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

***INTERIM REPORT CONCLUSIONS ON
REMUNERATION AND REPRESENTATION
RESTRICTIONS***

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1.0 Introduction

- 1.1 The issue of agent remuneration is the most controversial aspect of agent 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”¹ and that agents have “raked in money”² and are “sucking tons of money out of football”.³
- 1.2 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 regards 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.⁴
- 1.3 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.
- 1.4 In this connection, we acknowledge in our previously published chapter, *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.
- 1.5 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.
- 1.6 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

¹ “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/>

² “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>

³ “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>

⁴ 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

assistance, players and clubs can achieve jointly shared objectives in a mutually beneficial way.⁵

2.0 Agent Fees: The Evidence

2.1 According to FIFA figures⁶, 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.

2.2 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.

2.3 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.

2.4 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 agent 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.

2.5 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.

⁵ 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.

⁶ 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%.

2.6 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 player agent 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%).

3.0 Limiting Agent Fees under the 2015 RWWI

3.1 In the 2015 RWWI, FIFA *recommended* that national associations impose a 3% remuneration cap on agent fees. Our National Association reports, published in the main body of our report, 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 agent 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 (<i>plus solidarity contribution</i>), 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

3.2 The reform process initiated by FIFA in 2018 includes a reassessment of the 3% cap recommendation contained in the 2015 RWWI. As described in the main body of our Interim Report, throughout 2018, the FIFA Transfer System Task Force has been discussing the reform of the transfer system and the system of agent 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 remuneration⁷:

- “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”.
- “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

⁷ 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>

agents through the Transfer Matching System. The development of these proposals also followed a lengthy consultation process with a representative group of agents”.

4.0 Remuneration Restrictions: Objectives

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

4.2 *Agent spending is too high:* Spending on agent 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.⁸ 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 agent 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.

4.3 *Agent spending is out of balance with solidarity and training compensation payments:* Spending on agent remuneration comfortably outstrips payments made to clubs via the solidarity and training compensation schemes. For example, in 2017, whereas club spending on agent commissions reached \$446 million, solidarity payments totalled \$64 million and training compensation \$20.3 million. This is set in the context of rising agent commissions since 2013, yet stable solidarity and training compensation sums.⁹ 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.

4.4 *Agent 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 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

⁸ Resolution on intermediaries/agents, EU Sectoral Social Dialogue Committee for Professional Football, 17/11/17.

⁹ FIFA Football Stakeholder Committee (2018), Task Force Transfer System, White Paper – Transfer System Reform 2018, p.48.

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.

- 4.5 *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.¹⁰ 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%.
- 4.6 *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.
- 4.7 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.
- 4.8 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.¹¹ 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.¹² It must also be recalled that a position of dominance can be held by

¹⁰ See Resolution on intermediaries/agents, EU Sectoral Social Dialogue Committee for Professional Football, 17/11/17.

¹¹ See Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65.

¹² Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, [1979] ECR 00461, para. 41.

a single undertaking, or a group of undertakings.¹³ 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.¹⁴

4.9 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.¹⁵ 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.

4.10 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%.¹⁶ 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”.¹⁷

4.11 Rossi et al examined market concentration in the big five leagues just prior to the introduction of the 2015 RWWI.¹⁸ 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”¹⁹ although they do acknowledge variations across markets.

¹³ 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), para. 4.

¹⁴ Although, they do not have to be necessarily part of the same economic entity. See Jones, A. & Sufirin, 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, paras. 357-358.

¹⁵ UEFA Club Licensing Benchmarking Report (2018), pp.45-53.

¹⁶ 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.

¹⁷ UEFA Club Licensing Benchmarking Report (2018), p.45.

¹⁸ Rossi, G., Semens, A. & Brocard, J.F. (2016), *Sports Agents and Labour Markets*, Routledge, p.70.

¹⁹ Rossi et al (2016), p.71.

4.12 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.²⁰ 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.

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

5.0 Compensation Restrictions: An Assessment of the Various Models

5.1 In the following section, we consider some potential regulatory responses to the issues raised in section 4.0 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.

6.0 A Prohibition on Dual Representation

6.1 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.

6.2 The vast majority of the national associations surveyed allowed clubs to discharge players’ liabilities to agents. A noticeable exception is Netherlands. Dutch law²¹ 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 at Section 8 (Player / Client pays model).

²⁰ 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., Semens, A. & Brocard, J.F. (2016), *Sports Agents and Labour Markets*, Routledge, p.139.

²¹ The Placement of Personnel by Intermediaries Act (WAADI).

Table 2: The Regulation of Dual Representation in National Associations

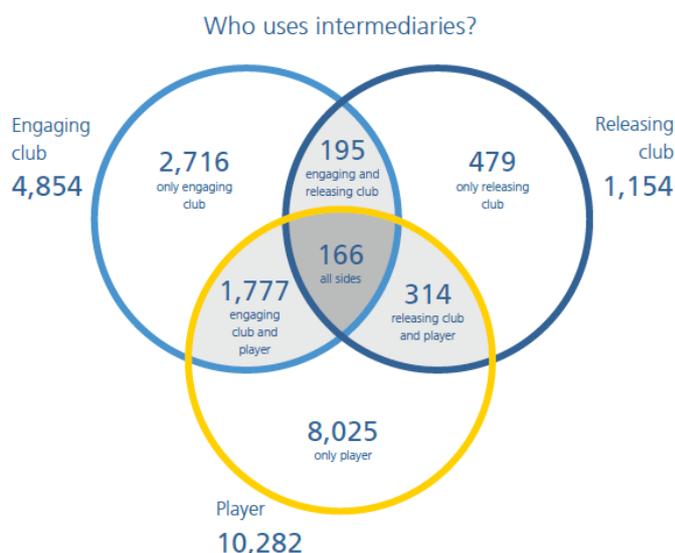
Rules on Dual representation	National Associations
FIFA RWWI – Player and club must give express written consent prior to the start of the relevant negotiation, and confirm in writing which party will remunerate the intermediary.	Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, England, Estonia, 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

6.3 FIFA TMS figures reveal the extent of dual representation in football.²² 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.

6.4 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.

²² 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)



6.5 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.²³

6.6 The major concern with dual representation in football is that it risks leading to conflicts of interest.²⁴ 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.

6.7 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.

6.8 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 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

²³ See footnote 1.

²⁴ 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.

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.²⁵

6.9 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.

6.10 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.²⁶ Within the legal profession this would be considered an unacceptable conflict and the agent should not represent both principals.

6.11 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.

6.12 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

²⁵ 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'.

²⁶ 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.

club has the option to employ other professionals, such as estate agents and lawyers, to assist with player welfare and legal compliance issues.

6.13 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.²⁷

6.14 A further regulatory means of mitigating conflicts concerns imposing a remuneration cap on the agent's commission. This is discussed at section 7 below.

6.15 *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.²⁸ 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 agent 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 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

²⁷ 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.

²⁸ The Financial Times referred to dual representation as a 'shady practice'. Financial Times (2016), 'Five shady practices that taint English football', 01/01/16. Accessed at: <https://www.ft.com/content/98e0373c-871c-11e6-bbbe-2a4dcea95797>

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.

6.16 *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.²⁹
- 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.
- 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.

²⁹ *Imageview Management Ltd v Jack* [2009] EWCA Civ 63

6.17 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 agent commissions and excessive agent influence. The additional regulatory measures advocated by proponents of this view are interrogated below.

7.0 An Agent Remuneration Cap

7.1 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.³⁰ 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.

7.2 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.

7.3 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 agent fees, a case can be made linking the agent commission 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.³¹ Furthermore, the salary of the player is often employed to calculate employment needs when public authorities issue work permits for players. Decoupling agent 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 agent 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.

7.4 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 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

³⁰ 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.

³¹ Article 17 of the FIFA Regulations on the Status and Transfer of Players.

investment the engaging client has in the cost and quality of the service being provided by the agent.

7.5 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.

7.6 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.

7.7 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 agent commissions with industry solidarity percentages therefore aligning agent 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.

7.8 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 places a maximum an agent can earn in any one transaction.

7.9 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' salaries³² or they must adhere to 'break-even' requirements.³³ 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 575/2013,³⁴ and Directive 2013/36³⁵ 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.

7.10 *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 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

³² For a discussion see Lewis, A., & Taylor, J. (2014), *Sport: Law and Practice*, 3rd edition, Bloomsbury, pp.1182-1183.

³³ See for example, UEFA Club Licensing and Financial Fair Play Regulations, 2018.

³⁴ Regulation 575/2013 on prudential requirements for credit institutions and investment firms [2013] OJ L176/1.

³⁵ Directive 2013/36 on access to the activity and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338.

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, agent 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' and 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.

7.11 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 RWVI, 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.”³⁶

- Capping agent 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.³⁷ 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.³⁸ 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 agent 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 professionally³⁹.
- The cap is discriminatory. If agent 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

³⁶ 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>

³⁷ Letter from Mario Monti to Joseph S. Blatter, D/000258 (5 March 2001); See also European Commission (2002), Commission Closes Investigations into FIFA Regulations on International Football Transfers, IP/02/824 (Brussels 5 June 2002).

³⁸ Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921.

³⁹ Case C-325/08, *Olympique Lyonnais v Olivier Bernard and Newcastle United* [2010] ECR I-2177.

facilitates a straightforward transaction will be over-rewarded. Criticisms of the current 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.⁴⁰ 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.⁴¹ Stringent sanctions, imposed on all parties, for wrongdoing, 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.⁴² 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.⁴³ 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

⁴⁰ 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.

⁴¹ 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.

⁴² Case T-193/02, *Laurent Piau v Commission of the European Communities* [2005] ECR II-209.

⁴³ C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991.

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

8.0 The Player Pays / Client Pays Model

8.1 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 report highlighted the Netherlands as the noticeable exception to this whereby Dutch law and KNVB intermediary regulations, prohibits the player remunerating the agent.

8.2 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.⁴⁴

8.3 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.⁴⁵
- 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.

8.4 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.

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

⁴⁴ Directive on Temporary Agency Work, 2008/104/EC.

⁴⁵ 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.

- 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.
- 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 the 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.⁴⁶
- 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 gate-keeper 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.
- 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 agent regulations also provided that only the client engaging the services was permitted to remunerate him/her.

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

⁴⁶ See KEA, CDES, EOSE (2009), Study on Sports Agents in the European Union, A study commissioned by the European Commission, November 2009, p.93.

- 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.⁴⁷
- 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 merely an additional cost in the transaction. Points deductions or transfer bans are a more stringent deterrent.

8.7 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 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

⁴⁷ KEA (2009), p.94.

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 agent's commissions.

9.0 Conclusions

- 9.1 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.
- 9.2 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.⁴⁸
- 9.3 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.
- 9.4 It is imperative that agent 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 agent's own financial interest cannot be ignored.

⁴⁸ The issue of licensing and on-going education is the subject of another thematic conclusion.

- 9.5 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 agent 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.
- 9.6 Should a cap on agent 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.
- 9.7 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.
- 9.8 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 gate-keepers 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.
- 9.9 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.
- 9.10 The pursuit of contract stability is a legitimate objective for a sports 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.
- 9.11 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 agent 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.

- 9.12 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).
- 9.13 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.
- 9.14 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.