the group to allow them to adopt a conduct that restricts or eliminates competition on the market.[129]

A starting point in the context of this analysis would therefore be to assess the number of agents or agencies active on the market and the number of transfers with which they have been involved. According to the 2018 UEFA Club Licensing Benchmarking Report, which analysed the 2017 summer transfers involving clubs participating in UEFA competitions, the four agents/agencies responsible for the largest number of transfers were involved in 17% of the total number of transfers.[130] The Report also provides data on the market shares of the top agencies, calculated on the basis of the value of the players they represent. In this regard, the top 10 agencies represent 27.3% of the market in England, 21.1% in France, 17.6% in Spain, 14.7% in Germany and decreasing values for the remaining associations.

The extent of market concentration can also be examined through the percentage of players represented by the largest agency within the top division. In only one National Association reviewed in our study (Austria) did the percentage of players represented by the largest agency surpass 10%. In France, the figure was 3.3%, in Italy 3.4%, in England 5%, in Spain 5.5% and in Germany 6.4%.[131] In the German Bundesliga, over 200 agencies represent players. Across 11 National Associations surveyed in our study, the percentage of players represented by the top agencies in national leagues averages 5.5% of the number of registered players in the leagues. Merely in practical terms, it seems difficult for an agent or agency to represent a large number of players in different markets. Indeed, in the Benchmark Report, UEFA stated that "*the agent business is relatively open, with the largest agency responsible for only 6 of the 96 major transfers of summer 2017*".[132]

Rossi et al examined market concentration in the big five leagues just prior to the introduction of the 2015 RWWI.[133] Their method rests on examining market share (defined by the total percentage of professional players represented by an agent or an agency) and market power (based on the total sum of the potential transfer market values of the players involved). Combined, this identifies the competitiveness within the market for agents based on the Herfindahl-Hirschman Index (HHI). On this measure, the study identified low levels of market concentration – 39 points for market share and 60 points for market power, both of which are well below the HHI limit of 100 points which is the benchmark for dominance. The authors conclude that "*the market can be thought to be operating competitively*"[134] although they do acknowledge variations across markets.

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[128] See the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009/C 45/02), paragraph. 4.

[129] Although, they do not have to be necessarily part of the same economic entity. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p.277, and Joined Cases T-68, 77, and 78/89, *Società Italiana Vetro SpA, v Commission*, [1992], ECR II-01403, at paragraphs. 357-358.

[130] UEFA Club Licensing Benchmarking Report (2018), pp.45-53.

[131] It should be pointed out that in the Ukrainian top division, more than a quarter of the top-division players (27.7%) are represented by the largest agency.

[132] UEFA Club Licensing Benchmarking Report (2018), p.45.

[133] Rossi, G., et al. (2016), *Sports Agents and Labour Markets*, Routledge, p.70.

[134] Ibid., p.71.

The above two studies point to a lack of evidence that the European agent industry suffers from excessive concentration. This proposition conflicts with more anecdotal evidence gathered by the research team at the various meetings we organised or attended at which the 'gate-keeper' scenario was raised. Indeed, the actual conduct of agents on the market may present a different picture. For example, some agents have strong links with certain clubs resulting in a high level of local concentration.[135] Agents might collaborate amongst one another and share clients or areas of the market. Further, agents can seek forms of collaborations with clubs under a different denomination, such as scouting and consultancy, which would not be considered under the previous set of data.

In light of the above, it is our recommendation that if amendments to agents regulations are introduced based on the objective of dismantling the alleged excessive influence of agents, further evidence of this influence should be provided.

## Compensation Restrictions: An Assessment of the Various Models

In the following section, we consider some potential regulatory responses to the issues raised above. Specifically, we focus on the merits of introducing one or a combination of the following:

1. A prohibition on dual representation
2. A cap on agent remuneration
3. A player / client pays model.

### *A Prohibition on Dual Representation*

The RWWI established minimum standards and permitted National Associations to take measures that go beyond this threshold. The RWWI permitted dual representation when the parties involved gave their prior written consent. Obligations are imposed on clubs and players to use all reasonable endeavours to ensure that no conflicts of interest exist, and on the agent to inform the parties of any cause that may lead to conflicts of interest. With the exception of *France*, *Hungary* and *Portugal*, which prohibits dual representation, the vast majority of the National Associations mirrors the words of the RWWI. *England*, *Romania* and *Wales* introduced an additional measure that parties are to be given the opportunity to take independent legal advice.

The vast majority of the National Associations surveyed allowed clubs to discharge players' liabilities to agents. A noticeable exception is *the Netherlands*. Dutch law[136] and the KNVB intermediary regulations contain a prohibition on the worker (player) paying an agent for being placed into employment. This has implications for the discussion entered into below (Player / Client pays model).

[135] For example, Gestifute conducted 68% of the transfers of players from Portugal's top three clubs, Porto, Sporting Lisbon and Benfica over the last decade prior to 2014. Quoted in Rossi, G., et al. (2016), *Sports Agents and Labour Markets*, Routledge, p.139.
[136] The Placement of Personnel by Intermediaries Act (WAADI).

**Table 2: The Regulation of Dual Representation in National Associations**

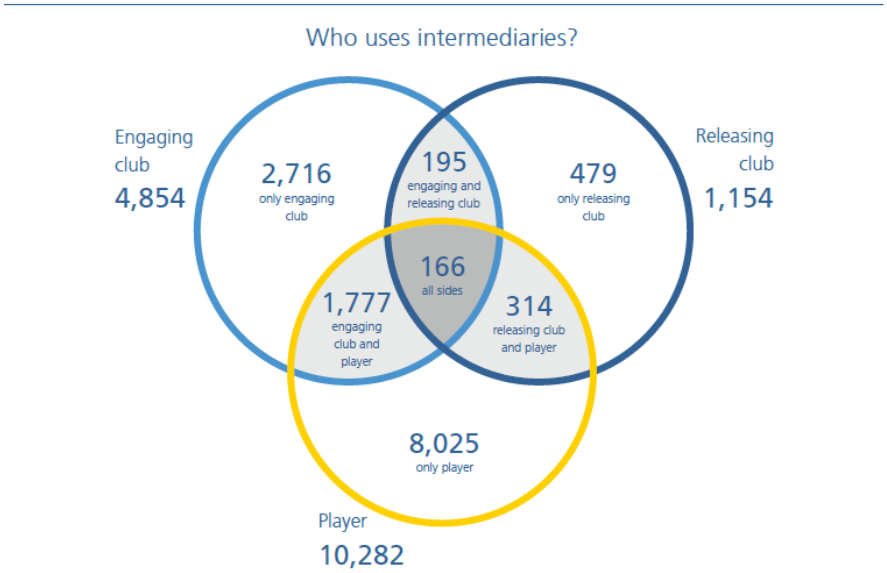
| Rules on Dual representation | National Associations |
|---|---|
| FIFA RWWI – Player and club must give express written consent prior to the start of the relevant negotiation and confirm in writing which party will remunerate the intermediary. | Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, England, Estonia, Finland, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Northern Ireland, Poland, Republic of Ireland, Romania, Scotland, Slovakia, Slovenia, Spain, Sweden, Wales |
| Parties to be given opportunity to take independent legal advice | England, Romania, Wales |
| No Dual Representation | France, Hungary, Portugal |
| Clubs allowed to discharge players' liability | Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Republic of Ireland, Romania, Scotland, Slovakia, Slovenia, Spain, Sweden, Wales |
| Payment to be made by represented party | Netherlands, Northern Ireland |

FIFA TMS figures reveal the extent of dual representation in football.[137] Between January 2013 and November 2017, the TMS reported 13,672 international transfers involving at least one intermediary. In approximately 58.6% of those transfers (8,025), the agent exclusively represented the player, in 19.8% (2,716) the agent exclusively represented the engaging club and in only 3.5% of cases (479) did the agent exclusively represent the releasing club. Therefore, in the vast majority of cases, conflicts were not, on the face of it, evident.

In the remaining 18% of cases, dual or triple representation was present. In 13% of cases, the agent represented both the player and the engaging club (1,777). In 2.3% of cases (314), the agent represented the player and the releasing club. In 1.4% of cases (195) the agent represented both the releasing and the engaging club. In 1.2% of cases (166) the agent represented the player, releasing and engaging club.

[137] FIFA TMS, Intermediaries in International Transfers, Period Jan 2013-Nov 2017, 2017 Edition. Accessed at: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2017/12/Intermediaries-2017.pdf

**Table 3: Who uses Agents (Source FIFA TMS 2017)**




From the above, dual representation appears only to be a significant practice in terms of an agent representing both a player and an engaging club. The other dual representation scenarios (an agent representing a releasing club and player, an agent representing the engaging and releasing club, and an agent representing all three parties) accounted for less than 5% of transfers, although one very high profile transfer (that of Paul Pogba's transfer from Juventus to Manchester United) caused concern regarding the fee paid to the players' agent under the reported triple representation agreement.[138]

The major concern with dual representation in football is that it risks leading to conflicts of interest.[139] The starting principle in any principal/agent relationship is that the agent (football agent) must act in the best interest of the principal (the client player or club). The fact that an agent operates in a complex legal and regulatory environment in which he/she must exercise skill and discretion, should not limit this duty. The existence of a financial interest for an agent in a dual representation scenario casts doubt on whether an agent can genuinely relegate their own interest behind that of their client.

Regulated professions, such as legal services, requires that a lawyer should not act where there is a conflict, or a significant risk of conflict between the lawyer and his/her client. Where the clients' interests in the end result are not the same, the lawyer should not represent both parties unless the risk can be mitigated.

Conflicts of interest appear to be of greatest concern where an agent represents all three parties in the same transaction. The range of interests involved is such that their perfect alignment is unlikely, even if disclosure is made and consent attained. For example, if a fourth party wishes

[138] "Backlash grows over 'immoral fees' after claim Paul Pogba's agent made £41m from transfers", The Daily Telegraph, 10/05/17, available at: https://www.telegraph.co.uk/football/2017/05/10/backlash-grows-immoral-fees-claim-paul-pogbas-agent-made-41m/

[139] In a 2009 study, dual representation was the most frequently cited problem by respondents to a survey on sports agents. See KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009, p. 104. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf

to enter the negotiation to sign the player, an agent will be placed in an inherently conflicted position. There is, therefore, a prima facie case that the inherent conflict created by triple representation cannot be mitigated and that FIFA should act to prevent this practice to protect the parties and the image of the sport. It must be recalled that it is legitimate for a sports governing body to take measures that protect both the actual integrity of its sport and also the public's perception of the integrity of the sport.[140]

It is also questionable that the interests of engaging and releasing clubs can be aligned in such a way as to avoid conflicts, although this arrangement is relatively rare.

The more significant issue is the classic dual representation scenario, namely an agent acting for a player and the engaging or releasing club in the same transaction, and whether this should be prohibited or whether the conflicts can be mitigated through regulatory measures. The practice of an agent representing both the player and the engaging club accounted for 13% of all international transfers reviewed above. In this scenario, an agent might be conflicted whereby acting in the best interest of the player might mean seeking to secure a high salary and other benefits, whereas acting in the best interest of the club might be to secure a lower remuneration package for the player. The agent would also be acting against the interest of the player if he/she fails to disclose interest from another club. The agent might be financially incentivised to privilege the club's position at the expense of the player.[141] Within the legal profession this would be considered an unacceptable conflict and the agent should not represent both principals.

This stark assessment requires further interrogation, in terms of whether dual representation should be permitted in circumstances where steps are taken to mitigate these conflicts. It is sometimes suggested that conflicts of interest could potentially be mitigated through measures that fall short of a ban on dual representation. For example, conflicts can be considered mitigated when the interests of the player and club are perfectly aligned and the agent has explained the risks to his/her clients, they have given informed written consent, possibly following legal advice, and that the benefits to the clients outweigh the risks. Examples of interest alignment include:

- Engaging the same agent to represent two parties in the same transaction is often favoured to ensure the transaction and integration of the player at his new employer goes smoothly. Both parties have a shared interest in this.

- Whereas many clubs have a player welfare department that can help a player settle at the new club, many clubs do not offer this service and engage the players' agent to assist with this. Both parties benefit from the involvement of the agent.

- Clubs will often require assistance with legal compliance, such as obtaining work permits for the player. It is in the best interest of both clients that the agent assists with this activity.

[140] See Commission Decision in Case COMP/37 806 *ENIC/UEFA*. See also Commission Press Release IP/02/942, 27. June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.
[141] As was revealed in *Newcastle United PLC v The Commissioners for Her Majesty's Revenue and Customs* [2006] UKVAT 19718, 21 August 2006. See also *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, a case involving a club offering a payment to an agent who was also representing the player in the transaction.

Critics of the above assessment argue that if the agent is acting in the best interest of the player, he or she does not need to become engaged by the club to discharge this duty and that these functions merely mask an inherent financial conflict of interest. Equally, the club has the option to employ other professionals, such as estate agents and lawyers, to assist with player welfare and legal compliance issues.

On the question of conflicts being mitigated if informed consent is given, anecdotal evidence suggests that players are rather liberal in giving their consent. This is due to their, generally, young age and their lack of investment in the quality and cost of the services provided, because they are able to discharge their liability to the agent through the club. In these circumstances, it is questionable that consent is genuinely informed meaning that the regulator might be justified in providing additional protections, such as an outright ban on dual representation. This also allows the regulator to discharge its duty to protect the image of their sport in light of popular perceptions that dual representation damages the integrity of the sector. It should be recalled that in the Quest Inquiry in the UK in 2006, Lord Stevens identified a lack of interest and/or education on that part of the players as to their own duties and responsibilities in relation to their own finances and amounts paid by clubs and to players' agents in respect of transfers.[142]

A further regulatory means of mitigating conflicts concerns would be to impose a remuneration cap on the agent's commission.

*The case for prohibiting dual representation:*

- Agents should act in the best interest of their clients. They should act as if the agent was the player and the agents own interest should be entirely secondary to that of the player. This duty cannot be discharged when the agent acts for two or more parties in the same transaction, particularly when the clients' interest differ and an agent's 'own interest' conflicts are so apparent.

- Dual representation damages the image of football and results in actual or perceived conflicts of interest.[143] Dual representation is prohibited in some other sports, for example rugby union, rugby league and in some US sports.

- Prohibiting conflicts is in line with other regulated professions such as lawyers.

- Dual representation results in double or triple payments to agents, depending on whether the agent acts for the player, engaging and releasing club. Banning dual representation goes some way in tackling high agents' commissions and excessive agent influence.

- Dual representation and the practice of club's discharging players' liabilities to agents can lead to tax avoidance and a lack of transparency. In the UK, at least, where an agent represents a player, but the club pays the agent's fees, the player pays income tax as a benefit-in-kind and the club is unable to recover VAT as a business cost. Dual

[142] The Quest Inquiry was commissioned by the Premier League to look into a number of transfers in English football. Here quoted in Lewis, A., & Taylor, J. (2014), *Sport: Law and Practice*, 3rd edition, Bloomsbury, p.1465.
[143] The Financial Times referred to dual representation as a 'shady practice'. Financial Times (2016), 'Five shady practices that taint English football', 01/010/16. Accessed at: https://www.ft.com/content/98e0373c-871c-11e6-bbbe-2a4dcea95797

representation agreements can be put in place so that, even though the agent is actually representing the player, the club engages and pays the agent. This can lead to tax efficiencies for the player and the club. However, these arrangements conceal the realities of the agreement in so far as the agent had in fact rendered his/her service to the player, not the club. This is a sham in the same way as 'switching' is. Switching is the practice of an agent suspending his agreement with a player and then 'switching' to represent a club.

*The case for retaining dual representation:*

- A ban disturbs entrenched industry practices and does not consider how less restrictive measures falling short of an outright ban can mitigate conflicts.

- Regulating dual representation, as opposed to prohibiting it, is a more effective means of enhancing transparency. Attempts at circumvention will be the inevitable outcome of a ban with transparency subsequently lost. Identifying circumvention will become problematic unless the regulator has strong investigatory powers and robust sanctioning weapons that are applied to all who violate the regulations, including clubs and club officials. Transparency can also result in greater certainty when it comes to taxation arrangements. For example, transparent dual representation arrangements that reflect the reality of the service rendered by the agent and to whom are accepted by the UK tax authority.

- The interests of players and clubs can be aligned in the same transaction and conflicts can be mitigated, particularly if supported by soft regulatory measures (such as disclosure and consent rules) and/or hard regulatory measures (such as a remuneration cap, discussed below). In the UK, at least, the soft approach is supported by law. In *Imageview Management Ltd v Jack*, the Court of Appeal found that an agency breached its fiduciary duty to the player by not making full disclosure to the player that the agent was receiving a fee from the club in the same transaction. Had the agent done so, and the player agreed, no breach would have occurred.[144]

- Clients should be free to enter into such contracts, subject to informed consent being secured.

- A prohibition on dual representation will complicate transfers and contract renewals leading to more agent involvement in deals and greater uncertainty of outcome for players and clubs.

- A return to a licensing system, supported by an agent examination and ongoing educational requirements, will help professionalise the agent industry and reduce instances of abuse.

- Non-regulatory measures, such as player education workshops, could be employed so players are better able to make informed choices.

[144] *Imageview Management Ltd v Jack* [2009] EWCA Civ 63.

- It is not known what the response of national tax authorities will be to a prohibition on dual representation. If they interpret a ban as recognition that the previous system permitting dual representation contributed to tax fraud, previous transactions could be investigated.

There is a line of thought arguing that a ban on dual representation does not go far enough in tackling the issues outlined elsewhere in this Report, particularly high levels of agents' commissions and excessive agent influence. The additional regulatory measures advocated by proponents of this view are interrogated below.

***An Agent Remuneration Cap***

The starting principle when discussing agent remuneration is that the agent should be fairly remunerated for the service provided. Many transfers or contract renegotiations are complex, and the agent should be appropriately rewarded for the expertise provided in facilitating these deals. In other professions, such as the legal profession, and indeed other sports, fees are calculated with reference to fixed fees, hourly/daily rates, retainer arrangements or fees that are contingent on the service provider obtaining a specific result for his/her client.[145] Each has its merits, and FIFA are encouraged to explore these options so that fees are demonstrably linked to the quality of the service provided.

Currently, the amount of remuneration due to an agent who has been engaged to act on a player's behalf is calculated on the basis of the player's basic gross income for the entire duration of the contract. However, the 2015 RWWI also reference the transfer fee paid as a means of calculating the total amount of remuneration to intermediaries who have been engaged to act on a club's behalf in order to conclude a transfer agreement. The regulations also permit a player to discharge his liability to an agent through a club.

The value of a player's salary and the transfer fee paid to secure his services are often not aligned. In order to attain consistency for agents' fees, a case can be made linking the agents' commissions exclusively to the player's basic gross income because the player's salary is the constant variable in the transaction and the salary of the player is a reasonable means of calculating the services of the player to the club. For example, the salary of the player is employed by the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) as one of the criteria used when calculating the value of a player's services in unilateral termination cases.[146] Furthermore, the salary of the player is often employed to calculate employment needs when public authorities issue work permits for players. Decoupling agents' commissions from the transfer fee is also a means of avoiding TPO/TPI scenarios in which an agent has a stake in a player's transfer value. Whereas the player salary model might result in lower agents' commissions being paid, it does not, on its own, address concerns surrounding conflicts of interest if dual representation is permitted, as an agent might be financially incentivised to act against the best interests of his client.

Introducing a cap on agents' commissions could be a regulatory mechanism that allows dual representation to continue. If a cap is introduced and tied exclusively to the player's salary, the financial incentive for the agent to work against the best interest of one of his clients is reduced

[145] For example, in Australia's National Rugby League, when calculating the agent's fee, the player can choose a percentage, a flat fee or an agreed hourly rate.
[146] Article 17 of the FIFA Regulations on the Status and Transfer of Players.

and potential conflicts mitigated. Essentially, an agent could not receive a payment from a club that is more than that he/she receives from a player. This regulatory mechanism would be strengthened if the party engaging the services of the agent was solely responsible for discharging their own liability to the agent. This would increase the investment the engaging client has in the cost and quality of the service being provided by the agent.

Under this model, an agent can claim a percentage (for example 5%) of the player's salary over the duration of the employment contract, regardless of whether they are representing the player or the engaging club. Under this model, the agent could represent, in addition to the player, only the engaging club (if it is determined that the other dual representation scenarios discussed above cannot be mitigated). A formula would need to be worked out if, in addition to the player, the agent represented the releasing club in the same transaction.

The alternative is for a cap to be introduced with dual representation being prohibited or for a cap to work alongside a prohibition on clubs engaging the services of an agent.

In terms of the reference point for the fixing of a cap, FIFA could reference existing industry practice (see median commission rates discussed above) or it could seek to align agents' commissions with industry solidarity percentages therefore aligning agents' commissions with one of the original objectives of the transfer system. As is discussed below, for a cap to survive legal challenge, the sporting objective pursued must be clearly stated and the restrictive effects felt by the agents (or indeed players and clubs) must be inherent and proportionate.

Other capping models can be envisaged. For example, a graduated capping model could link agent fees to the age of the player, the value of the transfer or the ranking of the league from which the player is located or is seeking to move to. A numerical limit could be envisaged that sets a maximum an agent can earn in any one transaction.

To locate the discussion on capping agent remuneration in a wider context, it should be noted that some sports have taken measures that affect player salaries and club expenditure. For example, clubs in some sports have restrictions placed on how much they can spend on players' salaries[147] or they must adhere to 'break-even' requirements.[148] In the non-sporting context, the EU has taken steps to regulate the bonuses of bankers in response to concerns regarding excessive risk taking in the sector. The EU Capital Requirements package, encompassing Regulation 575/2013,[149] and Directive 2013/36[150] determines the ratios between the fixed and variable components of the total remuneration so that a bonus cannot usually be greater than the fixed salary.

*Arguments advanced in favour of a cap:*

- The primary argument is that a cap protects players. For example, a cap limits the amount a player pays and aligns remuneration more closely with the value of the services provided by agents. Equally, and depending on the preferred model, ending

[147] For a discussion see Lewis, A., & Taylor, J. (2014), *Sport: Law and Practice*, 3rd edition, Bloomsbury, pp.1182-1183.
[148] See for example, UEFA Club Licensing and Financial Fair Play Regulations, 2018.
[149] Regulation 575/2013 on prudential requirements for credit institutions and investment firms [2013] OJ L176/1.
[150] Directive 2013/36 on access to the activity and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338.

dual representation refocuses agent activity on providing services solely on the basis of the best interest of the player. If dual representation is permitted, a cap on agent remuneration could go some way to mitigate the risks of the potential conflict of interest.

- A cap safeguards against the damaging effects of contract instability which is created as a consequence of agents being financially incentivised to move players within the period of players' contracts.

- A cap is aimed at ensuring consistency with the solidarity objectives of the transfer system. Currently, agents' commissions are far in excess of solidarity and training compensation payments and it is reasonable for a regulator to seek to rebalance these discrepancies, given its duty to consider the interests of all stakeholders and the interconnectedness of the transfer system. At the very least, a reduction in agent fees paid by clubs will free up resources for clubs to invest in developing young players, although there is, of course, no direct obligation on a club to spend this saving in that way.

- Depending on the preferred model, a cap might go some way to address the (contested) issue of excessive agent influence within the sector. If the market is not operating effectively, the sports regulator is justified to take measures.

- Remuneration caps are an accepted part of other sports (for example in the US) and some national laws (e.g. in France) accepts capping.

- As a recognised actor within the football system, agents must accept limited and proportionate restrictions on their economic activity in the same way that other stakeholders, such as clubs and players, do. Recognised stakeholders also receive 'rights' to sit alongside these 'responsibilities'; in this connection, it might be advantageous for agents to discuss capping within the context of a wider reform package including, for example, tighter regulations protecting their legitimate business interests (such as respect for representation contracts and securing payments), more effective means of enforcing these rights and greater representation within decision making structures.

*Arguments advanced against a cap:*

- Remuneration is a matter for the freely consenting parties. The free market should be left to regulate this practice.

- A cap will not offer greater protection to players. The cap debate has been generated by media reporting of a small number of transactions that have given rise to large commissions for some agents. Even in these transfers, the player might not necessarily have been disadvantaged, indeed the opposite might be true. Regulations should not be based on the exception. The reality is that fees are often shared amongst a number of agents and the larger agencies have considerable overheads to service. Imposing a cap could result in a large number of agents and agencies becoming unprofitable which will have the effect of further limiting plurality of providers in the market and reducing standards further. Commenting on the 2015 RWWI, Mel Stein, former Chairman of the

English based Association of Football Agents (AFA) stated, "*the 3% cap will destroy the business of probably 50% of my members*."[151]

- Capping agents' commissions will not result in greater respect for contracts. A cap might encourage agents to seek to destabilise contracts further as they push more transfers to cover the losses caused by a cap. Also, there will always be financial, and other, incentives for players to move, regardless of an agent agitating for a move. It should be recalled that under the 2001 transfer system agreement between FIFA and the EU, contract stability was to be balanced against the rights of players to move within their contracted period.[152] In this regard, a player's desire to move within the period of his contract should not necessarily be condemned as it is a regulatory entitlement, subject to compensation being paid. The conduct of clubs also needs highlighting. Clubs who are keen to protect the value of its playing asset can employ techniques to ensure a player's contract is renewed prior to expiry so as to avoid a *Bosman* scenario.[153] The club then has the option to sell the player for a transfer fee. In this scenario, it is the conduct of the club, not the agent, that destabilises contract stability due to (1) not allowing the contract to expire and (2) selling the player mid-contract when the transfer fee is at its highest.

- Problems with the solidarity and training compensation regimes are not connected with the activity of agents. Agents are not responsible for poor collection and redistribution rates for solidarity payments and it lies within the gift of FIFA to improve the redistribution of monies to training clubs. Less restrictive alternatives could rebalance the sums being spent on agents' commissions and solidarity payments, such as increasing solidarity percentages and using 'clearing houses' for both international and domestic transfers. FIFA could also calculate more accurately how much it costs to train young professionals and amend the training compensation system accordingly. In that connection, FIFA must be aware of the European Court's judgment in *Bernard* in which the Court held that a system of training compensation in sport which restricts the freedom of movement of players could be justified with reference to the objective of educating and training young players but that such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.[154]

- The cap is discriminatory. If agents' commissions are being considered as part of a holistic examination into the operation of the international transfer system, including considerations around solidarity and training compensation sums, other stakeholders should have their incomes or expenditures capped in the pursuit of those objectives.

- If a mandatory cap is imposed, this will become the industry norm meaning that an agent who facilitates a complex transaction will be under-rewarded whilst one who facilitates a straightforward transaction will be over-rewarded. Criticisms of the current

[151] The Guardian, 'Football agents fear 'wild west' as FIFA reforms seek to cap fees', 31/05/2015. Accessed at: https://www.theguardian.com/football/2015/mar/31/football-agents-fifa-reforms

[152] Letter from Mario Monti to Joseph S. Blatter, D/000258 (5 March 2001); See also Commission Press Release IP/02/824, 5 June 2002, 'Commission Closes Investigations into FIFA Regulations on International Football Transfers'.

[153] Case C-415/93, *Bosman.*

[154] Case C-325/08, *Bernard.*

system focus on the alleged 'undeserved' aspect of agent remuneration. Depending on the percentage cap agreed, the regulations risk undermining the principle that commissions should be in fair relation to the quality of the service provided.

- There is a risk that a cap will be too easily circumvented. For example, clubs will ignore the cap if they are so focussed on securing their preferred player and in order to escape a cap, an agent could receive side-payments for 'related' work, such as scouting and consultancy. If investigations are left to National Associations, a recurring problem of variable cultures of compliance and resources will once again present itself.

- The regulations should, instead of focussing on a cap, introduce full transparency requirements with regards financial flows in football. Payment of agent fees through clearing houses will allow agreements to be verified by the regulating authority thus improving regulatory enforcement. The competent regulatory authority could receive powers to review or reduce payments to agents where the agreed commissions are likely to be incompatible with national laws or grossly disproportionate to the service provided.[155] Full disclosure (publication of payments) will increase transparency and accountability thus reducing incentives for circumvention. Publication of player salaries could add greater transparency and help contextualise agent remuneration.[156] Stringent sanctions for wrongdoing, imposed on all parties, will return confidence to the sector. In this connection, we acknowledge that the Task Force is discussing the establishment of a clearing house to process not only payments to agents but also other financial flows including the payment of transfer fees, training compensation and solidarity payments. For the sake of completeness, it should also be pointed out that a clearing house operates in England.

- A cap is likely to be challenged legally. The AFA lodged a complaint, subsequently withdrawn, with the European Commission arguing that the cap recommendation under the 2015 RWWI amounted to price fixing and is contrary to Art.101 TFEU or Art.102 TFEU. Since *Piau*, the Court of Justice of the European Union has confirmed that FIFA must be considered as an association of undertakings.[157] When adopting a decision that may have the effect of restricting or conditioning the market, FIFA and its associates are subject to EU competition law. The analysis of such a conduct will have to start from the objective pursued. Following *Meca-Medina*, for a remuneration cap to be compatible with EU law, it must pursue a legitimate sporting objective, the restrictive effects must be inherent in the pursuit of that objective and the cap must be proportionate in so far as it is suitable to achieve the stated legitimate objective and it does not go beyond what is necessary to achieve it.[158] If the objective is merely economic – such as limiting the sums agents earn from the industry or ensuring that the market is not dominated by big agencies capable of influencing the market for transfer of players – the analysis, and the justification used, will have to assess the economic

[155] For example, although not directly comparable, UEFA has the power to investigate agreements under its Financial Fair Play regulations and impose 'fair-value' adjustments to break-even declarations.
[156] At the same time, the publication of player salaries equips those players who do not engage the services of an agent with greater individual bargaining power in relation to the club. The publication of player salaries could also drive down the cost of the service offered by the agent as it removes one of the key informational asymmetries an agent can use to justify a fee.
[157] Case T-193/02, *Piau*.
[158] Case C-519/04 P, *Meca-Medina*.

efficiency pursued through the restriction, its necessity and the effects on the consumers and the market.

***The Player Pays / Client Pays Model***

In normal business transactions, the person or entity engaging the services of a professional pays for that service. In the football industry it has, however, become common practice for the player to discharge his liability to his agent through a club. Our National Associations Reports highlighted the Netherlands as the noticeable exception to this, whereby Dutch law and KNVB intermediary regulations prohibits the player remunerating the agent.

The Dutch system is in line with the International Labour Organisation Convention C181 (1997) on Private Employment Agencies which forbids private employment agencies from charging any fees or costs to workers. EU law also provides that temporary workers should not be charged any recruitment fees.[159]

In practice, an agent can receive payment in a number of ways, not all of which are in compliance with regulatory or legal requirements:

- Payment can be made by the player.
- A club can deduct the agent's fees from the player's salary.
- A club can pay an agent on behalf of the player as a taxable benefit-in-kind.
- Under a dual representation agreement, the club can attempt to pay the entirety, or a proportion, of the player's liability using the reasoning that the club engaged the services of the agent.[160]
- Similar to the above, an agent could suspend his agreement with the player at the time of the transaction and then 'switch' to work on behalf of the club so that the club pays the agent on behalf of the player.
- An agent could receive undisclosed payments, including the practice of an agent sharing a commission with other agents.

Under the Player Pays model, only the first two scenarios would be legitimately permitted. In other words, it would be prohibited for clubs to discharge a players' liability to an agent. This could be accompanied by an outright or partial prohibition on clubs engaging the services of agents, meaning that only players could do so.

[159] Directive 2008/104/EC on Temporary Agency Work [2008] OJ L 327.
[160] In *Birmingham City Football Club plc.* [2007] BVC 2,439, it was revealed that invoices sent to the club from agents would purportedly claim that the agent acted only for the club with the player not being represented. In reality, representation agreements were in place between the agent and the player.

*The arguments advanced in favour of the Player Pays model are:*

- It is, on the face of it, an easily understood regulation. It is important that football regulations are clear and comprehensible so that better compliance can be attained, and circumvention avoided.

- A player who pays the agent for services is likely to have a greater investment in the quality and cost of those services than one who discharges his liabilities to an agent through a club. A player should not only consider the highest offer made by a club, but also lower offers that contain other considerations, such as training or playing opportunities. If the financial bottom line is driving transactions, these types of issues might not be considered, or worse, the agent might not even make these offers known to the player.[161]

- Many players will have their salaries increased to reflect these new arrangements, so players are not disadvantaged.

- It means that there can be no confusion, or negative perceptions, regarding whether an agent is indeed acting in the best interest of his client, the player, and it adds an additional safeguard in that the player is likely to take more of an interest in the services being provided by the agent. In essence, the Player Pays model reduces the risk of potentially damaging conflicts of interest, or at least, the perception of them which can still be damaging to the image of the sector.

- Connected to the above, Player Pays also means that there can be no doubt to whom the agent provides his/her service. Some current arrangements between players, clubs and agents are sham with little evidence of actual services being provided to clubs. These arrangements are put in place as tax evasion and avoidance schemes.

- Player pays might encourage greater contractual stability as it is the payment of the agent by the club, instead of the player, that tends to encourage player mobility.[162]

- Player Pays has the potential to address concerns that agents exert too much power in the market, if indeed it can be established that the market is structured in this way. The inability of a club to pay an agent, either on behalf of the player or on its own behalf, reduces the risk that the agent acts as a gatekeeper to transactions by requiring clubs to pay to access the agent's client. This type of gate-keeper activity does not amount to the provision of a genuine service.

- Player Pays avoids the contentious issue of capping agent fees, reviewed above.

[161] In this regard, it must be notice that the 2019 Intermediaries Regulations of the English FA impose an obligation on the agent to inform the player of any offer, including the terms of employment, received within 24 hours of receipt.

[162] See KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009, p. 93. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.

- Player Pays is found in other sports. For example, the NFL Regulations specify that in no case shall a 'contract advisor' accept, directly or indirectly, payment of any fees from the player's club. Previous iterations of the FIFA agents regulations also provided that only the client engaging the services was permitted to remunerate him/her.

*The arguments advanced against the Player Pays model are:*

- It disturbs what has become industry practice – for agents to represent more than one party in a transaction, for players to discharge their liabilities to agents through clubs and for clubs to engage the services of an agent for a range of reasons. These practices can lead to efficiencies with transactions and contribute to greater transparency within the sector.

- In some leagues, Player Pays might result in rising player salaries and/or signing on fees to offset the sums players would be required to pay their agents. Whilst players might benefit from this, club costs will rise and tax efficiencies resulting from the current dual representation system will be lost. Clubs will need to consider whether the advantages to them accruing from the Player Pays model outweighs these potentially negative effects.

- The club pays model results in greater certainty for the agents that they will receive payment. The 2009 KEA study reported that agents often encountered difficulties securing payment from players.[163]

- There is a concern that Player Pays cannot be implemented globally and is therefore inapt for adoption in globally applicable regulations. Well-resourced clubs are better able to carry out functions relating to transfers, contract re-negotiations and scouting than less well-resourced clubs. A prohibition on clubs engaging the services of an agent might cause operational problems for such clubs. In such circumstances, limited exceptions to the rule could be considered whereby clubs are able to engage the services of an agent to, for example, facilitate a sale or sales or for an agent to carry out scouting services. Loose drafting of such exceptions could give rise to circumvention problems remembering that, whilst agents are often singled out for criticism in terms of compliance with rules, the conduct of some club officials also gives rise to concerns.

- A potential solution to the above issue is to allow some leagues to adopt Player Pays unilaterally. However, not only will this give rise to concerns regarding the uniformity of the regulations, but should unilaterally action be permitted, that league would need to consider whether this would competitively disadvantage its clubs in their attempts at recruiting from abroad, where club payment to agents is permitted.

- The preceding points highlight the central issue with all new regulatory proposals, and that is enforcement. Without robust investigatory powers, supported by stringent sanctions on *all* offending parties, not just agents, Player Pays will not work. Fining clubs for regulatory abuses is not sufficient as these fines are likely to be considered as

[163] KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009, p.94. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.

merely an additional cost in the transaction. Points deductions or transfer bans are a more stringent deterrent.

A variation of Player Pays is the Client Pays model. Under this model, for players and engaging clubs, the reference point for the calculation of the agent's commission is the player's salary. The client player or club is free to agree a percentage commission with the agent based on the salary reference point. The client player or club engaging the services of the agent pays the agent and this liability must be discharged by the engaging client. Under this model, dual representation relating to the player and the engaging club is permitted. To mitigate the conflict of interest that arises in this scenario, the commission the club spends cannot exceed the percentage agreed by the player. This would prevent an agent requesting a high percentage from the club. Under this model, only the client engaging the services of the agent can pay the agent. The advantage of this model is that the industry practice of dual representation can be maintained, but its negative effects potentially mitigated. Client Pays also increases the investment the client has in the cost and quality of the agent's services. It also removes the need to introduce a cap on agents' commissions.

**Conclusions**

Regulatory measures addressed at agent remuneration and the practice of dual representation should be based on evidence and should be aimed at securing the highest possible standards of good governance, including enforceability.

Agents should be considered a stakeholder within the football system, as opposed to an 'external' third party pursuing their own economic interests. It is incumbent on agent bodies to organise their activities effectively and collectively at national and international level, as EFAA currently does, so that they can take their place as a recognised stakeholder. Without compromising the integrity of their working relationship, FIFA and the stakeholders should consider how best to support the collective organisation of representative agent bodies. In this regard, increasing professional standards and ethics in the sector cannot be imposed solely by regulation. It can be envisaged that agent bodies will play an important role in changing culture within the industry through, for example, their role in advising and educating members.[164]

In light of the above, the ability of a private regulator (in other words FIFA), to set remuneration and representation restrictions will be strengthened if the party being regulated (agents) are a recognised part of the football 'eco-system' and subject to the same rights and responsibilities of other stakeholders within it, all of whom accept limited and proportionate restrictions on their economic activity for the good of the sector. In other words, whilst large parts of the football industry amounts to significant economic activity, the requirements of the market are different to those found in more traditional sectors. This is often referred to as the 'specificity of sport'. We also acknowledge that the specificity of sport cannot be invoked to remove an entire sector, or activity within it, from the reach of public authority oversight. This is why the debate on agent remuneration must be evidence-based.

It is imperative that agents regulations commence from the principle that an agent must act in the best interest of his client and that an agent should be appropriately and reasonably remunerated for the provision of his/her service. The practice of dual representation calls into

[164] The issue of licensing and on-going education has been discussed above, in section 7 of this Report.

question the trust between the principal and agent, due to the conflicts of interest it creates. At its most egregious, dual or triple representation damages players and clubs and it calls into question the integrity of football. Whilst there might be occasions when the interests of the agent's clients genuinely align, the existence of an agents own financial interest cannot be ignored.

In order to eliminate, as far as is possible, conflicts of interest, an outright prohibition on the practice of dual representation will need to be considered. However, before arriving at that position, FIFA and the relevant stakeholders should first discuss whether conflicts can be mitigated through a combination of soft measures (such as disclosure, consent and education) and hard measures (such as caps or Client Pays). The least restrictive, but most effective, measure should be adopted. A pragmatic approach to agents regulation that permits lawful industry practices, such as dual representation, to continue, does not necessarily conflict with the duty to maintain the highest standards of governance.

Should a cap on agents' commissions be introduced, clarity on the calculation of the adopted percentage is required. For example, the cap could be calculated following an assessment of current industry levels or it could be calculated with reference to the percentage of transfer fees that are set aside for solidarity and training compensation sums. If fees are not capped, FIFA should look to establish other mechanisms through which fees must be demonstrably not unconscionable.

The strongest justification in support of remuneration and representation restrictions relates to protecting the parties engaging agents (particularly players), preserving the integrity of the sector and driving up professional standards and ethics.

Further evidence is required to support the assertion that agents exert an excessive and damaging influence in the market. Statistically, the market appears quite open which contradicts strong anecdotal evidence suggesting that agents act as powerful gatekeepers in the system. Some national markets are more concentrated than others. Given that actors within the football industry prefer to work within trusted networks, including using trusted agents, and that new agents face high barriers to market entry, it is also questionable whether, alone, regulatory interventions linked to remuneration and representation restrictions can address the issue of market concentration. FIFA and the stakeholders should consider measures to decouple close relationships between agents and club officials.

FIFA is justified reviewing agent activity in light of the general objectives of the transfer system, namely, to encourage solidarity and contract stability. However, adopting remuneration restrictions does not, in itself, improve the level and redistribution of solidarity and training compensation payments. The debate on whether to introduce agent remuneration restrictions must take place within a wider review of how solidarity in football can be better promoted.

The pursuit of contract stability is a legitimate objective for a sport governing body but this must be balanced against the rights of athletes to take advantage of free movement opportunities within the EU. Remuneration and representation restrictions might go some way to promote contractual stability, but there are many more incentives for player movement and contract re-negotiation than agent activity.

Although it has become industry practice, the ability of a player to discharge his liability to an agent through a club raises some concerns. Specifically, if a player pays his agent, he is likely to have a greater investment in the cost and quality of the service provided and this aligns with the overall principle of agents regulation which is to improve professional standards. Although international, EU and national laws often prohibit an employment agency from charging a worker, the football sector appears distinguishable from 'ordinary' industries in the same way as the rights of fixed term contract workers do not apply to football employment contracts.

Should Player / Client Pays not be considered appropriate, other measures that encourage a player to take more interest in his contractual arrangements with an agent should be considered. For example, an anecdote frequently heard by the research team relates to player's being unaware of how much they are paying their agent. Mandatory provisions in representation contracts could detail how much a player is likely to pay in a given situation and why. Agent bodies could issue advice to members regarding this and player bodies could do likewise and support this with education programmes. Published advice to players should, insofar as is possible, be brief and highlight key issues (such as a one-page factsheet).

There is a case for the regulations referencing only the player's salary as the reference point for the calculation of an agent's commission, whether they represent the player or the club.

No system relating to remuneration or representation restrictions are viable unless the regulator has clear competence over the activities of agents, has properly financed investigatory powers, and an effective suite of proportionate sanctioning weapons. Cultures of compliance and resources vary considerable across the FIFA member associations and this contributed significantly to the need to reform the existing 2015 RWWI. Transitional arrangements must be clear and unequivocal so as to avoid disputes going forward.

# 9.

# *Working with Minors*

## Introduction

It is widely accepted that young football players are particularly vulnerable and therefore deserve special protection.[165] This applies in particular to minor players, meaning players that are younger than eighteen years old. The interest of protecting minor players is for example recognised in FIFA's Regulations on the Status and Transfer of Players (RSTP). As a general rule, minor players may not be the subject of international transfers (Article 19 RSTP), although a significant and increasing number of exceptions to that general rule are made.[166]

As explained by FIFA, this policy is based on a generalised idea about the interest of and risks to minor players: "[w]hile international transfers might, in specific cases, be favourable to a young player's sporting career, they are likely to be contrary to the best interests of the vast majority of players as minors."[167] Another example of such a rule is the requirement that football clubs that operate academies must report all attending minor players with the National Association to which they belong (Article 19bis RSTP).

The vulnerabilities and needs of minor players raise a number of issues specifically pertaining to the role and regulation of agents. Much of the importance of intermediaries as well as the need for regulating intermediaries stem from the fact that football players in general have limited experience and bargaining power, and young players are by definition inexperienced and generally tend to have even less bargaining power and this places them at risk. Young players that move abroad to train and compete are particularly vulnerable in this regard.[168]

The special rules governing intermediaries and minors reflect an ambivalent view of intermediaries: some provisions treat the intermediary as someone that protects the player, others as someone that the player needs protection from. As highlighted by FIFA RWWI 2015, agents play a central role with regard to the conclusion of employment contracts between players and clubs and player transfer agreements between clubs (Article 1.1) and therefore have a central role in protecting the minor player's interests in relation to clubs. The athletes' need for intermediaries have increased over time as the amount of money involved in sports has increased, and with it the complexity of navigating the market and negotiating agreements.[169] Minors also enjoy special protection in terms of working conditions.

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[165] For example, the UN General Assembly has underlined the dangers faced by young athletes "including, inter alia, child labour, violence, doping, early specialization, over-training and exploitative forms of commercialization, as well as less visible threats and deprivations, such as the premature severance of family bonds and the loss of sporting, social and cultural ties". UN Resolution 58/5, 17 November 2003, Sport as a means to promote education, health, development and peace, available at http://research.un.org/en/docs/ga/quick/regular/58.

[166] See FIFA, Global Transfer Market Report 2018, available at https://www.fifatms.com/data-reports/reports/ (accessed 18 April 2019) (stating that about 4,000 minor applications were decided in 2018).

[167] FIFA, Protection of Minors FAQ, September 2016, available at https://img.fifa.com/image/upload/xbnooh14lcaxzadstknx.pdf.

[168] See e.g. European Commission (2007), White Paper on Sport COM(2007) 391 Final., p. 16; Commission, Communication on Sport (2011) – Developing the European Dimension in Sport, p. 7.

[169] Cf. Masteralexis, L. (2016), *Regulating player agents*, in Barry, M., Skinner, J. & Engelberg, T. (eds.) Research Handbook of Employment Relations in Sports, Edward Elgar, Cheltenham, pp. 99–122, at p. 99.

However, at the same time, intermediaries are seen as posing a separate threat to minor players. According to the Commission, *"[t]here are reports of bad practices in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players*."[170] For example, independent intermediaries are believed to play a central role in the trafficking of young players from third countries.[171] Although there is limited data on the prevalence of such "bad agents", the fear that they exist and pose a risk to minor players gives rise to an ambivalence is key to understanding the regulatory field.
The signing or transfer of an adult player typically involve three types of actors: the player, agents and clubs. Situations involving minor players typically also involve a fourth central actor, the player's legal guardian(s), and guardians therefore frequently appear in the regulations.

**Banning Representation by Intermediaries**

One possible, effective approach for the purpose of reducing the risk that intermediaries pose to minors is to ban intermediaries from representing all minor players or, alternatively, players under a certain age. This approach is used in some sports. For example, the rules governing amateur golf players provide that a minor player may not enter into a representation contract without permission from the sport governing body[172] and the rules governing handball forbid players younger than fifteen years old from entering a representation contract.[173]

RWWI 2015 allows intermediaries to represent minor players, regardless of age. Similarly, a majority of the National Associations surveyed, including in many of the largest football markets (e.g. France, Germany, Spain and Italy) do not apply any direct ban on representation under a certain age, opting for regulating rather than banning.

Many National Associations have however banned or severely restricted intermediaries representing minor players. The most severe example is Hungary where the National Association regulations ban representation contracts with any minor player. It is more common that the National Associations regulations forbid representation contracts with players younger than fifteen (*Czech Republic, Denmark, Latvia, Poland* and *Sweden*) or sixteen (*Bulgaria, Romania, England*).

As a separate issue, some National Associations allow intermediaries and minor players to enter into a representation contract but the intermediary cannot, as a matter of law, act on behalf of the player (*Portugal*).

It is unclear what role bans on intermediary representation play in the protection of minor players, if any. Whereas a complete or partial representation ban may protect players from

[170] European Commission (2007), White Paper on Sport, COM(2007) 391 Final, p. 15. See also European Commission (2011) Developing the European Dimension in Sport (the Communication on Sport), COM(2011) final, p. 15.
[171] Esson, J. (2015), *Better Off at Home? Rethinking Responses to Trafficked West African Footballers in Europe*, Journal of Ethnic and Migration Studies, 41/3, pp. 512–530; KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009, pp. 124–125, 130. Available at ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.
[172] Rule 2.2b of the Rules of Amateur Status.
[173] IHF, Regulations for Players' Agents, Article 10.2.

exploitation by intermediaries, it increases the unrepresented player's exposure to exploitation by clubs. Thus, a representation ban is suitable if the risks of the player being exploited by the intermediary outweighs the risks of club exploitation and there are no viable options for changing that balance, such as intermediary regulations. An intermediary representation ban can also be justified if there are other actors, such as family members, who are trustworthy and capable of protecting the player against club exploitation. We are doubtful that either of those conditions are fulfilled and therefore, consequently, question the appropriateness of representation bans. In any case, it is difficult to understand why the risk balance would shift at a certain age.

### Guardians Representing Minor Players vis-à-vis Intermediaries

Because minors have limited legal capacity, most legal systems require the guardian to sign the representation contract on the player's behalf in order for it to be valid. On a national level, the requirement for guardian involvement seems to be stated either in special legislation or follows from general legal rules in the country in question. Thus, guardian involvement is in practice necessary regardless of the content of the relevant sports regulations.

RWWI 2015 nevertheless makes it explicitly clear that a representation contract between a minor player and an agent must be co-signed by the player's legal guardian(s) in accordance with national law (Article 5.2). Football is not unique in this regard; the same is for example true in handball.[174] This is mirrored in the regulations of the National Associations.

Guardian involvement is an essential element of protecting minor players in relation to intermediaries. One national expert (Italy) describes the requirement as the only real threshold for agents and minor players, stating that "*the intermediary does not have to satisfy any further requirement in order to represent a minor, apart from obtaining the signature of his parents.*"

### Relatives as Intermediaries

A related but distinguishable issue is the involvement of guardians and other relatives acting *as* intermediaries. The FIFA regulations governing intermediaries before 2015 provided for an exemption for parents, sibling and spouse of the player. These individuals did not need licensing and their activities fell outside FIFA's jurisdiction (Article 4 PAR 2008).

RWWI 2015 contains no comparable provision, in part because the need for such a provision was significantly reduced after the abolition of the licensing requirement. Nevertheless, National Associations take different approaches as to whether relatives fall under the intermediary registration requirement: while some exempt guardians and/or relatives from parts of the registration regulation (e.g. *Latvia, Slovenia and Sweden*), others explicitly include relatives and legal guardians in the registration requirements (e.g. *Croatia*). National Associations that require intermediaries to have special qualifications for representing minors also tend to exempt guardians and other relatives from this requirement (e.g. *Sweden*). There is no indication that existing relative exemptions are causing any major issues, nor that National Associations that lack relative exemptions are experiencing significant issues from that.

[174] IHF, Regulations for Players' Agents, Article 10.2.

Any movement towards stricter intermediary requirements, including but not limited to the reintroduction of a licensing requirement, will raise the question whether such requirements apply to players' guardians and other relatives. There are practical realities that heavily favour some relative exemptions, at least with regard to guardians. It is more doubtful whether it is necessary to extend this to other close relatives.

The family exemption in the PAR 2008 seems to be the underpinned by the assumption that guardians and close relatives are generally going to be loyal with the minor player and act in the player's best interest. Although this appears a reasonable assumption, it should, at the same time, be acknowledged that this is not always the case.

More commonly and therefore more importantly, relatives frequently lack necessary knowledge and experience to provide the player with good advice, and relative exemptions therefore undermine measures taken in order to provide players, in general, and minor players, in particular, with high-quality advice. This is supported by football stakeholders representing different interests who largely appear to agree that parent or other close relative representation is not in the players' best interest. Thus, while some exemptions for guardians are probably necessary, they should be construed restrictively.

**Banning Remuneration**

While bans on intermediary representations are relatively limited, RWWI 2015 contains a ban on intermediaries receiving remuneration in a transaction that involves a minor player. This applies to all parties and regardless of who the intermediary represents (Article 7.8). This remuneration ban is clearly mirrored in almost all of the National Associations' regulations. Considering the clear and mandatory nature of the rule in RWWI 2015, we are surprised to find that some Associations apply a remuneration ban with a lower age limit than eighteen, such as fifteen (*Slovakia*) or sixteen (*Czech Republic*).

Remuneration bans have severe workability problems. While some Associations prohibit intermediaries from doing any paid work for minor players, such as representing them in sponsorships agreements (*France*), most do not. There may be legal ways to circumvent rules on non-remuneration. For example, as the Scottish national expert points out, a representation contract may include a clause allowing the intermediary to receive remuneration after the player reaches the age of 18, thereby simply postponing the payment rather than preventing it.

Even if remuneration bans were effective, they are not advantageous. It is hardly realistic to expect competent intermediaries to represent minors for free. In our opinion, remuneration bans are likely to dissuade intermediaries to offer their services to minor players which, in turn, (i) deprives the players of qualified counsel, (ii) increases their reliance on non-transparent side-agreements and/or (iii) the use of non-registered intermediaries. None of these are in the players' best interest.

Remuneration bans also raise issues regarding reciprocity of rights between stakeholders. For example, a football club can monetise its relationship with a minor, through a transfer or training compensation sum, but under the current RWWI, an intermediary cannot.
For the above stated reasons, we advocate stricter regulation of intermediary remuneration when representing minor players over an outright ban.

### Limits on the Representation Contract Period

As discussed above, the remuneration ban may negatively affect players' access to qualified representation. For the intermediary, the main economic incentive for providing unpaid services is the prospect of subsequent compensated work. By conducting non-remunerated work, the intermediary can build a relationship with the player that may translate into remunerated work after the player reaches maturity. This is however far from certain. Intermediaries therefore have strong incentives to enter long-term representation contracts that stretch beyond the player's eighteenth birthday.[175]

RWWI 2015 contains no limits on the contract period. Approximately half of the studied National Associations restrict the representation contract length generally, and such restrictions obviously apply to minor players as well. In these cases, representation contracts are limited to a two-year (e.g. *England, Italy, the Netherlands*) or three-year period (*Czech Republic*). There are however many National Associations, including, ones with an established intermediaries' industry, that have no such restrictions (e.g. *Spain*).

Additionally, various National Associations regulations contain rules particularly governing minor player contracts. The most extensive of these is the clean-slate provision under which a contract between a minor player and an intermediary can never extend beyond the player's eighteenth birthday (*Bulgaria*). Thus, when the player turns eighteen, he or she is not bound to any representation contract entered as a minor.

Finally, various National Associations regulations provide minor players with increased flexibility when it comes to terminating a representation contract compared to other players. This is only subject to the observation of a period of notice that can be of three months (*Denmark* and *Scotland*) or even shorter (*Latvia*).

There are compelling reasons for making it easy for players to terminate representation contracts entered as a minor, including both above-mentioned examples, both because of possible youthful ignorance and that the player's guardian(s) likely exerted significant influence over its content. While such exceptions reduce intermediaries' interest in conducting unpaid work for minor players, as mentioned above we believe that this should be resolved in a different manner.

### Special Qualifications for Representing Minors

RWWI 2015 and virtually all studied National Associations regulations require intermediaries to have an impeccable reputation in order to be allowed to perform their services. If functioning well, this requirement also helps ensure that intermediaries working with minor players meet a certain minimum standard. In a similar way, any system that increases the quality of intermediary services generally, for example through education and/or licensing (see e.g. *Czech Republic* and *France*), also increases the quality of intermediary services offered to minor players. This aspect of protecting minor players is therefore closely related to the issue of licensing and qualifications addressed elsewhere in this Report.

[175] Yilmaz, S., Esson, J., Darby, P., Drywood, E., & Mason, C. (2018), *Children's rights and the regulations on the transfer of young players in football*, International Review for the Sociology of Sport, https://doi.org/10.1177/1012690218786665, p. 7.

One can, however, argue that it is particularly important that intermediaries working with minor players are honest, professional and qualified. Adult players can generally be presumed to have greater ability than minor players to evaluate the qualities of prospective intermediaries and minor players are therefore more reliant on formal assessments and qualifications when selecting intermediaries. Measures that seek to ensure a minimum quality of the services offered by intermediaries thus seek to protect minors from making ill-informed decisions.

Consistent with this, a number of National Associations have made use of the possibility under RWWI 2015 of posing special requirements for intermediaries to be allowed to offer services to a minor player. Such measures can be grouped into two categories.

A first category consists of checking the intermediary's personal suitability to work with minors. Several National Associations require that intermediaries must be approved by the Association to work with minor players following an enhanced background check conducted by a public body specifically intended to assess someone's appropriateness for working with minors (*Belgium*, *England* and *Wales*), and in the *Republic of Ireland* all intermediaries are subject to similar checks. The most extensive version of this can be found in the Regulation of *Croatia* where intermediaries working with minors must have court approval as a matter of national law.

A second category consists of requirements that the intermediaries undergo special training (e.g. *Republic of Ireland*). An extended version of this is requiring repeated participation in an enhanced training program where the intermediary after examination becomes a National Association Certified Intermediary (*Denmark* and *Sweden*). This essentially amounts to a reintroduction of the pre-2015 licensing system on basis that is voluntary for general intermediary work but mandatory for working with minors.

There is near general consensus that the regulatory and institutional framework does not adequately ensure that intermediaries are sufficiently professional and knowledgeable, and this Report has identified different approaches for general improvements in this regard. Such general improvements will obviously also have to consider the situation for minor players.

We are not able to assess the efficacy of measures geared specifically towards raising the qualifications of intermediaries representing minors. Neither the National Associations Report, the stakeholders survey, nor (as far as we are aware) existing research has assessed the impact of measures such as those identified and discussed above.

In the face of lacking knowledge, it is easy to favour taking precautions. However, it is important to remember that access to intermediaries is in the minors' interest. As discussed, minor players are particularly vulnerable and dependant on intermediaries when entering employment and transfer contracts and they are therefore particularly harmed by the fact that most such transactions are conducted without intermediaries' involvement. While it is important to raise intermediaries' qualifications and to protect minor players against "bad agents", one should consider how measures that seek to further these goals impact minors' access to representation, and to weigh the measures' qualitative benefits against possible reduction in representation.

**Summary**

To summarise, this Report makes the following general conclusions and recommendations:

- Representation bans should be avoided,
- Guardians representing minor players vis-à-vis intermediaries are both required by law and appropriate for protecting minors,
- Guardians representing minor players as intermediaries may for practical reasons need to be exempted from certain intermediary requirements, but such exemptions should be construed restrictively,
- Regulation of intermediary remuneration when representing minor players is preferable to bans,
- It should be easy for players to terminate representation contracts entered as a minor, and…
- While all measures that enhance the quality of intermediary services particularly benefit minor players, any resulting reduction in access to intermediary services particularly harm minor players.

It should be noted that any regulatory approach is likely to leave minor players exposed to certain risks. Educating minor players and their guardians are central in order to further reduce those risks. National Associations as well as organisations representing players play a natural roll in providing such education.

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# *Dispute Resolution and Sanctions*

## Introduction

Press reporting of the work of agents tends to be negative, with some alleging poor conduct which is contrary to football regulations and others highlighting alleged illegal activity. The sanctioning system together with the dispute resolution system are two very important parts of the legal framework by which football authorities (FIFA/UEFA and National Associations) "protect the game". The results of our stakeholders' survey demonstrate that the lack of uniformity discussed in other areas affects this field of regulation as well. The 2015 RWWI only aim to regulate the transactions involving agents, while agents themselves have been excluded from the 'football family'.

## The *Piau* case and former Players' Agents Regulations

As previously mentioned, in the 1994 Players' Agents Regulations (PAR), FIFA adopted a sanction mechanism for agents, players and clubs in the event of infringement of the regulations. Agents could face a caution, censure or warning, a fine of an unspecified amount, or withdrawal of their licence (Article 14). Players and clubs could be fined up to CHF 50,000 and CHF 100,000 respectively. Players could also be liable to disciplinary suspensions (of up to 12 months). Suspension measures or bans on transfers could also be applied to clubs (Articles 16 and 18). A 'Players' Status Committee' was designated as FIFA's supervisory and decision-making body (Article 20).[176]

In the 2002 iteration, the PAR included a new system of sanctions against clubs, players and agents. Lack of compliance with the rules was sanctioned with a caution, censure, or warning, or a fine (Articles 15, 17 and 19). Players' agents could have their licence suspended or withdrawn (Article 15). Players could be suspended for up to 12 months (Article 17). Clubs could be sanctioned with bans on transfers of at least three months (Article 19). Fines could also be imposed on players' agents, players and clubs, with no amount specified for agents, and minimum amounts of CHF 10,000 and CHF 20,000 for players and clubs respectively (Articles 15, 17 and 19). All these sanctions were cumulative. Disputes were dealt with by the competent National Association or the 'Players' Status Committee' (Article 22). Transitional measures allowed licences granted under the former provisions to be validated (Article 23).[177]

This sanctioning system was scrutinised by the Court of First Instance (now the General Court) in *Piau*. The Court found that the range of sanctions was not "*manifestly excessive*", and that "*[…]Mr Piau has not produced any evidence to show that this mechanism is applied in an arbitrary and discriminatory manner, thereby interfering with competition.*"[178]

[176] Case T-193/02 *Piau*, at paragraphs 5-7.
[177] Case T-193/02 *Piau*, at paragraphs 13-16.
[178] Case T-193/02 *Piau*, at paragraph 94.

With respect to legal remedies against the decisions by National Associations or the Players' Status Committee, and beside being able to appeal before the CAS, available in the ordinary courts, the Court stressed that

> "*[I]nterested parties can always have recourse to the ordinary courts, in particular in order to assert their rights under national law or under Community law, and actions for annulment can also be brought before the Swiss Federal Court against decisions by the Court of Arbitration for Sport.*".[179]

**The 2008 FIFA Players' Agents Regulations**

Under the 2008 FIFA Players' Agents Regulations (PAR 2008), by applying to become a licenced agent with the relevant National Association, the individual agreed to abide by the statutes, regulations, directives and decisions of the competent bodies of FIFA as well as of the relevant confederations and associations (Article 6(4)).

In this iteration of the Regulations, domestic disputes arising from the activity of an agent were not to be heard by FIFA but had to be resolved by an independent arbitration tribunal at national level, albeit taking into account FIFA Statutes and national law. International disputes could be referred to the FIFA Players' Status Committee with disciplinary matters being referred to the Disciplinary Committee (Article 30).

Violations of the 2008 PAR could give rise to sanctions being imposed on agents, clubs, players and associations. In domestic transactions, these were imposed by the relevant national, although the FIFA Disciplinary Committee could impose additional sanctions. In international transactions, sanctions were imposed by the FIFA Disciplinary Committee in accordance with the FIFA Disciplinary Code (Article 32). Sanctions could include a reprimand or a warning, a fine of at least CHF 5,000 (CHF 30,000 for associations), a suspension or withdrawal of the licence for up to 12 months (for an agent), a match suspension (for players), exclusion from a competition (for associations), a ban on taking part in any football-related activity – and for clubs a transfer ban, points deduction or relegation (Articles 33-35). An agent was prohibited from taking a dispute to ordinary courts of law as stipulated in the FIFA Statutes and was required to submit any claim to the jurisdiction of the association or FIFA (Annex 1).

**The 2015 FIFA Regulations on Working with Intermediaries (RWWI)**

*Dispute settlement*

With the 2015 amendments to its Regulations on Status and Transfer of Players (RSTP),[180] FIFA removed contractual disputes involving intermediaries from the jurisdiction of the Players' Status Committee.

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[179] Case T-193/02 *Piau*, at paragraph 95.

[180] FIFA Circular no. 1468, p. 4. available at: https://resources.fifa.com/image/upload/1468-amendments-to-the-regulations-on-the-status-and-transfer-of-playe-2510650.pdf?cloudid=zro9p178udvmsgy3nzy7.
To access the current version, see https://www.football-legal.com/content/fifas-new-rstp-article-12bis-circular-1468.

While parties to a representation contract are free to choose the forum to resolve any dispute arising between them, the reform eliminated the ordinary dispute resolution forum within FIFA. As a result, disputes involving intermediaries that are heard before sports-specific arbitral panels or national courts have to deal with preliminary issues as to the jurisdiction of the adjudicatory body.

Under the system created by the RWWI and the 2015 RSTP, international disputes involving football intermediaries may be heard before three main jurisdictions:

- The Court of Arbitration for Sport,
- Domestic sport-specific arbitration,
- National courts.[181]

Although Article 57 of the FIFA Statutes state that *"FIFA recognises the independent Court of Arbitration for Sport (CAS) … to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents*",[182] the CAS is not automatically competent to settle disputes in cases regarding intermediaries. CAS will only accept jurisdiction over an intermediary dispute, when the parties have agreed to refer the matter to CAS, either through an arbitration clause contained in a contract or regulations, or by later arbitration agreement, or as an appeal against a decision by a sports-related body that provide for such a venue.[183]

It must be added that, under the 2015 FIFA Disciplinary Code, intermediaries could not seek enforcement for CAS decisions through FIFA, as Art. 64 was providing this route only for CAS appeal decisions and not ordinary ones. The 2019 FIFA Disciplinary Code has addressed this limitation, by extending the possibility to apply disciplinary sanctions both with regard to appeal and ordinary decisions made by CAS.[184] Moreover, intermediaries are also mentioned in Art. 3 of the Disciplinary Code, which relates to its scope of personal application. This is a welcome step from FIFA, as it can be concluded that, due to the combined effect of the two provisions, intermediaries are now not only subjects to the FIFA Disciplinary Code but are also entitled to invoke disciplinary sanctions on debtors who fail to respect a final CAS decision rendered in the context of an ordinary proceeding.

The second venue for resolution of disputes involving intermediaries is through domestic sport-specific tribunals. In this regard, two options are available. Disputes may be heard before a national arbitration tribunal competent on sports-related matter. Alternatively, National Associations may set up a specific body (National Association Commissions, Disciplinary Boards, etc..). In the latter, intermediaries must be members of the association, to ensure that they are subject to the jurisdiction of the tribunal. The study of the 31 National Associations highlights that in some instances (*Spain*, *Croatia* and *Slovenia*) this is not the case. In other associations (e.g. *Italy*), dispute resolution bodies have been set up to deal specifically with intermediaries, excluding other football stakeholders, as players and clubs, from their

[181] Mehrzad, J (2017), *Jurisdiction over international transfer related football disputes*, LawInSport. available at: http://www.littletonchambers.com/jurisdiction-over-international-transfer-related-football-disputes-by-john-mehrzad-1180/.

[182] FIFA Statutes, Art. 57-59. Available at: https://resources.fifa.com/image/upload/the-fifa-statutes-2018.pdf?cloudid=whhncbdzio03cuhmwfxa.

[183] CAS Code of Sport, R 27 (Application of the Rules), Available at: https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf.

[184] FIFA Disciplinary Code, Art. 15, available at: https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=i8zsik8xws0pyl8uay9i.

jurisdiction. This fragmentation leads to severe inconsistency in terms of rights of the parties to choose the forum competent to hear the dispute and - more generally - guaranteeing access to justice.

A further route to dispute resolution is through ordinary national courts. In this regard, it must be pointed out that FIFA prohibits recourse to ordinary courts of law unless specifically provided for in the FIFA regulations.[185] Instead, FIFA establish that provisions should be included in the Statutes and Regulations of National Associations imposing referral to independent and duly constituted arbitration tribunals, or to CAS. Furthermore, National Associations shall impose sanctions on any party failing to respect this obligation, against which is again prohibited appeals to ordinary courts. The provision, however, does not directly address intermediaries, as opposed to the previously mentioned Article 57(1). Therefore, a number of National Associations refer to ordinary courts as competent forum for resolution of disputes between intermediaries.

While the referral of disputes to arbitration presents clear advantages, as costly and lengthy procedures before ordinary courts may not be suitable for the needs of the sporting system, the reading of Article 59 of the FIFA Statutes raises questions of access to justice, as it denies players and/or clubs the right to judicial protection in cases regarding the activity of an intermediary.

To conclude, without FIFA having competence to hear disputes involving intermediaries, and in the context of the uncertainty still existing after the introduction of the FIFA Regulations and their domestic equivalents, much of the burden will fall on CAS to resolve the disputes that arise out of intermediary relationships.[186]

*Sanctions and Enforcement*

As mentioned, under the RWWI, National Associations are responsible for the imposition of sanctions on any party under their jurisdiction that violates the provisions of the 2015 regulations, their statutes or other regulations. The RWWI are silent on the sanctions that can be imposed, thereby leaving National Associations discretion. National Associations are required to publish and to inform FIFA of any disciplinary sanctions taken against any intermediary. The FIFA Disciplinary Committee will then decide on extending the sanction to grant worldwide effect in accordance with the FIFA Disciplinary Code.

The heterogeneous range of sanctions that may be imposed at national level, coupled with differing cultures of compliance amongst National Associations, create obstacles to the uniformity and consistency of the sanctioning system. Furthermore, the possibility that FIFA would not give worldwide effect to the sanction granted at National level, raises concerns as to the effectiveness of the system, and may encourage agents that have been sanctioned in one country to move their operation – and the players they represent - to another country.

However, the role of FIFA is to monitor the implementation of RWWI and take steps if the National Associations are not fully complying with their obligations. FIFA's Disciplinary

[185] FIFA Statute, Art. 59(2-3). Such a prohibition must also be inserted in the Statutes and Regulations of National Associations.
[186] See Lloyd, T et al. (2018) *Intermediaries in Football: An Update on CAS Jurisprudence*. Available at: https://www.sports.legal/2018/01/intermediaries-in-football-an-update-on-cas-jurisprudence/.

Committee is competent to deal with such matters in accordance with the FIFA Disciplinary Code.

Concerns as to the effectiveness of the sanctioning and enforcement system were raised by the EU Sectoral Social Dialogue Committee for Professional Football. The Committee pointed out that the sanctions provided for under the RWWI did not appear to be far reaching enough and that the rules could be circumvented too easily (and a high number of intermediaries/agents remained unregistered).[187] The Social partners highlighted the needed for greater transparency, disclosures and accountability and an appropriate and dissuasive sanctions in case of non-compliance.[188] The introduction of a uniform mechanism for sanctioning and enforcement was also recommended in a study published in 2018 by KEA and CDES.[189] The need for such a system was recognised even by the Agents themselves in a series of workshops organised by EFAA, where one of the issues raised was the need for enforceable regulations with proper sanctioning and dispute resolution procedures.

*Stakeholders Survey*

The 2015 RWWI establish minimum standards and require National Associations to adopt national regulations that can go beyond these minimum standards. The ability of National Associations to adopt more stringent national requirements found favour with the Expert Group on Good Governance[190] and respondents to our stakeholder survey also supported this principle. 67.5% of respondents strongly agreed or agreed that "*in any new set of regulations, National Associations should retain the ability to adopt more stringent national rules*". Only 10% disagreed with 0% strongly disagreeing.

The National Associations Reports highlight considerable variations in approaches to intermediary regulations across the territory of the EU, even in relation to sanctions and dispute resolution mechanisms vary across the territory of the EU. The problem with such a varied regulatory landscape is that simplicity and transparency are compromised and the incentives for regulatory circumvention are increased as stakeholders navigate the complex system. 77.5% of respondents to our stakeholder survey either strongly agreed or agreed that "*current intermediary regulations are easily circumvented*" and only 5% disagreed. Football is an inherently international business but the system introduced by the RWWI partitions the EU single market into national markets with different standards, thus making some markets more or less attractive. The varying standards make the work of an agent more difficult and frustrate the provision of his/her services across frontiers. This complexity also raises the potential for agents (and indeed clubs and players) to commit technical regulatory offences despite having acted in good faith.

[187] EU Sectoral Social Dialogue Committee for Professional Football, Resolution on Intermediaries / Agents, November 2017.
[188] EU Sectoral Social Dialogue Committee for Professional Football, Resolution on Intermediaries / Agents, November 2017.
[189] KEA European Affairs & ECORYS (2018), An update on change drivers and economic and legal implications of transfers of players: Final Report to the DG Education, Youth, Culture and Sport of the European Commission. at p. 58. Available at: https://ec.europa.eu/sport/sites/sport/files/report-transfer-ofplayers-2018-en.pdf
[190] Expert Group "Good Governance", Deliverable 3, Supervision of Sports Agents and Transfer of Players, Notably Young Players, EU Work Plan for Sport 2011-14, December 2013, Recommendation 5.

*National Reports*

Our National Reports highlight how in some countries, concerns are raised as to the effectiveness and clarity of the sanctioning of intermediaries. Although all intermediaries are required to sign the declaration in which they agree to be subject to the rules of FIFA and the National Association, in some countries like Croatia, Slovenia and Spain the intermediaries are not being regarded as members of the National Association and are not under the competence of the National Association's disciplinary bodies. In Spain the competent National Association body (the Jurisdictional Committee of the National Association) has only competence on economic disputes between an intermediary and a club/player while any non-economic dispute should be brought before ordinary courts. In Germany, there is an ongoing litigation procedure about the legality of the rule of the German National Association which require that intermediaries must sign a declaration by which they abide to the FIFA/UEFA and rules of the National Association. Table 1 shows the sanctioning mechanism of the 31 National Associations.

*Table 1: Sanctions under Regulations of National Associations*

| Rules on Sanctions – Competent body | National Regulations |
|---|---|
| FIFA RWWI - Imposition and publication of sanctions on intermediaries: Member associations are responsible for imposing sanctions on any party under their jurisdiction. They are obliged to publish all sanctions taken against intermediaries and must inform FIFA so that the FIFA Disciplinary Committee can decide on whether the sanction should have worldwide effect in line with the FIFA Disciplinary Code | National Association Body (Committee or Arbitration Tribunal):<br>Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Northern Ireland, Poland, Portugal, Republic of Ireland, Romania, Scotland, Slovakia, Spain, Wales |
| No sanctions on intermediaries / No competent National Association body | Croatia, Slovenia, Spain, |

Table 2 gives an overview and comparison of how the dispute settlement is set in the various national National Associations. This overview clearly demonstrates the range of options used by the National Associations.

*Table 2: Dispute Resolution under Regulations of National Associations*

| Rules on Dispute Resolution | National Regulations |
|---|---|
| FIFA RWWI, Article 10: (1) FIFA shall monitor the proper implementation of these minimum standards/ requirements by the associations and may take appropriate measures if the relevant principles are not complied with. (2) The FIFA Disciplinary Committee shall be competent to deal with such matters in accordance with the FIFA Disciplinary Code. | |

| | |
|---|---|
| Specific National (General) Body | Belgium (Belgium Arbitration Court of Sport), Portugal (Portuguese Court of Arbitration for Sports) |
| Specific National Association Body (National Association Commissions, Disciplinary Boards etc.) | Austria, Bulgaria, Cyprus, Czech Republic, Denmark, England, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Northern Ireland, Poland, Republic of Ireland, Romania, Scotland, Slovakia, Spain (just for economic disputes), Sweden, Wales |
| Ordinary Court | Croatia, Denmark, England (an option)[191] France, Slovenia, Spain (for non-economic disputes) |

## A Comparison of Agents Regulations in other sports

The following part of the Report focuses on how the issues related to sanctioning, enforcement and dispute resolutions are tackled in basketball and handball by two other international federations, respectively FIBA and the IHF. By assessing the models adopted by other international federations, best practices are identified.

*FIBA Agents Regulations*

Chapter 9 of the FIBA Internal Regulations[192] provides the rules governing the activities of player's agents licenced by FIBA who undertake to bring about or assist in the international transfer of players or coaches (players and coaches are jointly referred as "Players").[193] Any national member federation may establish its own regulations governing players' agents who deals with transfers of domestic players within their own federation. Such regulations (a) must be approved by FIBA; and (b) must respect the principle set out in this Chapter; and (c) may enter into force no earlier than their written approval by FIBA. Agents practicing or domiciled in the territory of the association that has adopted national regulations must hold a valid licence issued by the relevant governing body.

Agents could be sanctioned by FIBA, through the Secretary General, in case: (a) the requirements for issuing a licence under FIBA Regulations are not/no longer met; (b) if the Agent fails to attend a FIBA seminar; (c) or fails to pay an annual fee for his licence; (d) or fails to provide proof to FIBA that he/she holds a valid agent's licence issued by the federation of his domicile; (e) is in breach of any of his duties according to the FIBA Regulations; and (f) for any other important reason.[194] Sanctions could be: (a) a warning or reprimand; (b) a fine and (c) withdrawal of a licence. Those sanctions may be cumulative.[195]

Cumulative sanctions could also be imposed against a player who uses the services of an unlicensed agent or more than one agent at the same time. Sanctions may include: (a) a warning or reprimand; (b) a fine and (c) a ban on international transfer of the player.[196]

[191] Under The FA Regulations, disputes between registered intermediaries and players/clubs/intermediaries are subject to FA rule K, referring them to The FA arbitral body. Disputes involving other individuals could go be hear before ordinary courts.
[192] FIBA Internal Regulations - Book 3 (Players and Officials), available at: http://www.fiba.basketball/internal-regulations/book3/players-and-officials.pdf, (hereinafter: FIBA Agents Rules), Arts. 282-323
[193] FIBA Agents Rules, Art. 282.
[194] FIBA Agents Rules, Art. 309.
[195] FIBA Agents Rules, Arts. 311-312.
[196] FIBA Agents Rules, Arts. 313-315.

In the event the club violates the FIBA Regulations, it could be sanctioned with: (a) a warning or reprimand; (b) a fine; (c) prohibition from carrying out national and/or international transfers; and (d) a ban from all national and/or international basketball activity. [197]

Any appeal against any decision of FIBA under the FIBA Regulations shall be filed with FIBA's Appeal Panel[198] in accordance with FIBA Internal Regulations governing Appeal.[199]

*Basketball Arbitration Tribunal (BAT)*

FIBA Regulations[200] include provisions setting the competence of the basketball Arbitration Tribunal (BAT). BAT is primarily designed to resolve disputes between clubs, players and agents.[201] For any dispute to be admissible to BAT the following Standard Arbitration Clause should appear in a contractual agreement between the parties (either before or after the dispute has arisen):

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) […] and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President.*
> *The seat of the arbitration shall be Geneva, Switzerland.*
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*[202]

The BAT President and Vice-President are appointed by the FIBA Central Board for renewable term of four years between the ordinary sessions by the FIBA elective Congress and must have legal training.[203] The BAT president among other duties establishes a list of at least five BAT arbitrators for a renewable period of two years and appoints BAT arbitrators or removes them from the list.[204] The BAT arbitrators shall have legal training and experience with regards to sport.[205]

In terms of enforcement of BAT awards, in the event one party fails to honour any award, the other can request FIBA to adopt sanctions against the first one.[206] Sanctions, which can be applied cumulatively and more than once, may include: a monetary fine up to CHF 150,000; and/or withdrawal of the FIBA licence if the first party is a player's agent or of the WABC membership if the first party is a coach; and/or a ban on international transfers if the first party is a player; and/or a ban on participating in international competitions with his national team and/or club if the first party is a player; and/or a ban on registration of new players and /or a ban on participation in international club competitions if the first party is a club.

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[197] FIBA Agents Rules, Arts. 316-318.
[198] FIBA Agents Rules, Art. 323.
[199] FIBA Internal Regulations – Book 1 – Chapter 7, available at: http://www.fiba.basketball/internal-regulations/book1/general-provisions.pdf
[200] FIBA Internal Regulations – Book 3 - Chapter 10 (Basketball Arbitration Tribunal (BAT)), Arts. 324-337.
[201] FIBA Internal Regulations, Art. 326.
[202] BAT Arbitration Rules, point 0.3, available at: http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017
[203] FIBA Internal Regulations, Art. 332.
[204] Currently there are 8 arbitrators. Available at: http://www.fiba.basketball/bat/composition.pdf
[205] FIBA Internal Regulations, Art. 334, b.
[206] FIBA Internal Regulations, Art. 335.

Upon request by FIBA, the national member federation to which the first party is affiliated shall actively and promptly take all necessary measures to ensure that the first party fully honours the BAT award within a time fixed by FIBA. If a national federation fails to comply, FIBA may impose disciplinary sanctions on the national federation in accordance with the FIBA Regulations.[207] The decision to sanction the first party can be subject to appeal to the FIBA Appeals' Panel according to the FIBA Internal Regulations governing Appeals.[208]

The unique characteristics of BAT, including its voluntary nature and the use of *ex aequo et bono* as decisional standard have rendered this dispute resolution venue particularly successful within the basketball community. In turn, this has reinforced the mandate of the institutions and its arbitrators.[209]

*International Handball Federation (IHF) Agents Regulations*

Similar to FIBA, the IHF has its own regulations on working with agents.[210] Players' agent licences are issued by the IHF through its National Associations. The IHF reserves the right to limit the number of licences issued to agents coming from one National Association. The criteria that shall be taken into consideration when fixing such a quota are the number of registered clubs and the number of players within this National Association.[211]

A licence is terminated when it is withdrawn because the players' agent no longer fulfils the relevant conditions, returned as a result of the termination of the activity or as a result of a sanction. If the unfulfilled conditions can be remedied, the IHF sets the players' agent a reasonable time limit in which to satisfy the relevant requirements. If, at the expiry of such a time limit, the requirements are still not satisfied, the licence is definitively withdrawn.[212] The IHF publishes the name of the players' agents who have terminated their activity.[213]

Sanctions may be imposed on any players' agent, player, club or National Federation that violates the regulations, their annexes or the Statutes or other Regulations of the IHF, the Continental Confederations or the National Federations. In domestic transactions, the relevant National Federation is responsible for imposing sanctions. This responsibility, however, does not prevent the IHF Arbitration Commission from imposing sanctions on a players' agent involved in a domestic transfer as well as in international transactions. The IHF Arbitration Commission is responsible for imposing sanctions in accordance with the IHF Regulations concerning Penalties and Fines. If any uncertainty or dispute arises regarding competence, the IHF Arbitration Commission shall decide who is responsible for imposing sanctions. Sanction proceedings shall be initiated by the IHF, either on its own initiative or upon request.[214]

The following sanctions may be imposed on *players' agents* for violation of the regulations and their annexes: (a) a reprimand or a warning; (b) a fine of at least CHF 5,000; (c) a

[207] FIBA Agents Rules, Art. 336.
[208] FIBA Internal Regulations – Book 1 – Chapter 7.
[209] Radke, H. (2019), *Basketball Arbitral Tribunal (BAT) as a 'lawmaker': the creation of global standards of basketball contracts through consistent arbitral decision-making*, International Sports Law Journal (2019) 19: 59.
[210] IHF X. Regulations for Players' Agents, available at: http://www.ihf.info/files/Uploads/NewsAttachments/0_PlayerAgentRegulations_GB.pdf, (hereinafter: IHF Regulations)
[211] IHF Regulations, Art. 2.
[212] IHF Regulations, Art. 7.
[213] IHF Regulations, Art. 9.
[214] IHF Regulations, Art. 15.1.

suspension of licence for up to 12 months; (d) a licence withdrawal; a ban on taking part in any handball-related activity. These sanctions may be imposed separately or in combination. In particular, the licence shall be withdrawn if the players' agent repeatedly or seriously infringes the Statutes and Regulations of the IHF, the Continental Confederations or the National Federations.[215] *Players* may be sanctioned with: (a) a reprimand or a warning; (b) a fine of at least CHF 5,000; (c) a match suspension; (d) a ban on taking part in any handball-related activity. These sanctions may be imposed separately or in combination.[216] *Clubs* may be sanctioned with: (a) a reprimand or a warning; (b) a fine of at least CHF 5,000; (c) a transfer ban. These sanctions may be imposed separately or in combination.[217] Finally, *federations* may be sanctioned with: (a) a reprimand or a warning; (b) a fine of at least CHF 5,000; (c) Exclusion from a competition.[218]

*Enforcement in IHF Regulations*

In the IHF Standard Contract of Representation Form there is a clause stating (in bold): "*The parties agree to submit any claim to the jurisdiction of the federation. Recourse to ordinary courts is prohibited unless specifically provided in the regulations.*[219] Appeal authorities are established in each Continental Confederation. The IHF Arbitration Tribunal as last appeal authority may – if authorised by corresponding legal provisions – be invoked in an appeal against their final ruling.[220]

All disputes arising from these Regulations are handled by the IHF legal bodies. After exhaustion of the internal IHF remedies, the final decision of IHF can be appealed to the CAS, in accordance with the CAS Code, that shall definitely resolve the dispute in accordance with IHF Regulations, and additionally Swiss Law. The decision of CAS is final according to Articles R46 and R59 of the CAS Code.[221]

## Conclusions

Resourcing the global regulation of agents was administratively burdensome for FIFA and under the 2015 RWWI, this burden has been passed to the National Associations. One problem with the pre-2015 system appeared to be the varying cultures of compliance and resources across National Associations. For example, pass rates for the agent examination varied considerably across the world suggesting varying standards of diligence at National Association level. These varying cultures still exist at National Association level and this raises questions about standards of compliance, enforcement and sanctioning.

[215] IHF Regulations, Art. 15.2.
[216] IHF Regulations, Art. 15.3.
[217] IHF Regulations, Art. 15.4.
[218] IHF Regulations, Art. 15.5.
[219] IHF Regulations, Annex 3, Clause 5.
[220] IHF 2.- Legal Provisions, available at: http://www.ihf.info/files/Uploads/NewsAttachments/0_02%20-%20Legal%20Provisions_GB.pdf, Art. 2.2.
[221] IHF Statutes, available at: http://www.ihf.info/files/Uploads/NewsAttachments/0_01%20-%20Statutes_GB.pdf, Art. 23.

Under the 2008 PAR, if a dispute had an international dimension, a mandatory referral was made to FIFA. Some claim that a benefit of this was that it addressed concerns of bias at National Association level.[222]

Under the 2015 RWWI, an intermediary from outside the association is subject to the dispute resolution system of the National Association, if one exists, and he/she may feel disadvantaged in so far as the association may favour 'its' club for example. Furthermore, in some countries like *Slovenia*, *Croatia* and *Spain* the National Associations do not have competence on agents/intermediaries to sanction them. The heterogeneity of regulations regarding the sanctions end enforcement in the European football industry, depending as it currently is on very different regulations of the national National Associations, is an obstacle to the objective of ensuring compliance, enforcement and access to justice.

Once more, it must be reaffirmed the need to bring the agents back into the football family, to promote both the effectiveness of the sanctioning mechanism and the protection of their right to recourse. A recourse to ordinary court is not always possible, and in any event not necessarily suitable to the needs of the football system, which needs rapid and cost-efficient decision making. In *Piau*, the Court held that, with respect to legal remedies available in the ordinary courts,

> "*[I]rrespective of the system of remedies against decisions by National Associations or by the Players' Status Committee, which is competent in matters involving players' agents, before the Court of Arbitration for Sport, interested parties can always have recourse to the ordinary courts, in particular in order to assert their rights under national law or under Community law, and actions for annulment can also be brought before the Swiss Federal Court against decisions by the Court of Arbitration for Sport.*".[223]

Guaranteeing a route to recourse to legal protection is another fundamental objective of any future regulation, to ensure that players, clubs and agents have a legal forum for the protection of their rights but also for the fulfilment of their duties towards the other party.

An effective sanctioning system, such as the one run under FIBA and IHF Regulations, and ultimately as it was under the 2008 PAR, is a fundamental step in the right direction. As the General Court stated in *Piau*, the sanctioning system should not be *"…applied in an arbitrary and discriminatory manner, thereby interfering with competition*."[224]

The stakeholder survey has confirmed this impression, as the majority of the respondents agreed that "*the sanctions provided for under the new rules did not appear to be far reaching enough; and that the rules could be circumvented too easily*". A system that guarantees cooperation and integration between FIFA and National Associations is required, to ensure greater certainty in the application of the relevant regulations, transparency and help increasing the standard of professionalism in the football agents' industry.

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[222] Lombardi, P. (2016), *The FIFA Regulations on Working with Intermediaries*, in Colucci, M., The FIFA Regulations on Working with Intermediaries: Implementation at National Level, International Sports Law and Policy Bulletin, Issue I-2016, pp.23-40.
[223] Case T-193/02 *Piau*, at paragraph 95.
[224] Case T-193/02 *Piau*, at paragraph 94.

# *11.*

# *Conclusions*

## Introduction

The purpose of this final chapter is to present findings regarding the operation of the FIFA RWWI (2015), particularly regarding the implementation of the regulations at National Association level across the territory of the EU. In doing so, our study aims to support key private stakeholders and public policymakers, by providing evidence-based options and recommendations in terms of future regulatory initiatives in the sector informed by principles of good governance. Our recommendations are based on five key sources:

- The content of our National Associations Reports.
- The responses to our Stakeholder Survey.
- Research, including literature reviews, undertaken by the project team.
- Attendance at agent related conferences and seminars throughout Europe.
- Discussions that have taken place as part of our own agent workshops (MSEs).

The research team acknowledge that, part way through our research, FIFA undertook to reform the current intermediary regulations and that a FIFA Transfer System Task Force sat to consider possible reforms. In order to assist with that process, throughout the duration of our project, we published an Interim Report and a series of Thematic Reports covering the most contentious issues, namely: Professional Standards; Representation and Remuneration Restrictions; Working with Minors and Sanctions and Dispute Resolution. A series of stakeholder workshops, staged throughout Europe, discussed the content of these publications. These Reports were shared with members of the Task Force.

Our conclusions are structured around the following:

1. Terminology: Intermediary or agent?
2. Good governance
3. Models of regulation
4. Uniformity of the regulations
5. Professional standards
6. Remuneration and representation
7. Working with minors
8. Enforcement and dispute resolution

## 1. Terminology: Intermediary or Agent?

Our National Associations Reports revealed that most National Associations adopted the definition of intermediary contained in the RWWI. This focuses on the activity of the intermediary, as a person – natural or legal – whose objective is to negotiate between clubs and players with a view to concluding an employment contract or a transfer agreement. It must be noted, in this regard, that a number of National Associations employed broader definitions to

cover a wider range of professionals whose activities exceed the mere conclusion of a transfer agreement. In particular, the Regulations of the English and the Welsh National Associations define the intermediary activity as acting directly or indirectly in relation to any matter relating to a transaction. The definition is therefore stretched to include activities ancillary to the mere conclusion of the employment contract and even related to other forms of consultancy activities. This is in line with the definition used by the Belgian National Association, which specifically mentions consultancy, but also with those adopted by the Bulgarian, Slovakian, and Swedish National Associations which all include other aspects of the activity.

In contrast to this, the French National legislation, which regulates the activity of intermediaries in France, only refers to the activity of bringing together parties with a view to conclude an employment contract, thereby excluding any person involved in the conclusions of other types of contracts, such as image rights licensing contracts, endorsement contracts, etc. On the other hand, the Regulations in some Associations, such as *Bulgaria*, *Cyprus*, *France* and *Romania* provide that intermediaries may represent coaches/trainers as well as players.

With the exception of *France*, it can be argued that this demonstrates that the definition contained in the RWWI has been considered, in some circumstances, too rigid, especially in light of the fluidity of the market and the range of activities undertaken by intermediaries. It is suggested that a broader definition would be more suitable in this regard and could allow inclusion of a greater range of professionals under the Regulations.

It is observed that at the events organised or attended by the research team, many who work in the football industry routinely referred to the work of football 'agents' rather than 'intermediaries'. Whilst the term 'agent' was preferred for cultural reasons, in other words, the term has been used historically, others actually objected to the term 'intermediary' as it did not convey the range of services offered by agents/intermediaries.

FIFA's reasoning for changing the title from agent to intermediary is clear – the 2015 regulations refocussed the regulatory emphasis away from the individual and placed it on the transaction. In that sense, the term 'intermediary regulations' better reflects the new emphasis.

Our view is that the term 'agent' is to be preferred for the following reasons. It is a term generally understood by the public. It is a term seemingly favoured by the stakeholders. It is a term that conveys more accurately the range of services offered. It aligns with our recommendation for FIFA to regulate the profession, by way of a licensing system and ongoing compliance requirements, not just the transaction.

In light of the above we recommend:

- *That new regulations refer to 'agent's rather than 'intermediaries'.*

## 2. Good Governance: Stakeholder Consultation

Press reporting of the work of agents tend to be negative, commenting on powerful agents demanding remuneration that goes beyond the services they offer and alleging poor conduct and illegal activities. There seems little value in interrogating all of these claims, beyond observing that many press reports relate to the work of a very small number of individuals and that those responsible for adopting agents regulations, be they football authorities or public

authorities, should guard against drafting regulations to control just the exception rather than the norm. In this regard, these bodies should acquire a good understanding of how the industry actually works in practice, rather than basing regulations on perceptions generated by the media. In that connection, it is advisable that FIFA, as a matter of good governance, consults those within the industry who routinely work with agents to conclude agreements. Naturally, this includes the agents themselves.

When stakeholders were asked whether *"your organisation was appropriately consulted by FIFA during the framing of the RWWI currently in force"*, only 17.5% of respondents agreed (0% strongly agreed). 67.5% disagreed or strongly disagreed. Specifically, with regards to agents, there is no evidence to suggest that FIFA consulted with EFAA or any other agent / agent body when the 2015 RWWI were being drawn up. This is to be somewhat contrasted with the discussions that have taken place with agents as part of the FIFA Transfer Task Force process throughout 2018 and 2019. For example, FIFA invited individual agents and EFAA to participate within the Task Force process, not as members but as part of consultative workshops held in Zurich throughout 2018.[225] Whilst FIFA's greater level of engagement with agents is to be welcomed, it must be stressed that agents themselves are not entirely satisfied that the consultation was as thorough as it could have been.[226]

In this regard, the research team do acknowledge that as the global governing of football, FIFA needs to be satisfied that the stakeholders involved in consultation are properly organised and representative and that EFAA does not count amongst its members some of the so-called 'super-agents'.[227] Nevertheless, EFAA is clearly the most representative body of agents and a recognised football stakeholder by the European Commission. Whilst it does not yet have a global organisational structure, it does count amongst its members non-EU National Associations. It should also be noted that EFAA was very co-operative throughout the duration of our study.

In terms of whether *"your organisation was appropriately consulted by the competent National Association when it was developing and implementing the regulations on working with intermediaries within its territory"*, 25% agreed (2.5% strongly agreed) and 47.5% disagreed or strongly disagreed. The 2017 EU Sectoral Social Dialogue Committee for Professional Football Resolution on Intermediaries/Agents highlighted the lack of stakeholder consultation in this process.[228] Our National Associations Reports reveal that in the majority of the associations, agents were not consulted by the National Associations when it came to implementing the RWWI on a national level. In part, this can be attributed to an absence of a national agent association but elsewhere, agent associations were simply not involved, or were merely informed of the new Regulations. Exceptions to this observation are the Netherlands, Germany, and Bulgaria, where agents were recognised stakeholders actively involved in the discussion, and to a lesser extent Belgium, Denmark, Sweden, Poland and Slovakia, where minimum consultation took place.

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[225] FIFA holds talks with agents on possible revision of football intermediaries system, FIFA.com, 20/04/18. Available at: https://www.fifa.com/about-fifa/news/y=2018/m=4/news=fifa-holds-talks-with-agents-on-possible-revision-of-football-intermediaries-sys.html

[226] See for example discussions at an EFAA event in London, 23/07/19. Availble at: https://www.lboro.ac.uk/news-events/news/2019/august/the-future-of-football-agents/

[227] In fact, EFAA members are national agents' associations and not individuals. Nevertheless, some of these 'super-agents' are not part of the national association set-up.

[228] Resolution on intermediaries/agents, EU Sectoral Social Dialogue Committee for Professional Football, 17/11/17.

It must be recalled that under the principles established by the EU institutions, the sport system is entitled to self-governance, insofar as the principles of good governance are respected.[229] This is the principle of conditional autonomy, a key feature of which is that relevant stakeholders must be involved in the rule-setting and decision-making processes of the governing bodies, particularly when the rules are directly affecting their economic activity. In this regard, the research team acknowledge that consultation with stakeholders is unlikely to lead to unanimity on all occasions and that, at some point, a governing body will need to take a decision that might not find favour with all stakeholders.

When asked, *"if properly organised at national and/or European / global level, intermediaries should be considered an official stakeholder within FIFA's 'football family'",* 65% of respondents to our stakeholder survey strongly agreed or agreed and 22.5% disagreed (2.5% strongly disagreed).

Our stakeholder survey also revealed an acceptance by the football stakeholders that *"intermediaries are a necessary part of the football industry"*. 77.5% of respondents strongly agreed or agreed with that proposition. Even more respondents – 82.5% - strongly agreed or agreed with the proposition that *"the job of an intermediary relates to more than just negotiating players' contracts and includes other aspects including scouting, legal consultancy, career planning, financial planning etc"*.

From the above, there appears to be an acceptance within the football industry that agents are a necessary part of it and that they should play a more prominent role in the framing of the rules. Yet, the 2015 RWWI are framed in such a way that agents are not actually part of the regulated 'football family'. Only the transaction that they facilitate is regulated. Indeed, 77.5% of respondents strongly agreed or agreed with the proposition that *"with the introduction of the RWWI, the sector has been 'de-regulated'"*. Only 12.5% disagreed or strongly disagreed with this statement. The language of 'de-regulation' is also commonly found in academic and practitioner commentaries on the RWWI. This 'de-regulation' tends to pull against the desire to embrace agents rather than distance them from the regulatory system.

For agents to take their place as a recognised stakeholder, they need to be properly organised through representative bodies. This is a challenge for agent bodies given the individualistic nature of the industry. EFAA is a relatively new organisation, established in 2007. It is the European umbrella organisation representing national agents' associations from Bulgaria, Czech Republic, Denmark, France, Germany, Italy, Netherlands, Portugal, Spain and UK & Ireland. EFAA also has affiliated members from Argentina, Australia, Brazil, Japan and Switzerland. The EU recognises EFAA as a stakeholder and has invited it to participate in a number of agent related activities, as detailed elsewhere in this Report (see: *Intermediaries: the EU Dimension*). FIFA also consulted with EFAA during the Task Force discussions throughout 2018/19. EFAA is not, currently, a recognised social partner under the EU social dialogue process.

In light of the above, we recommend that the football authorities consider:

- *Officially recognising properly constituted agent/intermediary associations, particularly EFAA, as stakeholders within the football family.*

[229] See European Commission (2007), White Paper on Sport COM(2007) 391 Final, at paragraph. 4.

- *Without compromising the integrity of their working relationship, FIFA and the stakeholders should consider how best to support the collective organisation of agent bodies so that levels of representativity and professionalism can be enhanced.*

- *Returning to regulating the agent profession as well as the transaction that they facilitate. A further set of conclusions relating to professional standards are provided below.*

To agents we recommend:

- *Re-doubling efforts to organise the profession nationally and internationally so that representative agent associations, particularly EFAA, can take its place as a recognised and fully consulted stakeholder. Specifically, EFAA and its national affiliates should take steps to ensure higher levels of representativity within their respective organisations.*

## 3. Models of Regulation

The necessity to regulate the activities of sports agents is discussed elsewhere in our Report. Essentially, regulation is justified with reference to the need to ensure high standards of professionalism and ethics, especially in order to protect players who are generally young and whose careers are short. In terms of who should regulate agents, one, or a combination of the following are usually found in sport:

- Regulation under national law
- Regulation under EU law
- Regulation under international law
- Regulation through collective bargaining
- Regulation by the international federation

Agents regulation tends to take the form of:

- Regulating access to the profession
- On-going requirements to ensure compliance and, where applicable, retention of any licence to practice
- Regulatory requirements, such as remuneration and representation restrictions and
- Disciplinary and dispute resolution systems

*Regulation under national law:* Our Report highlights the increasing importance of national law in the regulation of agents. Most countries across the EU have adopted general legislation, such as that relating to private job placements, which affects the activities of agents, with far fewer Member States having enacted sports specific legislation. Only in Bulgaria, Croatia, France, Greece, Hungary, Italy and Lithuania specific laws regulating the activities of agents have been enacted. In terms of the European market, the examples of legislation coming from France and Italy are of greatest significance in terms of imposing requirements on agents that are not mandated by the 2015 RWWI, such as the need to hold a licence following satisfactory completion of an examination. The Italian legislation was adopted in 2018. It can be assumed that should the next iteration of the FIFA regulations governing agents fail to address concerns highlighted throughout our Report, more Member States of the EU are likely to consider

legislative responses. This will pose a problem for those who favour a sports self-regulatory approach in this area, and it might undermine efforts to ensure consistency and uniformity of standards across the EU. On the question of whether *"Member States of the EU should regulate intermediaries through national legislation"*, only 22.5% strongly agreed or agreed whilst 50% disagreed or strongly disagreed. A higher percentage (42.5%) either strongly agreed or agreed that *"the EU should regulate intermediaries through EU legislation"* whilst 30% either disagreed or strongly disagreed with this statement.

*Regulation under EU law:* As outlined elsewhere in this Report, the EU has the competence to act in the area of the regulation of agents. This is because EU law regulates economic activity taking place within the Single Market. This has implications for agents regulations in relation to the application of EU competition law, EU free movement requirements and the recognition of professional qualifications. Although the provision granting EU competence in sport (Article 165 TFEU) specifically excludes harmonisation of national sports laws, EU action could be justified under another Treaty heading. For example, it could be argued that given the current 2015 RWWI has contributed to a fragmented regulatory environment in the industry and has failed to address some concerns regarding the activity of agents, Article 114 TFEU could be used to adopt binding measures, as EU regulation of the sector is necessary for the establishment and functioning of the internal market. Clearly, EU measures are applicable within the territory of the EU with, by contrast, FIFA's jurisdiction being global. EU measures would therefore, impact on the sporting self-regulation of this area and raise questions concerning the global functioning of agents regulations, particularly in light of the UK leaving the EU. To counter this view, it must be recalled that the EU accounts for the largest share of agent activity globally.[230] 47.5% of respondents either strongly agreed or agreed that *"the EU should support the football stakeholders with intermediary regulations, but this should fall short of legislation"*. Only 7.5% disagreed with this statement (0% strongly disagreed). In that connection, 67.5% either strongly agreed or agreed that *"An EU Social Dialogue committee is a useful and effective platform for discussing and agreeing future intermediary regulations"*. Only 7.5% disagreed or strongly disagreed with the proposition.

*Regulation under international law:* Our Report highlights that in relation to the regulation of agents, specifically regarding payments to agents, most countries disregard the provisions of the International Labour Organisation Convention C181 (1997) on Private Employment Agencies. This Convention forbids private employment agencies from charging any fees or costs to workers. Similar provisions are also to be found under EU law which provides that temporary workers should not be charged any recruitment fees.[231] The notable exception is in the Netherlands where Dutch law and National Association (KNVB) regulations follow the ILO Convention.

*Regulation through collective bargaining*: Some sports regulate agents through collective bargaining. For example, the US National Basketball Players Association (NBPA) plays a central role in agents regulation. This type of regulation can result in the adoption of higher standards than those imposed by law or governing body regulation. For example, the NBPA adopts stricter requirements than FIFA in relation to mandatory licence and educational

[230] Between 2013 and 2017, 97.2% of the total sums paid to intermediaries occurred within the UEFA territory which is, of course, larger than the territory of the EU. Nevertheless, the EU is, currently, the home of the dominant 'big-5' leagues. See, Intermediaries in International Transfers, 2017 Edition, Period Jan 2013-Nov 2017 (FIFA TMS 2017), p. 2.
Available at at: https://www.fifatms.com/wp-content/uploads/dlm_uploads/2017/12/Intermediaries-2017.pdf
[231] Directive 2008/104/EC on Temporary Agency Work [2008] OJ L 327.

requirements. The collective bargaining model has a link with the EU model. As it is explained elsewhere in the Report, the EU possesses a range of 'softer' measures that can help shape the content of agents regulations adopted by the football authorities. Most productive appears to be the EU's role in encouraging social dialogue within the football sector. Agents regulation has been discussed with the EU Sectoral Social Dialogue Committee for Professional Football throughout 2016 and 2017, culminating in a Resolution being published.[232]

The Social Dialogue Committee for Professional Football is a tool that could potentially be used to discuss agents regulation. Conceivably, at EU level at least, a European agreement on agents regulation could sit alongside the FIFA agents regulations, in the same way as national laws and collective agreements sit alongside the FIFA Regulations on the Status and Transfer of Players. This is appealing given the high concentration of global agent activity within the territory of UEFA. However, for a social dialogue agreement to materialise, a number of obstacles need to be overcome. First, EFAA requires wider recognition from stakeholders than thus far afforded. Second, and connected to this, agreements within the Social Dialogue Committee must relate to the employment relationship between employers (clubs) and workers (players). Agents do not fall within these two categories, although they are clearly connected to both.[233] However, it must be noted that UEFA sits on the Social Dialogue Committee as an Associate Party. In the same way, a collective representation of agents could participate in the discussion of the Committee. Finally, agents regulation is a matter of FIFA regulatory oversight and currently it is UEFA that chairs the Social Dialogue meetings for Professional Football. Clearly, FIFA and UEFA have different jurisdictional reaches (global and European respectively) and the Social Dialogue Committee is very much a European initiative.

*Regulation by International Federations*: In some sports, for example football, basketball, handball and rugby, the competent international federation adopts globally applicable rules regulating agents. In other sports, the national federation assumes this role. In the *Piau* judgment, the European Court accepted FIFA's rule making authority over agents due to "*the almost complete absence of national rules*" on agents regulation,[234] and because "*collectively, players' agents do not, at present, constitute a profession with its own internal organisation*".[235] FIFA's need and legitimacy to regulate this profession was therefore strengthened by the absence of external regulatory control and a representative trade body to consult with. Our National Associations Reports highlight an evolving picture since that judgment. As discussed above, many Member States of the EU have general laws applicable to employment agencies, with a smaller number having adopted specific legislation applicable to sports agents. A far more comprehensive regulatory landscape has been provided by FIFA who, since the early 1990s, has regulated the activities of agents on a global scale.

*Assessment*

Due to the global nature of the football sector, particularly concerning cross-border migratory flows of labour, international solutions are to be preferred. A recurring theme in our National Associations Reports was the fragmented system of agents regulation the 2015 reforms had

[232] EU Sectoral Social Dialogue Committee for Professional Football, Resolution on Intermediaries / Agents, November 2017.
[233] The European Parliament Resolution on the White Paper on Sport recommended that agents be brought within the Social Dialogue structure, see European Parliament Resolution on the White Paper on Sport (2007/2261(INI)), paragraphs 99 - 101.
[234] Case T-193/02 *Piau*, at paragraph78.
[235] Ibid., at paragraph 102.

spawned. A properly functioning and uniform set of globally applicable rules allows the regulator to monitor and enforce sanctions, and an effective dispute resolution system facilitates the efficient and economical settlement of disputes. FIFA is best placed to deliver this system, but as it is discussed above and below, it should do so with the assistance of the football stakeholders, UEFA, National Associations and public authorities.

Unsurprisingly, continued self-regulation in the area of agents regulation is favoured by the stakeholders who responded to our survey, although many respondents also favoured a role for the EU in this area.

- 90% of respondents either strongly agreed or agreed that *"The football stakeholders should find solutions to issues concerning intermediaries (self-regulation)"*.

- 90% of respondents either strongly agreed or agreed that *"FIFA should retain competence to regulate intermediaries"* although

- 50% either strongly agreed or agreed that *"UEFA should regulate intermediaries in the EU / UEFA territory"*.

The extent to which sport should be self-regulating divides opinion but the research team see merit in advocating continued self-regulation in this area. However, we agree with the line of reasoning that asserts that this should be conditioned on the competent authorities adhering to principles of good governance, including the type of stakeholder involvement in decision making discussed above.

The football stakeholders have acquired significant experience of regulating agents and they are better placed than public authorities to adapt regulations to fast changing industry practices in the sector. A proper functioning set of football agents regulations adopted by the football authorities would reduce or remove the need for Member States to legislate in this area and reduce the necessity for the EU to consider action. In this way, the football authorities can preserve sporting autonomy and protect the specificity of sport by adopting appropriate regulations governing agents.

In doing so, the football authorities are encouraged to work with public authorities, such as national public authorities and the EU, in the search for workable solutions. FIFA alone is not capable of addressing serious illegality within the sector, but it can work with public crime and tax authorities to combat wrongdoing by, for example, providing evidence that will facilitate prosecutions. In order to do so, FIFA are encouraged to establish more robust investigatory and auditing processes, such as the wider use of clearing-houses to monitor financial flows.

In that connection, the research team point to some positive developments facilitated by the EU, such as its support for structured and social dialogue as a means of the football stakeholders achieving better governance standards and finding solutions to common problems in the sector. Ultimately, however, the EU's competence in the area of sport is limited and progress in areas such as agents regulation requires the football authorities and stakeholders to show leadership and will. If self-regulation in this area fails, Member States and the EU are likely to act. Recent developments in Italy concerning the state regulation of sports agents demonstrates this point.

Given the high concentration of global agent activity with the territory of UEFA, it is also appealing for UEFA to assume a greater responsibility in this area. Since 2013, the total

spending on agents' commissions paid by clubs to agents is $1.89 billion, out of which 97.2% was paid by clubs from UEFA Members.[236] As Chair of the Social Dialogue Committee and a member of the FIFA Task Force, UEFA is already, and should continue to be, an influential voice concerning the reform agenda. However, the question of whether it should, at this stage, acquire greater powers in the area of agents regulation is more complex. From a constitutional perspective, the statutes of FIFA and UEFA would need amending to accommodate the jurisdictional adjustment.

In light of the above, we recommend:

- *That the football authorities, notably FIFA, are currently best placed to regulate the activities of agents but should do so in accordance with good governance principles, particularly genuine stakeholder consultation, and with the support of public authorities, particularly the EU. In return, the EU institutions should offer the football authorities a wide margin of appreciation when supervising the regulatory choices made by football. This is especially important when questions concerning the compatibility of EU laws to agents regulations arise. Given the high concentration of global agent activity within the territory of UEFA, it is important that the voice of the European stakeholders is prominent within on-going discussions regarding reforming agents regulations.*

## 4. Uniformity of Regulations

The 2015 RWWI establish minimum standards and require National Associations to adopt national intermediary regulations that can go beyond these minimum standards. The ability of National Associations to adopt more stringent national requirements found favour with the Expert Group on Good Governance[237] and respondents to our stakeholder survey also supported this principle. 67.5% of respondents strongly agreed or agreed that *"in any new set of regulations, National Associations should retain the ability to adopt more stringent national rules"*. Only 10% disagreed with 0% strongly disagreeing.

The question with the 2015 RWWI is whether the minimum standard bar was set too low and whether mandatory requirements should have been more stringent. In this regard, a number of issues have been raised. First, there is a concern that this approach has resulted in a lack of consistency in terms of the implementation of the RWWI at National Association level. Second, concern has been expressed that the variation of approaches and regulatory requirements at National Association level raises legal issues and questions of compatibility with national and EU laws, particularly concerning whether intermediaries are unlawfully having their economic activity restricted and whether an uneven playing field in the EU exists.[238] Third, a lack of uniformity risks increasing the administrative burden on stakeholders (National Associations, leagues, clubs, players and intermediaries) but it is unclear if this effort is proportionate to the benefits secured.

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[236] Intermediaries in International Transfers, FIFA TMS, 2017 Edition, Period Jan 2013-Nov 2017, p. 2. Available at,https://www.fifatms.com/wp-content/uploads/dlm_uploads/2017/12/Intermediaries-2017.pdf

[237] Expert Group "Good Governance", Deliverable 3, Supervision of Sports Agents and Transfer of Players, Notably Young Players, EU Work Plan for Sport 2011-14, December 2013, Recommendation 5.

[238] The most recent study on this is: Colucci, M., (2016) *The FIFA Regulations on Working with Intermediaries: Implementation at National Level*, International Sports Law and Policy Bulletin, Issue I-2016, pp.23-40.

Our National Associations Reports highlight the considerable variations in approaches to intermediary regulations across the territory of the EU. Registration requirements, definitions of 'impeccable reputation', rules on representation contracts, disclosure, remuneration, approaches to minors, conflicts of interest and dispute resolution mechanisms vary across the territory of the EU. In this regard, it seems that administrative costs have increased for National Associations, for intermediaries and for clubs and players as well, when the latter are required to register transactions. The registration fee varies considerably from one association to the other, with cases in which the registration is free of charge (*Austria, Croatia, Czech Republic*), associations that charge thousands of Euros for the annual registration (*Greece* and *Portugal*) and others that impose a fee for any representation contract registered (*Italy*).

Only 12.5% of respondents to our stakeholder survey agreed with the statement that *"the RWWI and the National Association regulations have brought consistency to standards in terms of intermediary regulations across the EU"*. 60% disagreed or strongly disagreed with this statement and 27.5% neither agreed nor disagreed.

The problem with such a varied regulatory landscape is that simplicity and transparency is compromised and the incentives for regulatory circumvention are increased as stakeholders navigate the complex system. 77.5% of respondents to our stakeholder survey either strongly agreed or agreed that *"current intermediary regulations are easily circumvented"* and only 5% disagreed. Football is an inherently international business but the current system (2015 RWWI) partitions the single market into national markets with different standards, thus making some markets more or less attractive to do business in. The varying standards make the work of an agent more difficult and frustrate the provision of his/her services across frontiers. This complexity also raises the potential for agents (and indeed clubs and players) to commit technical regulatory offences despite having acted in good faith.

In light of the above, the research team recommend:

- *The adoption of a high level and harmonised uniform approach to the regulation of agents/intermediaries, at least at EU level and preferably at global level.*

- *Where National Associations adopt more stringent standards, a mutual recognition system should operate, at least in the territory of the EU, so that the system does not result in the fragmentation of the European single market.*

## 5. Professional Standards

The main objective of a set of rules regulating the activity of football agents must be to ensure the quality of the service provided to the market. Although the public debate has not focussed on the issue of licensing and qualification of agents, this is an aspect of vital importance for all the stakeholders involved in the area. Formal standards of knowledge and specific levels of experience prepare agents to become qualified representatives of individuals or collectives in professional football and ensure the overall integrity and legitimacy of the system. In practice, the service of football agents may cover a broad range of activities, from financial, legal and tax services, to assistance on matters such as education, dual careers, foreign language, media presence and cultural integration. In order to respond to the growing demands and challenges of an ever-complex football environment, the implementation of certain standards is largely considered as inevitable.

The 2015 RWWI de-licensed the system, although we noted that some National Associations (*Czech Republic*, *France* and *Italy*) retained licensing requirements and others adopted a various approaches to drive up standards of professionalism such as a requirement to hold a university degree (*Bulgaria*), to have a personal interview (*Slovakia*, *Spain*), to hold liability insurance (*Portugal*) or to be recommended by a bank (*Malta*). The Dutch National Association adopted an innovative system of certification for intermediary bodies and the Danish and Swedish National Associations issue certificates and provide training for intermediaries on a voluntary basis. It is clear that a number of National Associations take seriously the need to ensure high standards of professionalism within the sector. Nevertheless, the 2015 RWWI do not give a good steer in this regard by facilitating an effective deregulation of the sector.

Taking into account the results of our stakeholder survey, it becomes evident that stakeholders do not consider the situation under the 2015 RWWI to be satisfactory. Considering the effects of the 2008 PAR, 35% of respondents agree that *"Prior to the introduction of the FIFA RWWI, the FIFA Players' Agents Regulations were working effectively"*; 45% disagree, 20% neither agree nor disagree. Whilst the old licensing system was flawed, many respondents argued that it was underpinned with sound principles and a return to it, or a similar system, is necessary in order to ensure that players and clubs are engaging a professional agent.

In light of this, the research team recommends:

- *That in order to improve standards of professionalism in the sector, FIFA should introduce a transparent, non-discriminatory and proportionate licensing system including an examination and on-going education element; a robust good character requirement; insurance requirements; and the requirement to sign a code of conduct. Compliance with these requirements can be monitored electronically, for example through domestic or international Transfer Matching Systems (TMS). Only licensed agents can be engaged by players and/or clubs.*

- *That due to uncertainty being caused by the existence of exempt individuals (under the old PAR) and the need to apply universal standards, no individuals should be exempt from the licensing requirements.*

- *In order to prevent conflicts of interest, applicants for a licence should not hold positions within FIFA, continental federations, national associations, leagues or clubs.*

- *Agents licensed under the pre 2015 RWWI could be considered for an exemption from the examination, but not the continuing competence requirements. In order to promote the highest standards of professionalism, it must be considered that all agents should undertake the new licensing requirements, perhaps with former licensed agents being subject to a transitional period.*

- *Once an agent has been issued with a licence, intermittent re-examination should be considered (for example every five years) although for administrative efficiency a licence could be issued for an indefinite period, subject to compliance with continuing competence requirements.*

- *Re-examination and/or compulsory engagement with continuing competence requirements should fall within the range of sanctioning powers of relevant disciplinary*

*bodies. This is because, some agents have been sanctioned for technical regulatory offences as opposed to bad faith conduct.*

- *Failure to satisfy continuing competence requirements should result in withdrawal of the licence. Re-examination should then take place prior to an agent being authorised to act once again.*

- *That FIFA adopt robust enforcement and sanctioning powers.*

## 6. Remuneration and Representation Restrictions

The question of remuneration and representation restrictions in the agency industry are, perhaps, the two most contentious issues. Regulatory measures addressed at agent remuneration and the practice of dual / triple representation should be based on evidence and should be aimed at securing the highest possible standards of good governance, including enforceability.

Agents should be considered a stakeholder within the football system as opposed to an 'external' third party pursuing their own economic interests. It is incumbent on agent bodies to organise their activities effectively and collectively at national and international level, as EFAA currently does, so that they can take their place as a recognised stakeholder. Without compromising the integrity of their working relationship, FIFA and the stakeholders should consider how best to support the collective organisation of representative agent bodies. In this regard, increasing professional standards and ethics in the sector cannot be imposed solely by regulation. It can be envisaged that agent bodies will play an important role in changing culture within the industry through, for example, their role in advising and educating members.

In light of the above, the ability of a private regulator (in other words FIFA), to set remuneration and representation restrictions will be strengthened if the party being regulated (agents) are a recognised part of the football 'eco-system' and subject to the same rights and responsibilities of other stakeholders within it, all of whom accept limited and proportionate restrictions on their economic activity for the good of the sector. In other words, whilst large parts of the football industry amounts to significant economic activity, the requirements of the market are different to those found in more traditional sectors. This is often referred to as the 'specificity of sport'. We also acknowledge that the specificity of sport cannot be invoked to remove an entire sector, or activity within it, from the reach of public authority oversight. This is why the debate on agent remuneration must be evidence-based.

It is imperative that agents regulations commence from the principle that an agent must act in the best interest of his client and that an agent should be appropriately and reasonably remunerated for the provision of his/her service. The practice of dual representation calls into question the trust between the principal and agent due to the conflicts of interest it creates. At its most egregious, dual or triple representation damages players and clubs and it calls into question the integrity of football. Whilst there might be occasions when the interests of the agent's clients genuinely align, the existence of an agents own financial interest cannot be ignored.

In order to eliminate, as far as is possible, conflicts of interest, an outright prohibition on the practice of multiple representation will need to be considered, particularly with regard triple

representation where an alignment of interests between the parties is most doubtful. However, before arriving at that position, FIFA and the relevant stakeholders should first discuss whether conflicts can be mitigated through a combination of soft measures (such as disclosure, consent and education) and hard measures (such as caps or Client Pays). The least restrictive, but most effective, measure should be adopted. A pragmatic approach to agents regulation that permits lawful industry practices, such as dual representation, to continue, does not necessarily conflict with the duty to maintain the highest standards of governance.

Should a cap on agents' commissions be introduced, clarity on the calculation of the adopted percentage is required. For example, the cap could be calculated following an assessment of current industry levels or it could be calculated with reference to the percentage of transfer fees that are set aside for solidarity and training compensation sums. If fees are not capped, FIFA should look to establish other mechanisms through which fees must be demonstrably not unconscionable.

The strongest justification in support of remuneration and representation restrictions relates to protecting the parties engaging agents (particularly players), preserving the integrity of the sector and driving up professional standards and ethics.

Further evidence is required to support the assertion that agents exert an excessive and damaging influence in the market. Statistically, the market appears quite open which contradicts strong anecdotal evidence suggesting that agents act as powerful gatekeepers in the system. Some national markets are more concentrated than others. Given that actors within the football industry prefer to work within trusted networks, including using trusted agents, and that new agents face high barriers to market entry, it is also questionable whether, alone, regulatory interventions linked to remuneration and representation restrictions can address the issue of market concentration. FIFA and the stakeholders should consider measures to decouple close relationships between agents and club officials.

FIFA is justified reviewing agent activity in light of the general objectives of the transfer system, namely, to encourage solidarity and contract stability. However, adopting remuneration restrictions does not, in itself, improve the level and redistribution of solidarity and training compensation payments. The debate on whether to introduce agent remuneration restrictions must take place within a wider review of how solidarity in football can be better promoted. In this regard, it could be envisaged that agents themselves make solidarity contributions from their commissions.

The pursuit of contract stability is a legitimate objective for a sport governing body, but this must be balanced against the rights of athletes to take advantage of free movement opportunities within the EU. Remuneration and representation restrictions might go some way to promote contractual stability, but there are many more incentives for player movement and contract re-negotiation than agent activity.

Although it has become industry practice, the ability of a player to discharge his liability to an agent through a club raises some concerns. Specifically, if a player pays his agent, he is likely to have a greater investment in the cost and quality of the service provided and this aligns with the overall principle of agents regulation which is to improve professional standards. Although international, EU and national laws often prohibit an employment agency from charging a worker, the football sector appears distinguishable from 'ordinary' industries in the same way as the rights of fixed term contract workers do not apply to football employment contracts. Any

move towards a 'player/client pays' model will, nevertheless, cause some local disturbances and potential legal conflicts where adherence to the International Labour Organisation (ILO) Convention on Private Employment Agencies (Convention 181) is observed (such as in The Netherlands).[239]

Should 'player/client pays' not be considered appropriate, other measures that encourage a player to take more interest in his contractual arrangements with an agent should be considered. For example, an anecdote frequently heard by the research team relates to player's being unaware of how much they are paying their agent. Mandatory provisions in representation contracts could detail how much a player is likely to pay in a given situation and why. Agent bodies could issue advice to members regarding this and player bodies could do likewise and support this with education programmes. Published advice to players should, insofar as is possible, be brief and highlight key issues (such as a one-page factsheet).

There is a case for the regulations referencing only the player's salary as the reference point for the calculation of an agent's commission, whether they represent the player or the club.

No system relating to remuneration or representation restrictions are viable unless the regulator has clear competence over the activities of agents, has properly financed investigatory powers, and an effective suite of proportionate sanctioning weapons. Cultures of compliance and resources vary considerable across the FIFA member associations and this contributed significantly to the need to reform the existing 2015 RWWI. Transitional arrangements must be clear and unequivocal so as to avoid disputes going forward.

In light of the above, the research team recommend:

- *That FIFA consider ending the practice of triple representation.*

- *That FIFA consider permitting the continuation of the practice of dual representation but that proportionate regulatory measures designed to mitigate potential conflicts of interest are considered, such as the introduction of a remuneration cap, player/client pays and/or disclosure and transparency.*

- *That agents are part of this conversation as a recognised and consulted stakeholder.*

- *That the introduction of any remuneration and representation restrictions are justified with reference to the pursuit of legitimate objectives and proportionately implemented.*

- *That transparency in financial flows are ensured, particularly by way of payments being processed via a clearing-house.*

- *That FIFA properly finance its investigatory measures and robustly applies sanctions to all parties who breach the regulations.*

[239] C181, Private Employment Agencies Convention, 1997 (No.181).

## 7. Working with Minors

It is widely accepted that young football players are particularly vulnerable and therefore deserve special protection. This applies in particular to minor players, meaning players that are younger than eighteen years old. The FIFA Regulations on the Status and Transfer of Players (RSTP) recognise the need to protect minors. As a general rule, minor players may not be the subject of international transfers (Article 19 RSTP), although a number of exceptions to that general rule are made.

The vulnerabilities and needs of minor players raise a number of issues specifically pertaining to the role and regulation of agents. Much of the importance of intermediaries as well as the need for regulating intermediaries stem from the fact that football players in general have limited experience and bargaining power, and young players are by definition inexperienced and generally tend to have limited bargaining power and this places them at risk. Young players that move abroad to train and compete are particularly vulnerable in this regard.

One possible approach for the purpose of reducing the risk that intermediaries pose to minors is to ban intermediaries from representing all minor players or, alternatively, players under a certain age. The 2015 RWWI allow intermediaries to represent minor players, regardless of age. Similarly, a majority of the National Associations, including in many of the largest football markets (e.g. *France*, *Germany*, *Spain* and *Italy*) do not apply any direct ban on representation under a certain age, opting for regulating rather than banning.

Because minors have limited legal capacity, most legal systems require the guardian to sign the representation contract on the player's behalf in order for it to be valid. The 2015 RWWI makes it explicitly clear that a representation contract between a minor player and an agent must be co-signed by the player's legal guardian(s) in accordance with national law (Article 5.2).

Throughout Europe it is quite common for guardians and other relatives to represent minors as intermediaries. The FIFA regulations governing intermediaries before 2015 provided for an exemption for parents, sibling and spouse of the player. These individuals did not need licensing and their activities fell outside FIFA's jurisdiction (Article 4 PAR 2008). The 2015 RWWI contains no comparable provision, in part because the need for such a provision was significantly reduced after the abolition of the licensing requirement. Nevertheless, National Associations adopted different approaches as to whether relatives fall under the intermediary registration requirement: while some National Associations exempt guardians and/or relatives from parts of the registration regulation (e.g. *Latvia*, *Slovenia* and *Sweden*), others explicitly include relatives and legal guardians in the registration requirements (e.g. *Croatia*). National Associations that require intermediaries to have special qualifications for representing minors also tend to exempt guardians and other relatives from this requirement (e.g. *Sweden*).

The 2015 RWWI contains a ban on intermediaries receiving remuneration in a transaction that involves a minor player. This applies to all parties and regardless of who the intermediary represents (Article 7.8). This remuneration ban is clearly mirrored in almost all of the National Associations' regulations. Considering the clear and mandatory nature of the rule in the RWWI, we were surprised to find that some National Associations apply a remuneration ban with a lower age limit than eighteen, such as fifteen (*Slovakia*) or sixteen (*Czech Republic*). We note that in general, remuneration bans suffer from workability problems and circumvention. We also heard concerns expressed that remuneration bans might leave minors vulnerable as they

are likely to dissuade intermediaries from offering their services to minor players. Remuneration bans also raise issues regarding reciprocity of rights between stakeholders. For example, a football club can monetise its relationship with a minor, through a transfer or training compensation sum, but under the current RWWI, an intermediary cannot.

The 2015 RWWI contains no limits on the representation contract period. Approximately half of the studied National Associations restrict the representation contract length generally, and such restrictions obviously apply to minor players as well. In these cases, representation contracts are limited to a two-year (e.g. *England*, *Italy*, *the Netherlands*) or three-year period (*Czech Republic*). There are however many National Associations, including ones with an established intermediaries' industry, that have no such restrictions (e.g. *Spain*). In *Bulgaria* a contract between a minor player and an intermediary can never extend beyond the player's eighteenth birthday.

Due to the vulnerable nature of minors, we noted practice in the RWWI and throughout Europe requiring intermediaries to have an impeccable reputation in order to be allowed to perform their services. Some National Associations went further. A first category of consists of checking the intermediary's personal suitability to work with minors. Several National Associations require that intermediaries must be approved by the association to work with minor players following an enhanced background check conducted by a public body specifically intended to assess someone's appropriateness for working with minors (*Belgium*, *England* and *Wales*), and in *Republic of Ireland* all intermediaries are subject to similar checks. The most extensive version of this can be found in the Regulation of *Croatia* where intermediaries working with minors must have court approval as a matter of national law. A second category consists of requirements that the intermediaries undergo special training (e.g. *Republic of Ireland*). An extended version of this is requiring repeated participation in an enhanced training programme where the intermediary after examination becomes a National Association Certified Intermediary (*Denmark* and *Sweden*).

Throughout our research, it became evident that National Associations intermediary regulations reflect an ambivalent view of intermediaries: some provisions treat the intermediary as someone that protects the player, others as someone that the player needs protection from. The new regulations need to navigate between these two challenging positions.

Our stakeholder survey revealed some concern regarding whether *"current intermediary regulations offer sufficient protection to minors"*. Only 25% of respondents agreed with this statement (0% strongly agreeing). 58% disagreed or strongly disagreed.

In light of the above, the research team recommend:

- *That outright representation bans should be avoided.*

- *Guardians representing minor players vis-à-vis agents are appropriate for protecting minors.*

- *Guardians representing minor players as agents may for practical reasons need to be exempted from certain agent requirements, but such exemptions should be construed restrictively.*

- *Regulation of agent remuneration when representing minor players is preferable to bans.*

- *It should be easy for players to terminate representation contracts entered as a minor.*

- *Special qualifications, linked to licensing and ongoing education, should be required for agents to work with minors but it must not be forgotten that access to agents is in the minors' interest and so regulations should not be overly restrictive.*

- *In addition to agents regulation, educating minor players and their guardians is also an important way of reducing risk.*

## 8. Enforcement and Dispute Resolution

Throughout our research, a recurring theme concerned the inadequacy of the system of enforcement, sanctioning and dispute resolution. For example, FIFA partly justified the introduction of the 2015 RWWI on the grounds that a large number of international transfers were concluded without the involvement of a licensed agent – but the volume of sanctions imposed on parties in breach of the regulations did not reflect this. One might conclude that a more robust system of enforcement and sanctioning could have remedied many of the alleged inadequacies of the pre-2015 system. Under the 2008 PAR, if a dispute had an international dimension, a mandatory referral was made to FIFA. With the 2015 amendments to its Regulations on Status and Transfer of Players,[240] FIFA removed contractual disputes involving intermediaries from the jurisdiction of the Players' Status Committee.

With the introduction of the 2015 RWWI, the situation appeared to deteriorate as it gave rise to a fragmented set of regulations at National Association level. The problem with such a varied regulatory landscape is that simplicity and transparency was compromised, and circumvention became easier. 77.5% of respondents to our stakeholder survey either strongly agreed or agreed that *"current intermediary regulations are easily circumvented"* and only 5% disagreed.

Our National Associations survey revealed that in some countries the sanctioning of parties by the National Association is questionable. Cultures of compliance vary as do administrative resources. Elsewhere, although all intermediaries are supposed to sign the declaration in which they agree to be subject to the rules of FIFA and the National Association, in some countries such as *Croatia*, *Slovenia* and *Spain* the intermediaries are not being regarded as members of the association and not, therefore, under the competence of the disciplinary bodies of the National Association. A frequently heard complaint raised by intermediaries concerned their inability to enforce agreements via sports dispute resolution bodies and the cost and time of having to enforce contracts in ordinary courts.

[240] FIFA Circular no. 1468, p. 4. available at: https://resources.fifa.com/image/upload/1468-amendments-to-the-regulations-on-the-status-and-transfer-of-playe-2510650.pdf?cloudid=zro9p178udvmsgy3nzy7.
To access the current version, see https://www.football-legal.com/content/fifas-new-rstp-article-12bis-circular-1468.

In light of the above, we recommend that FIFA:

- *Bring agents into the 'football family' so that they acquire rights but are also subject to obligations.*
- *Consider enforcement and dispute resolution as starting principles in any new set of regulations, not afterthoughts.*

- *Establish an international dispute resolution chamber to resolve disputes involving agents and require National Associations to establish equivalent bodies for national disputes.*

- *Impose stringent but proportionate sanctions on all those who breach the regulations, not just agents.*

- *Explore the possibility of developing further its whistleblowing scheme in order to facilitate the reporting of poor practice, including criminal misconduct, and a victimisation scheme to ensure the protection of those who report such conduct.*

# *12.*

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# *Appendix I*

## *List of National Experts*

In compiling this Report, the research team drafted a questionnaire for distribution to national experts with knowledge of the intermediary regulations in force within their territory (National Association) of expertise. Below is a list of the experts who assisted us with this Report.

**Austria -** Maximilian Seltmann
**Belgium -** Sara Moya Izquierdo
**Bulgaria** – Boris Kolev, Elena Todorovska
**Croatia** – Vanja Smokvina
**Cyprus** – Loizos Hadjidemetriou & Associates LLC
**Czech Republic -** Jiří Janák
**Denmark -** Lars Hilliger
**England** – Andrea Cattaneo
**Estonia -** Katarina Pijetlovic
**Finland -** Antti Aine
**France -** Jean-Michel Marmayou
**Germany -** Maximilian Seltmann
**Greece -** Konstantinos Papastergiou, Athanasios Glavinas
**Hungary -** András Nemes
**Italy** – Andrea Cattaneo
**Latvia -** Sergei Petrov
**Lithuania -** Martynas Kalvelis
**Luxembourg** – Maria Carmen Perez Gonzalez
**Malta –** Vanja Smokvina
**Netherlands -** Dennis Koolaard
**Northern Ireland -** Andrea Cattaneo
**Poland -** Michał Bieniak
**Portugal -** Alexandre Miguel Mestre
**Republic of Ireland -** Seán Ó Conaill
**Romania -** Geanina Tatu
**Scotland -** Laura McCallum
**Slovakia -** Tomás Gábris
**Slovenia -** Vanja Smokvina
**Spain -** Maria Carmen Perez Gonzalez and Alberto Palomar Olmeda
**Sweden -** Johan Lindholm
**Wales -** Andrea Cattaneo

# *Appendix II*

## *Stakeholder Survey*

The research team drafted a stakeholder survey, which was circulated through an online platform (Bristol Online Surveys). Key stakeholders were invited to respond, specifically those from FIFPro, ECA, EPFL and EFAA and their national members. 40 stakeholders responded to the survey between June and August 2018.

The majority of the respondents (51%) identified themselves as representatives of a Football Player Union. 30.7% of respondents identified themselves as intermediaries, either in an individual capacity or as national or European associations.

A number of respondents represented organisations based outside the European Union, including Montenegro, Macedonia, Switzerland, the United States, Australia, New Zealand and Japan.

The aim of the survey was to collect the views of those active in the industry in relation to the regulation of intermediaries. A set of questions was drafted seeking to inform the Report. The questions mainly followed the themes contained in the FIFA RWWI and the questionnaire distributed amongst our National Experts. In particular, the questions were focused on the regulation of intermediaries prior to the adoption of RWWI and perceptions on the operation of the current Regulations.

Our Report presents a summary of the survey results. Anonymised data can be supplied on request.

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