**IN THE MATTER OF AN ARBITRATION**

**UNDER RULE K OF THE FOOTBALL ASSOCIATION RULES**

**BETWEEN:**

**CAA BASE LIMITED**

**KEY SPORTS MANAGEMENT LTD** (t/a **WASSERMAN**)

**STELLAR FOOTBALL LIMITED**

**ARETÉ MANAGEMENT LIMITED**

**Claimants**

**and**

**THE FOOTBALL ASSOCIATION LIMITED**

**Respondent**

**and**

**FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION**

**Participant**

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# PARTIAL FINAL AWARD

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**Rt Hon Lord Collins of Mapesbury**
**Christopher Vajda KC**
**Rt Hon Lord Dyson**

**London, November 30, 2023**
**[Rev 12/12/23]**

## Appearances

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## I Introduction

1. The Claimants are football agencies operating in the United Kingdom and abroad. The Respondent, The Football Association Ltd ("the FA"), is the sole governing body for association football in England. The Participant ("FIFA") is the international governing body of the sport. Together they will be referred to as "the Governing Bodies."

2. In December 2022, following a consultation process, the FIFA Council approved new FIFA football agent regulations (the "FFAR").

3. As a member of FIFA, the FA is bound to comply with FIFA regulations, and the FA has decided to implement national football agent regulations (the "NFAR").

4. The principal (but not only) complaint of the Claimants relates to the provisions of the FFAR which cap football agents' fees (the "Fee Cap"). The other provisions to which the Claimants object are those which require payment to be made over the life of the player's contract (the "Pro Rata Payment Rules"), which prohibit payment on behalf of the player (the "Client Pays Rule"), and those which prohibit an agent from acting for all three of the releasing club, the engaging club, and the player (the Dual Representation Rule or the multiple representation rule). Together these rules are referred to as "the Proposed Rules."[1]

5. The Claimants say that the NFAR would be an anti-competitive agreement and/or decision by an association of undertakings; and/or (b) an abuse of a dominant position by the FA, in breach of sections 2 ("the Chapter I prohibition") and 18 ("the Chapter II prohibition") of the Competition Act 1998 ("the 1998 Act"), and that the Proposed Rules are unlawful as being in unreasonable restraint of trade at common law.

6. The essence of the Governing Bodies' defence is that the FFAR, including the Proposed Rules, represent a necessary and proportionate regulatory solution aimed at ensuring the proper functioning of the player transfer system in line with principles agreed between FIFA and the European Commission in 2001, and that there has been no infringement of the Chapter I or Chapter II prohibitions, or an

[1] The Claimants no longer challenge the Minors Approach Rule (Article 13(1)) and certain rules restricting agents' activities (Articles 11(1), 11(3) and 12(2)).

unreasonable restraint of trade at common law (to the extent that the common law rule survives the 1998 Act).

## II The Governing Bodies

### *1. The FA*

7. The FA is responsible for all regulatory aspects of the game. It is made up of representatives from a range of constituents, of which professional clubs form a minority. It does not organise the club league competitions between men's professional football clubs which are organised by separate companies owned by and made up of the clubs playing in them. The FA implements and enforces rules and regulations and sets standards of conduct among players, officials, and clubs.

8. The FA is a limited company incorporated in England and Wales. Its shareholders in general meeting have the power (inter alia) to adopt or amend the FA Rules by a majority of at least 75%. 101 out of a total of 1094 shares in issue are held by the Premier League, the English Football League, the clubs in those Leagues, and their representatives on the Council of the Football Association (referred to together in FA terminology, along with certain others, as the "Professional Game").

9. The Council of the Football Association ("FA Council") has the power, inter alia, to "make or alter such regulations as are deemed necessary to provide for matters arising from or to implement the Rules in so far as any such regulation is not in conflict with any Rule". 19 of the total 113 voting members of the FA Council are representatives of the Professional Game.

10. The Football Regulatory Authority ("FRA") is a body established by the FA Council to be the regulatory, disciplinary and rule-making authority of the FA. The FRA's role includes "formulating, proposing amendments to and publishing the Rules or any other relevant rule or regulation of The Association and any changes to them from time to time" (FRA Terms of Reference, [7]).

## 2. *FIFA*

11. FIFA is football's international governing body. It is an association governed by Swiss law. The members of FIFA are the national football associations, of which there are 211, including the FA, which are the governing bodies at national level.

12. The objectives identified in FIFA's Statutes are, among others, "to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement" and "to promote integrity, ethics and fair play" (Article 2(c), (g)). The FIFA Statutes require the FIFA Council to "regulate the status of players and the provisions for their transfer, as well as questions relating to these matters" (Article 6).

13. Member associations are responsible for implementing and enforcing FIFA's statutes and goals.

14. The central decision-making body of FIFA is the FIFA Council. Members of the FIFA Council are elected by the national football associations. The FIFA Council has seven standing committees. For the purposes of the present case, the relevant standing committee is the Football Stakeholders Committee (the "FSC").

15. The FSC's mandate is to advise and assist the FIFA Council on all matters relating to football, particularly the structure of the game, as well as on all technical matters. The committee also deals with the relationship between clubs, players, leagues, member associations, confederations and FIFA.

16. The FSC is chaired by the Vice President of FIFA and has 23 members representing various stakeholders, including the football confederations, member associations, the European Club Association ("ECA"), the World Players' Union ("FIFPro") and the World Leagues Forum ("WLF"). The FA is not a member of the FSC.

# III The sport and transfers

## 1. *Men's professional football*

17. In England, professional football clubs compete within leagues, which are organised by companies owned by and made up of the clubs playing from time to time in that league. These companies are separate from the FA. The top league is

organised by the Football Association Premier League Ltd, the "Premier League". The Football League Ltd, trading as the English Football League, organises the next three divisions, comprising the Championship, League One and League Two. The Football Conference Ltd trading as the "National League", organises the fifth division. Promotions and relegations take place between leagues at different levels. The Premier League and the EFL are fully professional. The National League, the lowest division, comprises mostly professional clubs, although some promoted clubs retain part-amateur status.

### 2. *Women's professional football*

18. The women's association football pyramid is separately administered by the FA. It is split into a seven-tier system with the Barclays Women's Super League ("WSL") as the top division and the Championship the second tier, followed by a North and South divisional split for tiers three and four, regional splits for tiers five and six, and county-level leagues at tier seven. The WSL became a professional league at the beginning of the 2018/19 season and some clubs in the Championship choose to maintain professional status.

### 3. *Other football in England*

19. The FA governs grassroots and youth level football, which includes hundreds of teams playing across England.

### 4. *The Premier League and the Football League*

20. It does not need to be said that the football clubs in the Premier League and the Football League are fierce competitors. They earn money from broadcasting rights; matchday tickets, concessions and hospitality; sponsorship deals and brand partnerships; licensing and merchandise. English football is the most lucrative in the world, with more than half of the world's richest clubs by revenue being in the Premier League.

21. Success on the field is a key part of competition for such revenues. As a result, there is fierce competition for top talent. Attracting and retaining the best players and coaches is a key driver of sporting success and revenues. As clubs' revenues increase, so does the competition between them for the best players and coaches, and the sums (transfer fees and salaries) they are willing to pay to retain them.

### 5. *Player transfers and contract negotiations*

22. It is common ground that a key aspect of this competition concerns the operation of the transfer market – i.e. transfers of players from one club (the "releasing club") to another (the "engaging club"). The conditions of such transfers differ substantially depending on whether a player is still under contract with the releasing club at the time of the transfer.

23. Where the player is still under contract: (1) A transfer is only possible if the engaging club agrees terms with both: (a) the releasing club (such terms usually include the payment of a transfer fee by the engaging club to the releasing club, and may also provide that if the engaging club later sells the player to a third club, it will pay a so-called "sell-on fee" – usually a percentage of the future transfer fee – to the releasing club); and (b) the player (such terms including the player's salary and other contractual entitlements). (2) Under the rules of FIFA transfers of players who are under contract can only occur during certain specified "transfer windows", whose timings are set by national football associations such as the FA, but broadly take place twice a year. In most countries, one transfer window takes place in the summer, and has a maximum length of 12 weeks; the other during the winter, with a maximum length of four weeks.

24. Players who are not under contract are free to transfer at any time, and the releasing club cannot demand a fee.

25. As a result of these rules, a club which wishes to retain a player has every reason to renegotiate that player's contract before it expires, to prevent the player becoming a free agent and leaving without the club receiving a transfer fee; and a club which does not wish to extend a player's contract is incentivised to sell that player before the player's contract expires, in order to obtain a transfer fee. Because transfer fees tend to be lower as the player's contract approaches expiry (as the engaging club can simply wait for the contract to expire and thus avoid such a fee), contracts are typically renegotiated well before expiry.

## IV The role of football agents

26. The Claimants and the Governing Bodies have differing views of the role of football agents.

### *1. Claimants' view*[2]

27. According to the Claimants:

(1) Football agents, such as the Claimants, play a key role in facilitating competition between clubs for players and coaches, and thus for on-field success. They act as intermediaries between clubs, players, coaches and other interested parties. They represent and assist players, coaches and clubs in the brokering of contracts, including contracts for the transfer of players between clubs, and they also provide a much wider range of services to their clients.

(2) Agents add value through trust and reputation, which are fundamental to their success, and their specialist market knowledge and networks, which make the process of matching players to clubs, and agreeing transfers, more efficient.

(3) Football agents in England are currently subject to the FA's Working With Intermediaries Regulations (the "FA WWIR"), which gave effect to the FIFA Working With Intermediaries Regulations which came into force in April 2015 (the "WWIR").

(4) It is common, when contracts and transfers are being negotiated, for one agent to provide services to both the player and the engaging club ("dual representation"). In some transfers, services can be provided to the player and both clubs involved ("multiple representation"), although often the two clubs are represented by different individual agents within the same agency; or two smaller agencies that may work together regularly for such purposes.

(5) Particularly given the intense competition for the best players, clubs which are interested in hiring a particular player may prefer an intermediary to ask the releasing club whether the player is available, rather than identifying themselves from the outset, and for that purpose, may well prefer to use the players' agent, who can then help broker an entire deal, negotiating the player's salary with the engaging club, but also negotiating the transfer terms on the engaging club's behalf. Releasing clubs who wish to organise a transfer may often likewise benefit from asking the player's agent to act on their

[2] Points of Claim, [18] et seq.

behalf. Using a single agent, with a deep knowledge of the market, often assists the parties in finding solutions to unlock a potential deal.

(6) Dual and multiple representation is a long-established practice in the industry, as recognised and governed by the FA WWIR, which set out strict conditions that must be satisfied for such representation to occur, including: (a) the disclosure to all parties to the transaction of the intended arrangements; including any proposed fees; (b) all parties having a reasonable opportunity to take independent legal advice (or, in the case of players, advice from the Professional Footballers' Association); and (c) all parties providing their prior written consent, in a form prescribed by the FA, to the agent providing services to any other party to the transaction. It is also recognised by HMRC, which looks at evidence of the specific services provided in a given dual-representation transaction, when assessing the split of fees paid to the agent by an engaging club.

(7) In addition to contract negotiations, football agents provide a wide range of complementary services to their player, coach and club clients: (a) for players, agents help manage their clients' off-field interests, commercially and otherwise; by fostering relationships with global brands, and through client analysis, research, and tailored outreach with those brands, football agents negotiate sponsorship and endorsement deals, which enhance the marketability and earning potential of the players they represent, and in turn the clubs for which they play; (b) agents help players control and exploit their image rights, which are often the subject of separate negotiations with engaging clubs when a player's contract is being agreed; (c) agents also help their clients with many other aspects of their lives and careers: advising their clients on career strategy, and engaging with their player clients' performance in the game, from video and performance data analysis to support with physical rehabilitation; (d) many agents offer general legal, financial, public relations and publicity assistance; brand management (including with web and social media presences, merchandising and events); content production and strategy, and help with social media.

(8) The support and advice which football agents provide can be particularly beneficial for young and emerging talents, for whom agents often play a pastoral role, enabling them to focus on their on-field performance and achieve their full potential. Football agents will effectively invest in such young players, providing services over a long period for which they are not fully compensated unless and until those players achieve significant success. While many players will never achieve such success, agents will often continue to support and work with them, helping them find employment in the lower tiers of the game.

(9) Given their close and trusted relationships with their clients, clubs often call on agents to help with the many aspects of a player's transfer, over and above the contract itself: for example, help facilitating a player's move to a new city, or supporting a player with family or other personal matters.

(10) The largest agents are part of global agencies which operate across a wide range of sports and entertainment, and manage multiple high-profile clients and provide a comprehensive suite of services. Mid-sized agencies offer similar services but may cater to a smaller, more specialised client base. Individual agents typically represent a limited number of players, focusing on personalised attention and building strong relationships with their clients.

(11) Agents compete on range and quality of services, as well as price. Although the FA WWIR regulate certain of the terms on which they contract with their clients, many key terms, including price, and the bundling of different kinds of services, are set through such competition.

***2. Governing Bodies' view***[3]

28. Agents' fees have increased dramatically, with an increase in the number and value of transfers.

29. The number of international transfers has increased significantly. The number of annual international transfers recorded on FIFA's Transfer Matching System

[3] Points of Defence, [33] et seq.

(TMS) increased from 11,890 in 2011 to 18,081 in 2019, an increase of 52%, of which the large majority is attributable to increases over the years 2015-19.

30. Transfer fees have increased. Annual transfer fees recorded on TMS increased from $2.85bn in 2011 to $7.35bn in 2019, an increase of 158%.

31. Annual agents' fees recorded on TMS increased from $131.2 million in 2011, to $654.7 million in 2019, an increase of 399%. In the year to September 5, 2023, the amount spent by clubs on agents' fees was $865 million, an increase of 38.8% from 2022. Agents' fees increased by far more than player salaries in relative terms.

32. The current system incentivises agents to engineer transfers and negotiate the terms of transfers without reference to, and in conflict with, the best interests of their clients and football in general, with the result that the proper functioning of the player/transfer system is undermined:

    (1) the fees which an agent may earn are not subject to any limit or any necessary connection with the value added or result achieved for their client;

    (2) agents are incentivised to precipitate as many transfers as possible, as quickly as possible, without regard to the interests of their client;

    (3) this results in transfers which are both unsuitable for the player/coach and/or club concerned, and harmful to contractual stability, competitive balance and thus sporting integrity.

33. The incentives for agents to encourage and negotiate transfers without reference to the interests of their clients are exacerbated by certain features of the player/transfer system. These features, which are described below,[4] can be termed the "hidden information problem", "hold-up problem", "gatekeeper problem", and "engineering transfers".

34. The incentives for agents to precipitate as many transfers as possible without regard to the interests of their clients are further exacerbated by the business model adopted by certain agents. Agents often do not charge for the other services

[4] At [61].

which they provide, which renders them dependent on ensuring a steady flow of large payments for football agent services.

35. Consequently the present player/transfer system incentivises agents to prioritise maximising their own financial return over protecting the interests of their clients to achieve the best option for their sporting careers, on the best possible terms.

36. The proper functioning of the player/transfer system has been further undermined by the practice of certain agents in acting for multiple clients with conflicting interests in the same transaction. In particular, the interests of the player/coach and the releasing club, and the engaging club and releasing club, are not aligned. An agent purporting to represent those two parties, or even all three parties, is subject to a serious conflict of interest and cannot properly advance the interests of each of their clients.

37. The player/transfer system is undermined by a lack of transparency in relation to the work done by and fees paid to agents. As a result, it is difficult for the clients of football agents, in particular players, to measure the quality and value of the service provided by an agent. Both this lack of transparency, and the conflicts of interest to which it is related, are exacerbated by the fact that clubs often pay the fees of agents engaged by players.

38. Certain agents have engaged in abusive, excessive, unethical and sometimes illegal practices. These practices include (but are not limited to) money laundering, fraud, and human trafficking in minor players.

39. All players (and coaches) are vulnerable to the effects of perverse incentives, conflicts of interest and abusive practices referred to above. Players in general tend to lack experience and knowledge in relation to the operation of the player/transfer system.

40. The Governing Bodies do not allege that all agents act against the interests of their client or the interests of the sport. But they say that it is in the nature of regulation that uniformly applicable rules must be established in order to correct the problems which they identify.

41. In theory, the role of agents in the player/transfer system is to help their clients who are players or coaches to find suitable clubs, and to help their clients who are clubs to find suitable players or coaches. Agents may therefore advise or motivate players to stay at or move between football clubs; and advise or motivate clubs to renew or terminate an existing player's contract, or to seek to engage a new player. Thereafter, agents assist in the negotiation of the relevant contract(s) of employment.

42. Accordingly, football agents are interposed in the player/transfer system. In principle, that interposition should be capable of assisting the operation of the player/transfer system. But that interposition can also distort the proper operation of the player/transfer system, in particular when football agents' own interests predominate over the interests of their clients.

## V Regulatory background

### *1. The player/transfer system*

43. In 1995 the European Court held in Case C-415/93 *Union Royale Belge des Sociétés de Football Association (ASBL) v Bosman*[5] that the free movement provisions of Article 48 of the EEC Treaty precluded (inter alia) the application of rules laid down by sporting associations under which (a) football clubs could field only a limited number of professional players who are nationals of other Member States, or (b) a professional footballer who was a national of one Member State might not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club paid to the former club a transfer, training or development fee.

44. Subsequently, in response to a number of complaints, the European Commission undertook an investigation of FIFA's rules on international football transfers, which led to a Statement of Objections being sent to FIFA in December 1998.

[5] EU:C:1995:46 [1995] E.C.R. I-4921, [256]. In Case C-176/96 *Lehtonen v Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB)*. EU:C:2000:201 [2000] E.C.R. I-2681 the European Court held that transfer windows did not infringe the freedom of movement provisions, provided that they were not discriminatory: the setting of deadlines for transfers of players may meet the objective of ensuring the regularity of sporting competitions; late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole: [53]-[54].

45. Between 1998 and 2001, negotiations took place between FIFA, the European Commission and other football stakeholders with a view to agreeing a new set of principles to replace the existing player/transfer system. In March 2001 the European Commission closed the investigation following an agreement with FIFA and UEFA on the principles to govern a new player/transfer system.

46. The agreement did not deal with agents, but contained a number of provisions which are relevant background, including these: (a) in the case of players aged under 23, a system of training compensation to encourage and reward the training effort of clubs, in particular small clubs; (b) the creation of solidarity mechanisms which would redistribute a significant proportion of income to clubs involved in the training and education of a player; (c) international transfers of players aged under 18 to be allowed subject to agreed conditions; (d) the creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season; (e) minimum and maximum duration of contracts of respectively 1 and 5 years.

## *2. Football agents*

47. FIFA introduced Regulations for Players' Agents and Match Agents in 1991. New Regulations were adopted in 1994 and modified in 1995. The modified version came into effect on January 1, 1996. The Players' Agents Regulations provided for licensing of agents by national associations. They imposed a duty on agents not to approach a player who was under contract with a club to break his contract, and to represent the interests of only one party in the same transfer.

48. Following complaints, the European Commission opened an investigation into the Regulations and issued a Statement of Objections, which stated that the regulations constituted a decision by an association of undertakings within the meaning of what was then Article 81 of the EC Treaty and called into question the compatibility with that Article of the restrictions contained in the Regulations relating to (inter alia) the licensing requirement and the prohibition on clubs and players using unlicensed agents.

49. As a result of the investigation by the Commission,[6] FIFA adopted new Players' Agents Regulations, which came into force in March 2001, for the licensing of agents by national associations following examinations. As before, the Regulations imposed a duty on agents not to approach a player who was under contract with a club to break his contract, and to represent the interest of only one party in the same transfer: Article 14(c), (d). Agents were also required to adhere to a Code of Professional Conduct, which expressed the agent's duties in very general terms, including to "conduct himself in a manner worthy of respect and befitting his profession" and to "protect the interests of his client in compliance with the law and a sense of fairness" (Annex B, [i], [iii]).

50. In the early 2000s concern was expressed at the conduct of sports agents in general. In 2006 a report of the Independent European Sport Review, which was undertaken at the initiative of the UK sports minister, called for a more rigorous form of agent regulation. The 2007 European Commission White Paper on Sport highlighted reports of bad practice by some agents involving corruption, money laundering and the exploitation of minors, which was endorsed by a Resolution of the European Parliament in 2008.

51. In 2007 FIFA adopted new Players Agent Regulations, which provided that agents should avoid all conflicts of interest, and might only represent the interests of one party in a transaction: Article 19(8). Players' agents were prohibited from approaching players under contract with the aim of persuading them to terminate their contracts prematurely: Article 22(2). Subject to national regulations to the contrary, payment to the agent was to be exclusively by the client (club or player), except where the player authorised the engaging club to pay the agent: Article 29(1). This provision was not adopted by the FA because of adverse tax consequences for players.

52. In 2008 FIFA decided to concentrate on the regulation and control of the activity of agents rather than their access to the profession, because the existing

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[6] Subsequently, the European Commission decided to discontinue the proceedings, and a challenge by one of the complainants failed in the CFI: Case T-193/02: *Piau v Commission (FIFA intervening)*, appeal dismissed C-171/05P [2006] ECR I-37 (Order).

framework did not adequately deal with (inter alia) licensing of agents, and lack of transparency.[7]

53. In 2015 the WWIR replaced the previous Regulations, and provided for registration of agents by member associations (Article 3), but without the elaborate requirements for examination etc imposed by previous Regulations.

54. The WWIR "recommended" (Article 7(3)) that players and clubs "may" adopt the following benchmark: a 3% cap of a player's gross remuneration for the duration of the contract when the agent is employed by a player (or a club when engaged to conclude an employment contract) or 3% of the transfer fee when engaged by a club to conclude a transfer agreement (Article 7(3)). Payment was to be made by the client (Article 7(5), unless otherwise agreed by the player after conclusion of the transaction (Article 7(6)). Conflicts of interest were to be avoided, but no conflict of interest would be deemed to exist if disclosure were made and consent obtained (Article 8(1), (2)). But dual representation was allowed subject to express written consent (Article 8 (3)).

55. The Association of Football Agents (AFA) lodged a complaint, which was later withdrawn, with the European Commission that the cap under the WWIR was price fixing and contrary to Articles 101 and 102 TFEU.[8]

56. The WWIR were widely regarded as a form of deregulation. They largely delegated the task of overseeing and regulating the activities of agents to member associations, and, although a limited regulatory framework was maintained by FIFA, it was ineffective.[9]

57. The WWIR provided for only a few minimum standard requirements: a licence was no longer required, intermediaries were allowed to represent multiple parties in the same transaction (subject to disclosure) and FIFA renounced its competence on disputes and licensing. The widely shared perception was that they had been a

[7] CIES Football Observatory Report commissioned by UEFA, 2018: J1/26/17.
[8] Parrish Interim Report, [7.11]: E3/109/18-19.
[9] Newton 2, [14].

mistake, as recognised by FIFA, and consultation went on from 2018 for a reform process.[10]

58. FIFA acknowledged that the deregulation or decentralisation was a mistake.[11] Some FIFA member associations introduced strict frameworks (including the Fee Cap), and others kept them to a minimum, which disrupted the transfer market because it became more attractive for agents to encourage players to move to clubs in places where regulations favoured the agents. The FA adopted a recommended cap of 3%, but, in common with all other national associations (other than Cyprus and Malta), did not adopt a mandatory cap; nor did the FA (in common with most other national associations) adopt a Client Pays Rule.[12]

59. The EU Sectoral Social Dialogue Committee for Professional Football noted that the new FIFA regulations had had little impact on slowing down the inflation of fees paid to agents, who, it was felt, were disproportionately well-remunerated for their services, and recommended consideration of (inter alia) a reasonable, proportionate cap on agents' fees.[13] The Committee included representatives of UEFA, FIFPro, the ECA (a representative organisation for its 320 member clubs), and the EPFL, representing leagues.

## VI The development of the FFAR

### *1. Introduction: alleged abuses or market failures*

60. This section will outline the principal events and reports forming the background to the Fee Cap and the other Proposed Rules, mainly (but not exclusively) internal FIFA documents, and reports and surveys commissioned by FIFA or relied on by FIFA.

61. In this arbitration the Governing Bodies rely on what they say are abuses or market failures in the relationship between agents and the transfer system, and which are mentioned in some of the documents referred to below, and which the Governing Bodies describe as follows:

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[10] CIES Report: J1/26/18-19.
[11] Kleiner 2, [25].
[12] Parrish Interim Report: E3/109/5, 10.
[13] November 17, 2017: E3/99/2.

(1) The "hidden information problem": there is typically an asymmetry of information between agents and their individual clients. Agents have access to a significantly wider spectrum of information, and they have much more experience in transfer-related matters, than a player could ever have. Agents can choose to keep important information hidden from their clients and use this information asymmetry to their financial advantage. For example, agents can negotiate a salary for a player which is lower than the club is in fact willing to pay, but without disclosing this information to the player, and thereby free up financial resources within the overall budget available for a transfer, which they then in turn demand as increased commission.

(2) The "hold-up problem": agents can "hold up" a transfer by encouraging their individual clients not to sign with a club until the very last moments of a transfer window, thereby artificially increasing the bargaining power of the agent and their opportunity to extract excessive fees for themselves. If the club refuses to pay the fee requested by the agent and the player does not sign, both parties have very little time to find (respectively) an alternative player/club.

(3) The "gatekeeper problem": agents can control access to their individual clients by potential employers. For example, they may charge an "access fee" before negotiations even begin.

(4) "Engineering" transfers: agents can persuade players to transfer when it is not in their best interests, in order to obtain fees which they would not otherwise have earned.

### *2. March 2017-October 2019*

62. In this period FIFA set up a Task Force to consider reform proposals, conducted a consultation process with stakeholders, including workshops with agents, and approved the proposal of the Task Force for a cap on agents' fees and a prohibition on multiple representation. .

63. According to Dr Kleiner,[14] FIFA identified numerous concerning trends in the transfer system, which were jeopardising the principles agreed with the European Commission in 2001,[15] and the new (current) FIFA administration instigated a process of reform in order to align the player transfer system once again with the objectives approved by the Commission, and regulating agents' activities was an integral part of that process.[16]

64. On March 23, 2017 the FSC authorised its chairman to establish a task force to consider specific transfer issues.[17]

65. On October 19, 2017 the FSC agreed the terms of reference of the Task Force. According to the minutes, it was to act as an advisory sub-committee to the committee; to explore current and future proposals relating to the transfer system and take a holistic approach; and provide advice, proposals and recommendations to the committee based on its findings.[18]

66. At that meeting Mr Infantino, the President of FIFA, is minuted as saying:

> Agents/intermediaries to be paid by players and the commission to be fixed by regulations (acknowledging that there may be legal obstacles associated with this).

67. The Task Force consisted of representatives of various stakeholder groups including ECA (European professional football clubs), FIFPro (professional footballers), WLF (professional leagues round the world), certain of FIFA's member associations, and UEFA. The FA was not a member of the Task Force. The Task Force reported to the FSC, which reported to the FIFA Council.

68. The Terms of Reference of the Task Force stated that its key priorities were to (1) identify the issues of the transfer system; (2) outline the effective objectives of the FIFA Regulations on the Status and Transfer of Players (RSTPs) and of the transfer system in general which should be pursued in order to meet the current needs of international football; (3) identify and explore certain measures which might achieve the respective objectives, as well as other sporting and economic

[14] Director of Football Regulatory, Legal and Compliance Division, FIFA.
[15] [45]-[46], above.
[16] Kleiner 2, [27]-[28].
[17] E3/2.
[18] E3/3.

interests as discussed by the FSC; and (4) address the current objectives of the RSTPs and the transfer system in general, and explore such measures designated by the FSC and/or might explore other measures it considered necessary and/or appropriate.

69. An undated background and discussion paper was prepared by the FIFA administration prior to the first meeting of the Task Force on January 22, 2018.[19] The executive summary[20] said that FIFA's research had shown that the "amounts of money 'going out' of football to intermediaries/agents continues to increase while the money 'staying in' football via solidarity and training compensation mechanisms have stalled" and recommended "Restrictions on the amount of fees which intermediaries/agents can receive as commission from a transfer." The paper also said:[21]

> The current lack of regulation, has resulted in a number of issues, including …. [i]ncreasing (and unregulated) fees being paid to intermediaries
>
> ...
>
> Essentially, as transfer fees increase, because fees being paid to intermediaries and the ways in which they may be paid are not regulated, their fees are also increasing without proper controls
>
> …
>
> The statistics ... demonstrate that the money being paid to intermediaries in football is drastically increasing

70. The paper then asks: "How could FIFA restrict the amounts of commission being paid to intermediaries?" and answers:

> a. Regulatory: fixing, by regulations, the maximum percentage of commission paid to intermediaries for all transfers.
>
> b. Non-regulatory measures, e.g. support from EU to standardise 'cap' in Europe.[22]

71. The paper ends by recommending, inter alia: "Restrictions on the amount of fees which agents/intermediaries can receive as commission from a transfer. ... An example of this may be a cap on the percentage of commission which an

[19] E3/6.
[20] E3/6/1.
[21] E3/6/6, E3/6/10, E3/6/12.
[22] E3/6/12.

intermediary can receive when acting in connection with a domestic or international transfer."[23]

72. At its meeting on January 22, 2018, the Task Force minutes[24] recorded that it was being advised that the measures which were being discussed did not necessarily contradict European competition law as long as they provided for a proportionate framework, pursued a legitimate goal and sought desired reasonable objectives; but that the argument of money leaving the football cycle, via intermediary and agent fees, was increasing was not suitable from a legal point view. It was agreed to conduct further analysis to prove that the current intermediary system did not meet its objectives and the introduction of the proposed measures would improve the situation. The minutes recorded that stakeholders had agreed on the key principle (inter alia): "Cap on agent commissions."

73. Another document from this period also indicates that there was wider concern that a fee cap might infringe competition law. In March 2018 KEA European Affairs completed a Report, commissioned by the European Commission's Directorate for Education, Youth, Culture and Sport, on "Recast of the FIFA Regulations on Working with Intermediaries." Among its suggestions was making the 3% voluntary cap in the WWIR mandatory for all the transactions, or in case of potential non-compliance with European law, making the cap mandatory over a certain threshold.[25]

74. On April 20, 2018 there was a consultation meeting with Agents, and written feedback from the Agents included the view that a cap would be contrary to competition law.[26]

75. At a meeting of the Task Force on May 24, 2018 the FIFA administration recognised that the proposed representation provisions and cap modalities were the most controversial proposals and legal action by the agents should be anticipated.[27]

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[23] E3/6/14.
[24] E3/5.
[25] E3/100/58.
[26] E3/36; E3/45/4.
[27] E3/9/3.

76. A further consultation meeting was held with agents on May 25, 2018, when agents are recorded as having raised questions about the compatibility of the proposed fee caps with anti-trust law.[28]

77. From at least May 2018 the agents were employing lawyers to object to the plans, and in particular lawyers for the AFA were taking the position that the cap was unlawful under European competition law: letter from Bryan Cave Leighton Paisner, May 8, 2018, on behalf of Wasserman; see also Linklaters, December 6, 2018 on behalf of the Association of Football Agents.[29]

78. On June 29, 2018 the FSC issued the results of the Task Force on the Transfer System, entitled "WHITE PAPER – Transfer System Reform 2018."[30] The White Paper said that, as regards agents, the market was driven by speculation and not solidarity, when the amount spent on agents' fees rose to more than US $446 million (an increase of more than 100% since 2013), compared with US $20 million in solidarity payments (p 6). The White Paper recommended: *"*... "Placing a 'cap' on the fee an agent can earn in any given transaction", … "To ensure consistency with the objectives of the transfer rules by protecting solidarity and not facilitating speculation."[31]

79. The White Paper went on to say:[32]

> - … while the flow of money to short-term intermediary commissions increases, the amounts of money used to make sustainable investments in football via solidarity contributions has stalled.
> - …These figures show that the transfer fees are no longer serving the purpose of compensating clubs and protecting solidarity. To the contrary, commissions generated through club payments USD 1,586 million between 2013 to 2017 while total solidarity contributions raised just USD 277 million over the same period - that is almost 6 times higher.
> - The commission generated by intermediaries paid by clubs can also be compared to the total training compensation received by the clubs that actually trained the player concerned by the transfer. In 2017, just USD 20 million was paid in training compensation as compared to

[28] E3/38.
[29]Harman 1, Exhibit, pp 331, 342.
[30] E3/107.
[31] E3/107/10-11.
[32] E3/107/46-48, 53.

USD 446 million in fees to intermediaries by clubs - over 22 times higher.

- It cannot be right that an intermediary fee far outstrips the amount of money given to those clubs who helped train the player as well as the solidarity contributions to the development of football as whole (which is used to train up the next generation of players)
- The transfer system, which was conceived to ensure a fair contribution to the development of football, appears to have turned into a speculative market. This is not fair to the football clubs or grassroots which are the foundations of the professional sport.
- Moreover, the fees are not linked to services to players (who, in the majority of cases, they represent) with the result that there is a risk that players' salaries will be affected by the high fees being paid to agents.

…

- While one may conclude that the possibility for agents, who control access to the player, to make huge financial windfalls for the transfer of a player while still under contract is contributing significantly to this increased player mobility, what these statistics make clear is that the stability of contract and the interests of the players are being undermined.
- To promote the protection of the players' interests and stability of contract, a cap on the commission being paid to intermediaries would be introduced under the proposed new framework.
- The cap on fees to intermediaries:

  …

  - The cap on commission where an agent represents a player or a club pursues the following objectives:

    …

    - To protect contractual stability by limiting financial incentive of agents to engineer a transfer from the player's existing club; .
    - To ensure consistency with the objectives of the transfer rules by protecting solidarity and not facilitating speculation.

80. The White Paper concluded that to promote the objective of the protection of players and contractual stability a cap would be introduced.[33] At this stage a cap of 5% was envisaged.[34]

[33] E3/107/54.
[34] E3/107/56.

*CIES Report*

81. In July 2018 the CIES Football Observatory completed a study commissioned by UEFA earlier that year ("the CIES Report").[35] This is the earliest document produced to the Tribunal which deals with the deficiencies in the transfer market subsequently relied upon by the Governing Bodies to justify the Fee Cap. A presentation of the draft CIES Report was made to agents at the April 20, 2018 consultation meeting.[36] This document was much relied upon by Dr Kleiner in his evidence as justification for the Fee Cap.[37]

82. The CIES Report highlights the engineering of transfers issue. The study was based on interviews (mainly by telephone) with 51 actors (including some agents) in the European football transfer market. The Report noted that the mobility introduced by the *Bosman* case increased the number and influence of agents, as did a growing financial speculation around football. The frequency of transfers had increased so that the average stay of players in the main European leagues was 2.62 years.[38] "The possibility [for agents] to earn significant money in transfer operations constitutes a strong financial incentive to move players."[39] There had been a four-fold increase in the number of agents in England from 2010 (458) to 2018 (1864).[40]

83. The Report recommended[41] capping commissions at international level, which would be helpful in improving economic integrity, and limit corrupt practices, hinder tax evasion and money laundering, and "would also have a positive effect on curbing the inflation of transfer costs by rebalancing the bargaining power between clubs for the most sought after players. The measure would also be beneficial to footballers as lower commissions would often result [in] better salaries."

84. On September 24, 2018 the FSC endorsed the principles recommended by the Task Force. The minutes indicate that FIFA emphasised that "the amount of

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[35] J1/26.
[36] E3/402/9.
[37] Transcript, Day 3, pp 23, 63-64.
[38] E3/402/7.
[39] E3/207/15; also E3/207/23.
[40] E3/207/28.
[41] E3/207/108 et seq.

commission paid to intermediaries had increased significantly, while funds invested in football via solidarity and training compensation mechanisms had stalled."[42]

85. A FIFA Council meeting on October 26, 2018 approved the general principles of the agent framework (except representation and remuneration principles).[43]

*The Parrish Reports*

86. In November 2018 a team led by Professor Richard Parrish (Edge Hill University, UK) issued an interim report (funded by the European Commission) with conclusions on remuneration and representation restrictions for a project for promoting and supporting good governance in the European Football Agents industry ("the Interim Parrish Report").[44] On the question of a Fee Cap the Report said: (1) the strongest justification in support of remuneration (and representation) restrictions related to protecting the parties engaging agents (particularly players), preserving the integrity of the sector and driving up professional standards and ethics; (2) further evidence was required to support the assertion that agents exerted an excessive and damage influence on the market, and statistically the market appeared quite open and contradicted strong anecdotal evidence that agents act as powerful gate-keepers in the system.[45]

87. The Report noted[46] that at some of the meetings organised or attended by the research team, a frequently heard complaint concerned the influence exerted by the gatekeeper problem, where an agent could insist on agreeing a fee in advance of any discussions with the player. It recommended that if regulations were to be introduced to dismantle the alleged excessive influence of agents, further evidence of the alleged influence should be provided.

88. On the arguments for a cap, the Report said[47] that the primary argument was to protect players by aligning remuneration more closely with the value of the services provided. Other arguments were to mitigate the damaging effects of

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[42] E3/15/4.
[43] E3/16.
[44] E3/109.
[45] [9.7]-[9.8].
[46] [4.7].
[47] [7.10].

contractual instability, which is caused by agents being financially incentivised to move players within the period of players' contracts; to ensure consistency with the solidarity objectives of the transfer system; to address the (contested) issue of excessive influence of agents. The arguments against[48] were that (1) the market should be left to regulate remuneration; (2) the cap debate had been generated by reports of a small number of transactions, and players might not have been prejudiced; (3) a cap could result in a large number of agents becoming unprofitable, which will reduce the number of agents and reduce standards further; (4) a cap would encourage agents to destabilise contracts further as they push more transfers; (5) problems with solidarity and training compensation regimes are not connected with the activity of agents; (6) a cap would be discriminatory; (7) there was a risk that it would be circumvented. The Report also suggested that a cap was likely to be challenged on the basis that it was contrary to EU competition law.[49]

89. At a FIFA meeting with agents (AFA) on April 30, 2019 the agents said no form of cap could be accepted as it was against the principle of free markets and would unfairly limit agents.[50]

90. An undated FIFA memorandum was prepared at some time after the Task Force meeting on January 22, 2019, probably for the May 9, 2019 meeting of the Task Force.[51] On the proposed cap, the memorandum stated:[52]

> … there are still concerns as to how robust the legal arguments in defence of certain aspects of the suggested model are.
>
> Based on the information available today and on the market analysis that has been performed, it has not been possible to arrive at cap levels which are considered sufficiently reasonable and proportionate, and which provide an adequate level of legal certainty. In particular, a lack of information and consistent (documentary) evidence justifying a certain percentage rather than another has been identified. This would, however, be an essential element when having to defend such approach.

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48 [7.11].
49 [7.11].
50 E3/44.
51 Mr Alasdair Bell, Transcript, Day 2, p 213.
52 E3/29/4.

91. The final Parrish Report[53] in October 2019 repeated much of the material in the Interim Parrish Report. It recommended that FIFA should consider (inter alia) a remuneration cap, while noting the arguments for and against, including that a cap was "likely to be challenged legally."[54] The final Report stated that further evidence was required to support the assertion that agents exerted 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."[55]

92. On October 24, 2019 the FIFA Council endorsed the measures proposed by the FSC, which formed the basis of the FFAR, including a cap on agent fees and prohibition of multiple representation.[56]

93. On November 19, 2019 FIFA made a PowerPoint presentation[57] under the title "FIFA's Reform of the Transfer System". It showed the great increase in intermediary fees (accompanied by an offensive caricature representing an agent with dollar signs above his head and a money bag in one hand and bank notes in the other), compared with solidarity contribution and training compensation.[58]

### *3. December 2019-June 2020*

94. During this period FIFA had meetings with football agent associations, representative bodies and football associations to present the proposals and obtain feedback.

95. In particular, from February 2020, meetings were held with various interested parties when the issue of compliance with competition law was raised. At a meeting with FIPAWA on February 7, 2020[59] its President stressed the need for adherence to European competition law. At a meeting with the FA, Premier League, and the German Football League (DFL) on February 26, 2020, FIFA was asked about the legality of the proposed Fee Cap and FIFA said that it was taking

[53] E3/105.
[54] p. 89.
[55] p. 94.
[56] E3/628; Villas-Boas 2, [31].
[57] E3/643.
[58] E3/643/15-16.
[59] E3/47/5.

the matter very seriously and that it would do everything in its power to draft and structure the Fee Caps "in a way that they are confirmed on a European level in case of a legal challenge."[60] This issue was also raised in meetings with (inter alia) the Italian, Belgian, Dutch and Spanish Football Associations on February 26, 2020[61] and March 1, 2020.[62]

### *4. November 2020-December 2022*

96. On November 5, 2020 a first draft of the FFAR was circulated.[63]

*RBB Economics Report*

97. RBB Economics delivered a report to FIFA in September 2021, which had been commissioned by FIFA's lawyers. The Report says that FIFA's external lawyers had instructed RBB Economics to prepare an economic report that "details the major inefficiencies that affect the transfer system" because "some agents and their legal counsel were expected to challenge" the new rules.[64]

98. The Report deals with the hidden information/gatekeeper/hold-up problems, in relation to each of which it says that it has found evidence.[65] The evidence is based on FIFA data, and on surveys of ECA (European Clubs Association) and FIFPRO (International Association of Professional Footballers Professional Footballers) members.[66]

99. As regards the hidden information problem, the Report says that agents of less experienced, younger players tend to obtain on average a larger share of the player's remuneration than those for older, more experienced players.[67] For transfers involving higher amounts of transfer compensation (typically involving star players) agents tend to obtain higher commissions as a proportion of a player's remuneration.[68] There is evidence of agents getting higher commissions relative to remuneration towards the end of the transfer window, and evidence of

[60] E3/176/11.
[61] E3/177/33.
[62] E3/48/4.
[63] E3/622.
[64] E3/90/3.
[65] Pp 3-4.
[66] E3/90/11.
[67] E3/90/13.
[68] E3/90/16.

agents threatening to hold up transfers (but not in the largest value transfers which are likely to be affected by the gatekeeper problem).[69]

100. With regard to the proposed FFAR, the Report says that the hidden information problem is alleviated by aligning the agents' interests with the players. An agent wanting to earn a large service fee will be incentivised to negotiate a large remuneration for the player. This ensures that the player, as the weaker party in negotiations with the engaging club, is not exploited. The gatekeeper problem is alleviated by limiting the agent's service fee. Even if a football agent were still in a position to ask an engaging club for a large service fee, the engaging club would not be allowed to pay them more than 3% of the player's remuneration. The hold up problem is alleviated in two ways: first, capping the agent service fee limits the extent to which football agents can take advantage of clubs, even if they find themselves in a position to do so; second, by ensuring that releasing clubs cannot pay players' agents, releasing clubs can no longer fall victim to the hold-up problem.

101. The Report concluded that the new rules did not eliminate competition.

*FIFA Reports*

102. On December 6, 2021 FIFA issued a briefing document,[70] outlining the hidden information/gatekeeper/hold-up problems (without directly linking them to the proposal to cap fees), and proposing that the Fee Cap be linked not only to commissions but also to fixed fees.

103. In February 2022 FIFA compiled a report entitled "Football Agent Framework: FIFA Football Agent Regulations: The Premier League Survey" which was sent to the Premier League clubs.[71] Its stated purpose was to analyse information and feedback obtained from a survey on the transfer market and the process of working with football agents in the Premier League. The report said that the objective of the survey was to collect information on the relevant English transfer system, to assess trends or practices, which could help in developing guidance on

[69] E3/90/18.
[70] E3/72; I/64.
[71] E3/95.

certain areas regulated by the FFAR: "The findings focus on transfers and football agents, and abusive practices."[72]

104. For the preparation of the report, the FIFA Agents Department used an online anonymous survey distributed to the Premier League clubs. The survey asked questions about the amount of fees paid to agents, multiple representation, and "abusive practices". The question under abusive practices was: "how often has an agent attempted or managed to prevent a transfer your club was involved in because they believed their service fee was not high enough?" Of the 17 responses, 7 said occasionally, 5 said often, 3 said very often, and 1 said never. The report ends with about 20 examples given by clubs of abusive practice by agents, mainly relating to what is described as the "gatekeeper effect."

*The FIFA Consultation Report*

105. In October 2022 FIFA issued a Consultation Report: Football agent reform.[73]

106. The principal points relevant to this arbitration which were made by the Report were as follows:

(1) The activity of football agents has a direct and substantial impact on the football transfer system, and in particular, on the construction and maintenance of a club's squad. There is therefore a need to realign agent regulation with the objectives of the football transfer system by ensuring that it is founded on solidarity.[74]

(2) The following problems (inter alia) were identified: (a) the transfer market is driven by speculation instead of solidarity. This is particularly evident in the glaring disparity between the level of football agents' service fees and the level of payments to training clubs in connection with transfers. In 2020, for every euro paid back to training clubs almost 10 euros were paid to football agents. (b) contractual stability is partly undermined and impaired because football agents have an incentive to complete as many transfers as possible. (c) agents often act under conflicts of interest and in a non-transparent manner

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[72] E3/95/3.
[73] E3/1.
[74] [3.1].

towards their clients. This applies in particular because football agents often act simultaneously for two or more parties with regard to the same transfer.[75]

(3) Agents' fees increased to US $654.7 million in 2019, which was a fourfold increase from 2011 and double since deregulation in the WWIR. Agents' fees had increased while money reinvested through the football transfer system via training mechanisms had decreased.[76]

(4) The objectives of the imposition of a cap were (a) protection of the integrity of the sport by ensuring that agents did not incentivise transfers in order to receive fees; (b) prevention of abusive, excessive and speculative practices and addressing the market failures which arose as a result; (c) protection of the weaker party (players or coaches) who lacked experience or information from abusive and excessive conduct by agents; and (d) protection of solidarity and not facilitating speculation.[77]

107. The Report went on to say that a cap would meet those objectives in the following ways:[78]

(1) It would protect players from financial harm by "reducing the agents' pecuniary incentive to stimulate transfer activity" and would "limit financial incentives for football agents to self-engineer a potential transfer which would not necessarily be in the player's best interest or to prevent distortion or restriction of competition on the transfer market by not facilitating speculation."

(2) The hidden information problem would be alleviated by aligning the agent's interests with the player's interests, by incentivising the agent to seek a large remuneration for the player, and it will achieve transparency.

(3) The gatekeeper problem (and the hold-up problem) is alleviated, because the cap will limit the ability of the agent to prevent a transfer unless a higher fee is paid to him.

[75] [3.1].
[76] [3.1.1.1].
[77] [4.4.5.3].
[78] ibid.

(4) It would achieve the objective of protecting solidarity and not facilitating speculation by mitigating the stark imbalance between agents' fees and payments under the solidarity system:[79]

> … the cap on service fees … will achieve a **level of remuneration** that more accurately represents the value of the football agent services provided, to ensure that agent fees are commensurate with training/solidarity payments and avoid undue exploitation of (often inexperienced) football players. The **cap on service fees** is meant to achieve a **more ethical level of remuneration**.

(5) The Fee Cap is proportionate:[80] (a) there is a parallel with solidarity payments; (b) it enables price competition between agents; (c) the absolute amount is unlimited; (d) it is similar to other sports; (e) it is similar to the default cap of 5% accepted by Commission and the Court of First Instance in *Piau v Commission*;[81] (f) the level was the product of a collective agreement including all stakeholders; (g) the recommended cap in the WWIR had not proved effective.

108. In March 2022 FIFA produced a document on "Football agent reform: Consultation process- Feedback."[82] The document explains[83] why FIFA rejected the suggestion that FFAR should not impose fee caps, but only gives the example of hidden information; it justifies the Pro Rata Payment Rules[84] on the ground of contractual stability on the basis that it would prevent engineering of transfers.

109. The FFAR were approved by the FIFA Council at a meeting held in Doha on December 16, 2022.

110. In March 2023 FIFA issued "Reform of the Regulatory Framework for Agents: Context, Problems and Solutions," which stated[85] that the mandatory cap would achieve a fair level of remuneration which more accurately reflected the value of the football agent services provided and avoided undue exploitation of often inexperienced players, and "effectively remediates the 'gatekeeper', 'hidden information' and the 'hold-up' problems existing on today's markets." The

[79] E3/1/86 (emphasis in original).
[80] [4.4.5.5].
[81] Case T-193/02 *Piau v Commission (FIFA intervening)* EU:T:2005:22 [2005] E.C.R. II-209.
[82] E3/65.
[83] E3/65/41-42.
[84] E3/65/49.
[85] I/87/5.

document also stated that the deregulation of agents in 2015 had led to trends which had compromised the integrity of football and the functioning of the transfer system.[86]

## VII The FFAR

### *1. Adoption by national associations*

111. National football associations, including the FA, are under an obligation to "comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time" and to "cause their own members to comply with the Statutes, regulations, directives and decisions of FIFA bodies": FIFA Statutes, Article 14(1)(a), (d).

112. Article 3(1) of the FFAR requires member associations of FIFA, including the FA, to "implement and enforce national football agent regulations by 30 September 2023". Article 3(2) requires such national football regulations to be consistent with the FFAR and, in particular, to incorporate Articles 11 to 21 of the FFAR by reference.

113. The FA had decided to implement national football agent regulations ("NFAR") by September 30, 2023, because it was obliged to introduce NFAR by that date in order to comply with Article 3(1), (2) of the FFAR. But its solicitors informed the Claimants' solicitors on January 26, 2023: "If a competent tribunal ... finds that particular elements of the Regulations are unlawful, then FIFA would not and could not require implementation of those provisions. Absent such a finding against FIFA, the Regulations are lawful, and The FA will comply with its obligations …"

### *2. Objectives*

114. Article 1 of the FFAR sets out its objectives (so far as material) as follows:

> 1. FIFA has a statutory obligation to regulate all matters relating to the football transfer system. The core objectives of the football transfer system are to:
>
> a) protect the contractual stability between professional players and clubs;

[86] I/87/6.

b) encourage the training of young players;

…

e) maintain competitive balance; and

f) ensure the regularity of sporting competitions.

2. Regulation of the occupation of Football Agent ensures that the conduct of a Football Agent is consistent with both the core objectives of the football transfer system and the following objectives:

a) Raising and setting minimum professional and ethical standards for the occupation of Football Agent;

b) Ensuring the quality of the service provided by Football Agents to Clients at fair and reasonable service fees that are uniformly applicable;

c) Limiting conflicts of interest to protect Clients from unethical conduct;

d) Improving financial and administrative transparency;

e) Protecting players who lack experience or information relating to the football transfer system;

f) Enhancing contractual stability between players, coaches and clubs; and

g) Preventing abusive, excessive and speculative practices.

### ***3. Scope***

115. The FFAR are principally concerned with the provision by Football Agents of Football Agent Services. A Football Agent is defined as "a natural person licensed by FIFA to perform Football Agent Services, which are defined as "football-related 'services performed for or on behalf of a Client, including any negotiation, communication relating or preparatory to the same, or other related activity, with the purpose, objective and/or intention of concluding a Transaction". Transaction is "(i) the employment, registration or deregistration of a player with a club … (ii) the employment of a coach with a club … (iii) the transfer of the registration of a player from one club to another; (iv) the creation, termination or variation of an Individual's terms of employment."

116. In addition to Football Agent Services as defined, the FFAR also deal with what are defined as "Other Services", namely "any services performed by a Football Agent for or on behalf of a Client other than Football Agent Services, including but not limited to, providing legal advice, financial planning, scouting, consultancy, management of image rights and negotiating commercial contracts."

117. Articles 4-10 deal with eligibility to be a licensed Football Agent, including eligibility, the application process, examinations, fees, and continuing professional development.

### *4. Restriction on multiple representation*

118. By Article 12(8) "A Football Agent may only perform Football Agent Services and Other Services for one party in a Transaction subject to the sole exception …" that "a Football Agent may perform Football Agent Services and other Services for an individual and an Engaging Club in the same Transaction, provided that prior explicit written consent is given by both Clients."

119. By Article 12(10): "A Football Agent and a Connected Football Agent may not perform Football Agent Services or Other Services for different Clients in the same Transaction, except in accordance with Article 12(8)."

### *5. Restrictions on payment terms: Client Pays Rule and Pro Rata Payments Rules*

120. Article 14 imposes restrictions on payment terms, in particular:

(1) preventing third parties from paying Agents on behalf of Clients (including players or coaches) (Article 14(2)) except where an Agent represents an individual whose annual remuneration is below US $200,000 (Article 14(3));

(2) restricting fees to a percentage of the remuneration actually received by the player or coach (Article 14(7)), and preventing Agents from receiving any such payment in respect of periods of an employment contract which are not performed because the player transfers to another club (Article 14(12)(a)).

### *6. Restrictions on fees: the Fee Cap*

121. Article 15(2) provides, so far as is material, for a "Service Fee Cap":

(1) for Agents representing releasing clubs, 10% of the transfer compensation;

(2) for Agents representing engaging clubs: (i) 5% of the individual's (defined "player or coach") remuneration up to US $200,000; and (ii) 3% of any amount of the individual's remuneration exceeding US $200,000.

(3) for Agents representing players or coaches: (i) 5% of the individual's remuneration up to US $200,000; and (ii) 3% of any amount of the individual's remuneration exceeding US $200,000; and

(4) for Agents representing both an engaging club and a player or coach ("permitted dual representation"): (i) 10% of the individual's remuneration up to US $200,000; and (ii) 6% of any amount of the individual's remuneration exceeding US $200,000.

## VIII Procedural history

122. The Claimants served a Notice of Arbitration on March 17, 2023 pursuant to Rule K2.1 of the FA's Rules of Association, in which the Claimants nominated Mr Tom de la Mare KC as party-appointed arbitrator. The FA served a Response to the Notice of Arbitration on March 31, 2023, in which the FA nominated Lord Dyson as party-appointed arbitrator.

123. Subsequently the parties nominated Lord Collins of Mapesbury as chairman of the Tribunal, and Terms of Appointment of the Tribunal were signed on May 26, 2023.

124. Points of Claim were served on May 19, 2023.

125. On May 19, 2023 the Governing Bodies applied for an order striking out the claim on the ground that the subject matter of the arbitration fell within the exclusive jurisdiction of the Court of Arbitration for Sport and, in the alternative, if the Claimants did not consent to FIFA being joined as a party in this arbitration, an order that the claim be struck out as an abuse of process on the ground that the Claimants had failed to sue the correct respondent to the claim; or failing that, that FIFA be permitted to participate in the arbitration, with equivalent standing and rights as the FA, in particular to plead, serve evidence, call and cross-examine witness of fact and opinion, and make written and oral submissions, on the ground that FIFA is the correct respondent to the claim.

126. By letter dated May 22, 2023 the Claimants objected to the participation of FIFA at the hearing on the application, to which the FA responded on May 24, 2023.

127. On May 26, 2023 the Claimants responded to the application by the Governing Bodies.

128. On May 29, 2023 the Tribunal informed the parties that it considered that FIFA should be allowed to take part in the hearing on the Claimants' application (which had been fixed for June 12, 2023) and present its arguments, without prejudice to the question whether it had standing, and subject to two written undertakings as regards the incidence and payment of costs, and confidentiality.

129. On May 30, 2023 FIFA agreed to give the undertakings.

130. On June 7, 2023 the Claimants informed the Tribunal that the parties had agreed terms for the participation of FIFA, and on June 13, 2023 the parties entered into an Agreement for the Participation of FIFA in these proceedings, in which it was agreed (inter alia) that:

(1) FIFA and the FA would jointly file Points of Defence.

(2) FIFA would be bound by the obligations of confidentiality in the proceedings, as set out in Rule K11 of Rule K.

(3) FIFA would provide disclosure in the proceedings as ordered by the Tribunal or agreed between the Parties, and would comply with the rules of Rule K in relation to disclosure.

(4) FIFA and the FA would be permitted to adduce evidence from witnesses of fact.

(5) FIFA and the FA would be permitted to adduce evidence from a single expert competition economist.

(6) FIFA and the FA would be permitted to make written submissions, but such that their combined length did not exceed the maximum permitted length of the Claimants' written submissions (such length to be determined by the Tribunal).

(7) FIFA and the FA would be permitted to make oral submissions, such that their combined length did not exceed the maximum permitted length of the Claimants' oral submissions (such length to be determined by the Tribunal).

(8) Both FIFA's and the FA's legal representatives would be permitted to cross-examine witnesses.

(9) Counsel for either FIFA or the FA (but not both) would lead the cross-examination of any one of the Claimants' witnesses, and FIFA and the FA would ensure that the cross-examination of any one of the Claimants' witnesses by counsel for the Governing Bodies was non-duplicative.

(10) FIFA would be bound by any ruling of the Tribunal and the rules set out in Rule K for the purposes of these proceedings.

131. The Agreement annexed an agreed timetable for Points of Defence; disclosure of documents; witness statements and expert reports; and pre-hearing submissions.

132. Points of Defence were served by the Governing Bodies on June 19, 2023.

133. On July 12, 2023 the parties notified the Tribunal of the agreed list of issues for the experts.

134. Following correspondence from the parties relating to disclosure, the Tribunal gave directions on June 26, 2023 and July 10, 2023, in the latter of which the Tribunal directed that: “After consultation between the parties, if there are any further issues on the disclosures, they shall be presented to the Tribunal by noon on Thursday, July 13, 2023, in a joint document setting out succinctly the positions of the parties. Each of the parties shall bear in mind that the object of the exercise is to obtain a fair resolution of the dispute, without unnecessary delay or expense, and that a party seeking an order for disclosure of any document or class of document must identify with precision the issue to which it is directed and its relevance.”

135. As directed by the Tribunal, a joint document was submitted on July 13, 2023, consisting of the Claimants’ submission on their requests, and the response by FIFA.

136. By a Procedural Order dated July 17, 2023, the Tribunal dismissed the Claimants’ application.

137. On July 28, 2023 the parties served witness evidence.

138. On August 7, 2023 the Tribunal gave directions relating to the conduct of the hearing commencing on September 18, 2023.

139. On August 9, 2023 the Governing Bodies made an application for disclosure, in which it was noted that the Claimants had made disclosure conditional on additional disclosure from the Governing Bodies.

140. On August 15, 2023 the Claimants requested the Tribunal to direct that the in-house lawyers with conduct of the proceedings at each of (i) the Claimants, and (ii) the Governing Bodies be granted access to the confidential information in the other side's witness evidence and disclosure, to be kept confidential in accordance with the requirements of Rule K.

141. On August 17, 2023 the parties exchanged experts' reports.

142. On August 18, 2023 the Claimants made a further application for disclosure.

143. On August 19, 2023 the Claimants made an application for a variation of the directions for the hearing.

144. On August 21, 2023 the Tribunal made an order on the requests for disclosure of confidential information.

145. On August 22, 2023 the Tribunal made further directions for the hearing.

146. On August 23, 2023 the Tribunal dismissed the Claimants' application dated August 18, 2023.

147. On August 25, 2023 the Claimants applied to the Tribunal to reconsider its Procedural Order of August 23, 2023. On August 31, 2023 the Tribunal dismissed the Claimants' application.

148. On September 8, 2023 the parties supplied an agreed list of issues.

149. On September 9, 2023 the Governing Bodies made an application for the recusal of Mr de la Mare KC.

150. On September 11, 2013 Mr de la Mare KC resigned and the Claimants appointed Mr Christopher Vajda KC in his place.

151. On September 13, 2023 the parties submitted pre-hearing written submissions.

152. A hearing took place between September 18, 2023 and September 22, 2023, when the following witnesses and experts gave oral evidence in person or remotely:

(1) Claimants' witnesses: [redacted] Mr Simon Bayliff (founder and CEO, Areté Management Ltd); Mr Leon Angel (Head of Football, CAA Base Ltd); Mr Omar Ismail (Chief Financial Officer, ICM Stellar Sports Ltd); Mr Fahri Ecvet (Chief Operating Officer, Global Football, Key Sports Management Ltd (Wasserman)); [redacted] (former [redacted] (professional football player);

(2) Governing Bodies' witnesses: Mr Alasdair Bell (Deputy Secretary General, FIFA); Dr Jan Kleiner (Director of Football Regulatory, Legal and Compliance Division, FIFA) ; Mr Kevin Plumb (General Counsel, Premier League); Mr Luis Villas-Boas Pires (Head of Agents, FIFA); [redacted] (Executive Director, [redacted]); [redacted] (former Vice-Chairman and shareholder, [redacted]); [redacted] (former Head of Operations, [redacted]); Mr David Newton (Head of Player Status and Competitions, FA);

(3) experts: Mr Derek Holt (Alix Partners, instructed by the Claimants) and Mr Richard Harman (Berkeley Research Group, instructed by the Governing Bodies).

153. Following the request of the Tribunal at the hearing for a joint chronology of the consultation leading to the adoption of the FFAR, the parties produced separate chronologies on September 21, 2023 (Claimants) and September 23, 2023 (Governing Bodies).

154. On October 23, 2023 the Tribunal asked the parties to provide a joint response as to whether there remained an issue between them on the Client Pays Rule on which the Tribunal was required to rule (and, if so, what issue), together with applicable references to the pleadings/submissions and factual/expert evidence already before the Tribunal (but not new material) on any such issue.

155. The joint response was provided on November 1, 2023.

## IX The Tribunal's analysis

### A Introduction

156. The parties are broadly agreed[87] that the Tribunal should consider the issues in this order:

    (1) whether the Proposed Rules *prima facie* infringe the Chapter I and/or Chapter II prohibition;

    (2) if so, whether the Proposed Rules nonetheless escape the application of the competition rules entirely because they are ancillary restraints, either according to the standard (commercial) doctrine, or pursuant to the principle or principles established in *Wouters* and/or *Meca-Medina.*

    (3) if they do not escape the application of the Chapter I and/or Chapter II prohibitions, whether breach of the prohibitions has been made out;

    (4) whether they are exempt pursuant to Competition Act 1998, section 9 and/or objectively justified; and

    (5) whether the Proposed Rules are an unreasonable restraint of trade at common law.

157. This approach is similar to that in the opinion of Rantos A.-G. on the appeal[88] from the decision of the General Court in *International Skating Union v Commission*.[89] The General Court had decided the object issue before the application of the *Meca-Medina* principles, and on the appeal Rantos A.-G. dealt with the question of the order of issues:[90]

> It must be stated in that regard that the analysis of ancillary restraints and the question whether particular conduct falls outside the scope of Article 101(1) TFEU on the ground that it is proportionate to the legitimate objective pursued is separate from the question whether that conduct has as its object or effect the restriction of competition. *As is clear from the case-law of the Court, it is only after finding, in the first stage, that a measure is capable of restricting competition within the meaning of Article 101(1) TFEU – but without necessarily reaching an express finding of a restriction of competition by object or effect – that the Court will examine, in the second stage, whether the*

[87] Claimants' Written Submissions, [63], [135]; Governing Bodies' Written Submissions, [63].
[88] Case C-124/21P.
[89] Case T-93/18 EU:T:2020:610 [2021] 4 CMLR 9.
[90] At [41] (emphasis added).

*effects restrictive of competition are inherent in the pursuit of legitimate and proportionate objectives and therefore fall outside the scope of Article 101(1) TFEU.* See judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 110); of 4 September 2014, *API and Others* (C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraphs 43 and 49); and of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International* (C-427/16 and C-428/16, EU:C:2017:890, paragraphs 51 and 57).

158. This is a case principally concerned with the Chapter I and/or Chapter II prohibitions under the 1998 Act, but almost all of the authorities cited to the Tribunal were EU authorities, both pre- and post- Brexit.

159. By the 1998 Act, section 60A(2),(7):

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

160. The Tribunal asked the parties how the Tribunal should treat such EU authorities, and none of the parties suggested that it should not apply any of the EU authorities cited. Accordingly the Tribunal will apply the Chapters I and II prohibitions on the basis of the EU authorities.

## B Agreements and decisions under Chapter I

161. The Chapter I prohibition applies to "agreements between undertakings, decisions by associations of undertakings or concerted practices:" 1998 Act, section 2(1).

162. The Governing Bodies accepted, for the purposes of these proceedings, that the FA's decision to adopt the Proposed Rules as NFAR, and FIFA's decision to adopt the Proposed Rules *qua* FFAR, are each properly characterised as a decision of an association of undertakings (clubs in the case of the FA, and national associations in the case of FIFA) for the purposes of the Chapter I prohibition.[91]

163. This concession is consistent with the Opinion of Lenz A.-G. in *Union Royale Belge des Sociétés de Football Association (ASBL) v Bosman*,[92] that football associations could (in addition to the member football clubs) also be regarded as "undertakings" in so far as they themselves engaged in economic activity; and with the judgment of the Court of First Instance in *Piau v Commission (FIFA intervening)*:[93]

> … since [the Agent 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, and on clubs, players and players' agents, those regulations are the reflection of FIFA's resolve to co-ordinate the conduct of its members with regard to the activity of players' agents. They therefore constitute a decision by an association of undertakings within the meaning of Art.81(1) EC, which must comply with the Community rules on competition …

164. It is therefore unnecessary for the Tribunal to decide whether those decisions also amount to "agreements" for the purposes of the Chapter I prohibition, and, in particular, whether the NFAR amount to an agreement between the clubs which are members of the FA. But the Tribunal is satisfied that the decisions are agreements, for the reasons given by the Claimants:[94] the Premier League Rules and the English Football League Rules both provide that membership of those Leagues shall constitute an agreement between the League and club, and between each club, to be bound by and comply with the FA Rules (including the NFAR); and the FA is bound by its membership of FIFA to introduce the NFAR. Consequently the adoption of the NFAR and its implementation by the clubs is contractual in nature.

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[91] Points of Defence, [7], [93.2].
[92] Case C-415/93 EU:C:1995:46 [1995] E.C.R. I-4921, [256].
[93] Case T-193/02 EU:T:2005:22 [2005] E.C.R. II-209, [75]. See also the Opinion of Rantos A.-G. in Case C-333/21 *European Superleague Company SL v UEFA and FIFA* EU:C:2022:993, [59].
[94] Written Submissions, [18]-[19].

## C Do the Proposed Rules (or any of them) fall outside the scope of the Competition Act 1998 on the basis of the principle established in *Wouters* and/or *Meca-Medina*?

### *1. Whether the alleged restrictions are prima facie capable of restricting competition*

165. Before the *Wouters/Meca-Medina* issue is addressed, it is necessary for the Tribunal to take a view on whether the alleged restrictions are "capable of restricting competition" within the meaning of Chapter I and/or Chapter II, or, as the parties agree, *prima facie* capable of restricting competition.

166. The Tribunal will deal with this point shortly, since the whole emphasis of the arguments of the parties was not on the question of whether, *prima facie*, the restrictions were capable of restricting competition, but on whether they did *in fact* restrict competition.

167. The examples in section 2(2)(a) of the 1998 Act of agreements or decisions capable of restricting competition include those which "directly or indirectly fix purchase … prices or any other trading conditions."

168. The Fee Cap is plainly a decision to fix purchase prices, and by its nature *prima facie* capable of restricting competition by object. The Pro Rata Payment Rules fix pricing conditions, and also by their nature are *prima facie* capable of restricting competition by object. The Dual Representation Rule (which is only relevant in these proceedings as regards multiple representation) and the Client Pays Rule are also rules which fix trading conditions and are *prima facie* capable of restricting competition by effect.

### *2. The Wouters/Meca-Medina principle*

*Wouters*

169. In *Wouters*[95] regulations made by the Bar of the Netherlands prohibited its members from entering into or maintaining a professional partnership with members of other professions. The key objective of the Bar was to avoid conflicts

[95] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98 [2002] E.C.R. I-1577.

of interest. Mr Wouters breached the regulations by creating a professional partnership between lawyers and accountants. He challenged a decision of the General Council of the Bar before the national court, arguing that it was incompatible with the EC rules on competition and free movement.

170. On a reference from the Dutch court, the European Court held that the prohibition on multi-disciplinary partnerships was liable to restrict competition,[96] but said:[97]

> … not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Art. 85(1) of the Treaty. For the purposes of application of that provision to a particular case, 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. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience … It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

*Meca-Medina*

171. The European Court applied *Wouters* to sporting rules and regulations in *Meca-Medina*,[98] which concerned anti-doping rules of the International Olympic Committee and implemented by the International Swimming Federation (FINA). The Court of Arbitration for Sport (CAS) had imposed a two-year suspension which the athletes then sought to challenge by the indirect means of a complaint to the Commission, alleging that FINA's rules were anti-competitive because the threshold limits employed were not scientifically justified and because the strict liability system and the sports arbitral system were unwarranted. The Commission rejected the complaint, on the grounds that the competition rules were not engaged; or if they were, that the rules in question were justified ancillary restraints following *Wouters*.

172. The appeal against the rejection of the competition complaint was dismissed by the Court of First Instance on the basis that the rules were sporting rules which had nothing to do with economic activity and so fell outside the scope of the

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[96] At [90].
[97] At [97].
[98] Case C-519/04P *Meca-Medina v Commission* EU:C:2006:492 [2006] E.C.R. I-6991.

competition rules. On appeal, the European Court set aside the judgment, holding that sporting rules could not *a priori* be excluded from the scope of the competition rules.

173. The European Court ruled:[99]

> Next, the compatibility of rules with the Community rules on competition cannot be assessed in the abstract ... Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Art.81(1) EC. For the purposes of application of that provision to a particular case, 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 (*Wouters and Others* ... at [97]) and are proportionate to them.
>
> As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

174. The European Court then proceeded to find the anti-doping rules to be generally justifiable:[100]

> Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.

175. The European Court reviewed the justification for the rules by reference to the scientific thresholds used and then the application of the rules to the facts, and concluded:[101]

> It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus

[99] At [42]-[43].
[100] At [45].
[101] At [47].

imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport …

*Subsequent rulings*

176. In *Consiglio nazionale dei geoligi v Autorità garante della concorrenza e del mercato*[102] the European Court combined the principle in *Wouter/Meca-Medina* in a case concerning the code of conduct of a national geologists' association which recommended a scale of professional fees. The European Court said:[103]

> 53. However, not every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in art.101(1) TFEU. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which a decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which in the present case consist in ensuring that the ultimate consumers of the services in question are provided with the necessary guarantees. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters at [97]).
>
> 54. In that context, it is important to verify whether the restrictions thus imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives (see, to that effect, *Meca-Medina v Commission of the European Communities* …).

177. That decision was applied in *CHEZ Elektro Bulgaria AD*,[104] in a case involving the fixing of minimum amounts for lawyers' remuneration, which were made mandatory by national legislation. Citing (inter alia) both *Wouters* and *Meca-Medina*, the European Court said:[105]

> … account must first of all be taken of the overall context in which a 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 …
>
> In that context, it is important to verify whether the restrictions thus imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives …

### *3. The parties' submissions*

*Governing Bodies*

[102] Case C-136/12 EU:C:2013:489.
[103] At [53]-[54].
[104] Joined Cases C-427/16 etc EU:C:2017:890.
[105] At [54]-[55].

178. The Governing Bodies rely on the principle in *Wouters/Meca-Medina* to argue that (1) FIFA's role is regulatory in the same way as the bodies in those cases; (2) the relevant decision-maker (FIFA) enjoys a significant margin of discretion in determining what objectives to pursue, whether the restrictions complained of are inherent in the pursuit of those objectives and whether the restrictions are proportionate to those objectives; (3) FIFA was clearly entitled to consider that the FFAR are necessary and proportionate to the legitimate objectives identified; (4) the Tribunal should not interfere with the assessment made by the international governing body of football; (5) the FA, like all national associations, is entitled to act in accordance with its obligations to FIFA and implement the NFAR in England; and (6) this is particularly the case where the FA recognises the importance of these regulations being set at an international level and supports FIFA as the appropriate body to regulate this area.[106]

*Claimants*

179. The Claimants say[107] that the *Wouters/Meca-Medina* principle "cannot rescue object restrictions" and rely on the statement in Bellamy and Child, *European Law of Competition* (8th ed 2018, [2.210]) that "*Wouters* does not extend to severe restrictions of competition." Bellamy and Child say that the Court of First Instance rejected attempts to rely on *Wouters* to justify the Luxembourg brewers cartel (*Re Luxembourg Brewers Cartel: Brasserie Nationale SA v Commission*[108]) and to defend agreements on minimum prices and restrictions on imports in the French beef etc sector (*Fédération nationale de la coopération bétail et viande (FNCBV) v Commission*[109]); and the Claimants rely on the decision in the *Luxembourg Brewers Cartel* case to say that the Court of First Instance held that an agreement restricting competition by object cannot be exempted; and on the *Fédération nationale* decision to argue that the Court dismissed as "irrelevant" attempts to justify price-fixing agreements on the basis of the *Wouters* principle. The Claimants go on to say that the FFAR/NFAR fall outside the regulation of a sporting competition, that the Governing Bodies do not enjoy a margin of

[106] Governing Bodies' Written Submissions, [75], [79], [80].
[107] Claimants' Written Submissions, [74].
[108] Case T-49/02 EU:T:2005:298 [2005] E.C.R. II-3033.
[109] Case T-217/03 EU:T:2006:391 [2006] E.C.R. II-4987.

discretion of the sort enjoyed by a decision maker in public law, and that in any event it is for the Tribunal to determine whether the Proposed Rules are necessary and proportionate.

### *4. The Tribunal's view*

*Wouters/Meca-Medina and object restrictions*

180. In the view of the Tribunal, the authorities relied on by the Claimants do not support the proposition that the *Wouters/Meca-Medina* principle does not apply to object restrictions.

181. In the *Luxembourg Brewers Cartel* case the brewers had argued that they had enforced the beer ties to ensure that contracts were honoured, and that (relying on, inter alia, *Wouters*) their conduct was justified by the need to preserve commercial loyalty. This argument was rejected by the Court of First Instance:[110] "Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Art.81(1) EC by virtue of the fact that it also pursued other objectives, such as those at issue in those judgments." This in line with the rejection by EU competition law of the US principle of a "rule of reason," by virtue of which there should be undertaken a weighing of the pro- and anti-competitive effects of an agreement when it is to be characterised as a "restriction of competition:" for a recent example see *Generics (UK) Ltd v Competition and Markets Authority*.[111]

182. The *Fédération nationale* case concerned an agreement by co-operative groups of French producers in the cattle, pig and sheep-farming sectors and of slaughter and meat-processing groups with a view to fixing a minimum purchase price for certain categories of cattle and suspending imports of beef into France. The Court of First Instance, in answer to reliance on *Wouters*, said:[112] "… the reference to the judgment in *Wouters* is irrelevant here because the factual circumstances and the legal problems raised by that case, which concerned the regulation by a

[110] At [85].
[111] Case C-307/18 EU:C:2020:52.
[112] At [89].

professional association of the practice of the profession of lawyer and its organisation, are not comparable with those of the present case." What the Court was saying was no more than that the co-operative groups were not professional rule-making bodies.

*Does the regulatory body have a margin of discretion and, if so, what is its scope?*

183. In *Wouters* the European Court ruled that the Bar Association "could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession…",[113] and other passages suggest that the Bar Association had a margin of discretion: the Bar Association "was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts";[114] the regulations could "reasonably be considered to be necessary in order to ensure the proper practice of the legal profession;"[115]; and the Bar Association was "entitled to consider that the objectives …. cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means."[116]

184. Tribunals in three arbitral awards dealing with the application of *Wouters/Meca-Medina* to sporting regulations have proceeded on the basis that the regulatory authorities have a margin of discretion.

185. In *Queens Park Rangers v English Football League* the Tribunal said[117] "… the Panel's starting point is that self-regulatory sporting bodies should be given a reasonable latitude to set rules of the game, competition rules and divisional rules both because such rules are, as *Meca-Medina* notes at [45], inherent in the

[113] At [110].
[114] At [105].
[115] At [107].
[116] At [108].
[117] At [254].

organisation of sporting competition and the generation of spectator interest in that sport."

186. In *Premier Rugby Ltd v Saracens Ltd* the Tribunal said[118] that the European Court's "jurisprudence indicates that organisers of sports competitions have a margin of appreciation to identify appropriate measures to achieve legitimate objectives … This margin of appreciation was first identified in the context of professional self-regulation in Case C-309/99 *Wouters* … It was then applied in Case C-519/04 *Meca-Medina* … In *QPR v EFL* the Tribunal considered that *Wouters* and *Meca-Medina* established that the margin of appreciation to be applied was whether a rule was proportionate to a legitimate objective identified by the sporting organisation…"

187. In *PROFAA v FIFA* ("the CAS Award")[119] it was held that "*Wouters* and *Meca-Medina* indicate that FIFA enjoys a certain margin of appreciation when regulating economic activities intrinsic to or peripheral to the sport of football." [120] It also said, citing the ruling in *Meca-Medina* at [49]-[50], that the European Court had indicated that the applicant has to establish that the challenged act is vitiated by a "manifest error of assessment." But, as the Claimants point out, correctly,[121] this is an error of law by the CAS Tribunal, since the European Court was there dealing with the margin of discretion exercised by the Commission, whose rejection of the applicants' complaint was under appeal.

188. In cases applying the *Wouters* principle the European Court has made it clear that the national court itself must determine whether the rule in question is necessary in order to promote the (legitimate) objective relied on.

189. Thus "it is necessary to examine whether the restrictive effects which follow from the contested regulation can reasonably be regarded as necessary to guarantee the quality of the services offered by chartered accountants and whether those effects do not go beyond what is necessary to ensure the pursuit of that objective (see, to that effect, *Wouters,* at [97], [107] and [109])": *Ordem dos Tecnicos Oficiais de*

[118] At [44]-[46].
[119] CAS 202309370, July 24, 2023.
[120] At [223].
[121] Written Submissions, [85(2)].

*Contas v Autoridade da Concorrencia*;[122] or the national court "must also verify whether, in the light of all the relevant material before it, the rules may be regarded as necessary for the implementation of the legitimate objective of providing guarantees to consumers: *Consiglio nazionale dei geologi*.[123]

190. In *International Skating Union v Commission* Rantos A.-G. said:[124] "… where the restrictive effects which follow from a sports federation's contested regulation can reasonably be regarded as necessary to guarantee a legitimate 'sporting' objective and if those effects do not go beyond what is necessary to ensure the pursuit of that objective, those measures do not fall within the scope of Article 101(1) TFEU. See judgment in *Meca-Medina* (paragraph 42 and the case-law cited and paragraph 45)."

191. The view of the Tribunal is that the regulatory authority in a case such as this plainly does not have a margin of appreciation in the sense of public law, because it is not a public body. But a court or tribunal, which is not expert in sport, may consider, as the Court did in *Wouters* in relation to professional associations, whether a sporting authority could reasonably have considered that a regulation was necessary, but it needs, nonetheless, to verify that there is evidence to support the finding of necessity. In any event whichever approach is adopted in the present case, it does not affect the conclusions of the Tribunal.

192. As the case law cited above shows, the same principles apply equally to the case where a regulatory body relies on doctrine of ancillary restraints.

*Application of the Wouters/Meca-Medina principle to the present case*

193. Taken together, the application of the principle in *Wouters* and *Meca-Medina* requires the Tribunal, in the present sporting context, to consider the context in which the Regulations were made and their effect, and in particular whether the Proposed Rules are "limited to what is necessary to ensure the proper conduct of competitive sport" (*Meca-Medina* at [47]).

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[122] Case C-1/12 EU:C:2013:127, at [96].
[123] Case C-136/12 EU:C:2013:489, at [56].
[124] Case C-124/21P, Opinion, December 15, 2022, at [39].

194. Although the Governing Bodies relied on those principles in their Written Submissions,[125] and in their oral submissions,[126] they do not explain how each of the Proposed Rules can be reconciled with them.

195. In *Wouters* the European Court emphasised that account must be taken of the objectives of the regulations, which (as quoted above) in that case were connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience.

196. The Tribunal accepts that, even in the context of sporting bodies, the *Wouters/Meca-Medina* principle applies to non-sporting rules, since the principle is a development from *Wouters*, a case which had nothing to do with sport and was concerned with the Dutch Bar Association preventing members from entering into partnership with accountants; and *Consiglio nazionale dei geoligi v Autorità garante della concorrenza e del mercato*, above, combined *Wouters* and *Meca-Medina* in the context of a national geologists association code of conduct recommending a standard scale of professional fees.

197. The *Wouters/Meca-Medina* principle was held in *Rugby Premier Ltd v Saracens Ltd* and *Queens Park Rangers v English Football League Ltd* to apply to financial restrictions which were designed to preserve competitive balance and to protect the integrity of the sporting competition.

198. But the Governing Bodies endeavour to extend, in a sporting case, the *Meca-Medina* principle to regulation which is not aimed to ensuring that the sport is conducted in a fair way or to preserve its competitive balance, but (they say) to prevent alleged abuses or market failures in the relationship between agents and the transfer system, which prejudice clubs and players.

199. In the view of the Tribunal, there is no doubt that there is a qualitative difference between the Fee Cap, the Pro Rata Payment Rules (which are said to be intended to discourage transfers in the middle of contractual periods), the Dual

[125] [64]-[80].
[126] Especially Transcript, Day 1, pp 83-87; Day 5, pp 79-103.

Representation Rule (which is said to be intended to protect players from conflicts of interest), and the Client Pays Rule which regulate commercial activity of persons ancillary to the sport (namely that of agents), on the one hand, and the doping regulation at issue in *Meca-Medina*, on the other hand, to ensure that competitive sport was conducted fairly. It is not suggested that football competitions under the auspices of the FA are currently not being conducted fairly in the absence of the Proposed Rules.

200. The Tribunal accepts the contention of the Claimants that the Governing Bodies are seeking, not to regulate sporting activities (even in the wider sense recognised in *Saracens* and *Queens Park Rangers*) but to regulate prices (and associated terms such as the Pro Rata Payment Rules and the Client Pays Rule) or who should contract with agents (in the case of multiple representation) in a purely economic context.

201. Consequently the Tribunal does not consider that the Proposed Rules fall within the *Wouters/Meca-Medina* principle.

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

***(i) The Fee Cap***

*Governing Bodies*

203. The Governing Bodies say,[127] under the heading "Problems identified in the player/transfer system," that the current system incentivises agents to engineer transfers and negotiate the terms of transfers without reference to, and in conflict with, the best interests of their clients and the sport in general. The fees that an agent may earn in respect of Football Agent Services are not subject to any limit or any necessary connection with the value added or result achieved for their client. As a result, agents are incentivised to precipitate as many transfers as

[127] Points of Defence, [33]-[34].

possible, as quickly as possible, without regard to the interests of their client. This results in transfers that are both unsuitable for the player/coach and/or club concerned, and harmful to contractual stability, competitive balance and thus sporting integrity.

204. The incentives for agents to encourage and negotiate transfers without reference to the interests of their clients are exacerbated by certain features of the player/transfer system. There are three problems in particular, the nature of which has been set out above: (1) the "hidden information problem;" (2) the "hold-up problem;" and (3) the "gatekeeper problem."

205. Those incentives are further exacerbated by the business model adopted by certain agents. Agents often do not charge for the Other Services that they provide, which renders them dependent on ensuring a steady flow of large payments for Football Agent Services.

206. The player/transfer system incentivises agents to prioritise maximising their own financial return over protecting the interests of their clients to achieve the best option for their sporting careers, on the best possible terms.

207. The Governing Bodies' case on justification of the Fee Cap[128] is that the ultimate objective is to ensure the proper functioning of the player/transfer system and thereby to protect the integrity of the sport. In seeking to do so, the Fee Cap pursues the following key objectives: (a) reducing the financial incentives for agents to arrange as many transfers as possible as quickly as possible; (b) enhancing contractual stability between players, coaches and clubs, and thereby protecting team composition, competitive balance between clubs and the regularity of sporting competitions; (c) limiting conflicts of interest to protect clients from unethical conduct; (d) improving financial and administrative transparency; (e) protecting players who lack experience or information relating to the football transfer system; (f) preventing abusive, excessive and speculative practices; and (g) promoting a spirit of solidarity between elite and grassroots football.

[128] Points of Defence, [99].

208. Taking account of the overall context in which the Fee Cap was adopted and in which it will be implemented and its objectives, any restrictions arising out of Article 15(2) are inherent in the pursuit of legitimate objectives and proportionate to those legitimate objectives.

209. Article 15(2) is an appropriate means of pursuing those objectives:

(1) It sets maximum fees which apply to all transactions falling within the scope of the FFAR. By imposing a limit on the fees payable to agents for Football Agent Services, it seeks to reduce or remove the incentives for agents to arrange transfers which are not in the agent's clients' best interests. That protects the proper functioning of the player/transfer system by reducing agents' incentives artificially to stimulate transfer activity, such that the transfer activity that does take place should better reflect players' and clubs' interests and the resulting team composition will not have been influenced by agents' self-interest. Further, by aligning agents' interests with those of their clients, it incentivises agents to provide a high-quality service whilst establishing a uniformly applicable maximum rate for those services.

(2) It enhances contractual stability for players, coaches and clubs by ensuring that agents do not have incentives (in the form of excessive fees) that encourage transfers in circumstances in which a transfer is not in the interest of the player and/or clubs in question. This protects the proper functioning of the player/transfer system, team composition and sporting competition, and, ultimately, the integrity of the sport.

(3) It limits conflicts of interest by defining the Fee Cap in such a way that they more closely align the agent's interest with that of their client. In particular, by defining an agent's Fee Cap as a percentage of the individual's remuneration, it incentivises the agent to maximise the player's remuneration (which is clearly in the player's interest) in order to maximise his own (which is also clearly in the agent's interest). By limiting conflicts of interests in this way, it seeks to ensure that transfer activity reflects the player's interests and the interests of the clubs in question. For example, Article 15(2) avoids a situation in which a player is transferred to Club A rather than Club B because

Club A has offered to pay the agent more even though Club B has offered to pay the player more.

(4) It improves financial and administrative transparency and protects players who lack experience or information relating to the player/transfer system by establishing a system of fee caps that is uniformly applicable and known to players, coaches and clubs. This allows players, coaches and clubs to make more informed decisions about transfers, thereby facilitating the proper functioning of the player/transfer system.

(5) It limits abusive, excessive and speculative practices by (a) ensuring that agents do not have incentives to stimulate transfers which might be speculative from the players' or the clubs' perspective, (b) aligning agents' interests with those of their clients, and (c) capping fees at fair and reasonable levels.

(6) By setting fair and reasonable maximum fees, it promotes a spirit of solidarity between grassroots football and elite football. The system of training compensation and solidarity contribution established under the Regulations on the Status and Transfer of Players seeks to ensure that the contribution of clubs in a player's early years is reflected and rewarded if and when that player becomes a successful professional. It cannot be suggested that agents make a greater contribution to the success of a player than those clubs that train the player in their early years, and by ensuring that the fees payable to agents are commensurate with training compensation and solidarity payments, Article 15(2) seeks to reflect that and thereby protects the integrity of the sport.

*Claimants*

210. The Claimants say that fixing fees, and keeping more money for the clubs, has been a core aim of the Proposed Rules from the outset, that the Governing Bodies have adduced no proper evidence of the alleged abuses and market failures or that the Fee Cap is a necessary and proportionate means of addressing them.[129]

[129] Written Submissions, [92] et seq.

211. As for the alleged stimulation of transfers, a transfer can only take place if all three parties – releasing club, player and engaging club – consent. In any event, the number of transfers in the Premier League has in fact remained stable over the past decade.[130]

212. None of the alleged "problems" appear to have any rational connection with the imposition of caps on fees charged to players, even in cases of multiple representation.

213. As regards the alleged "hidden information problem," it posits an agent exploiting greater knowledge of the club's "overall budget" for a player to negotiate a lower salary for the player and a higher club fee for the agent. FA rules require any offer by the engaging club to be communicated to the player.

214. The alleged "hold-up problem" posits an agent exploiting the time pressure of the transfer-window system to demand an increase in the fee paid to them by the club, to the detriment of the player. But if club and player are both willing to succeed, it is unclear how the agent can hold the deal up: if the agent's conduct is not approved by the player, the club can inform the player about it.

215. The alleged "gatekeeper problem" posits agents charging an "access fee" to the club before even entering negotiations on the player's behalf. This is contrary to the FA rules requiring that all offers be communicated to players, which could again be policed by the club, should the agent breach those rules, informing the player (and/or the FA) of the agent's conduct. Such conduct would also be contrary to the agent's own long-term interest, as their value as agents consists in large part of the extensive knowledge about the market gathered from such communications.

216. None of these problems, could justify capping fees in any case of sole representation, or player fees under multiple representation; all are substantially policed by the FA's detailed existing rules; none could take place without the engaging club's complicity or silence; and the Governing Bodies have presented no analysis comparing the detriment to all players and clubs generally from reducing agents' incentives (or abilities) to provide them with high quality

[130] Holt 1, [5.2.5].

services, on the one hand, with the putative mitigation of individual instances of such conduct by bad actors on the other. Even if there is some rational connection with capping any fees by reference to the alleged problems, the conditions of necessity and proportionality cannot be made out on the evidence.

217. The first three "market failures" involve the agent breaching their fiduciary duty to their client through conflict of interest. The Fee Cap is not rationally connected, or necessary and proportionate, for the purpose of managing such conflicts of interest. As to the fourth "market failure", agents are not responsible for any greater incidence of transfers, but if they were, capping their fees per transfer would if anything increase their incentives to encourage transfers.

218. As regards the Governing Bodies' claimed justifications:

(1) reducing the financial incentives for agents to arrange as many transfers as possible as quickly as possible, and limiting conflicts of interest to protect clients from unethical conduct – they do not fall within *Meca-Medina* because they are not concerned with sporting competition, but economic efficiencies, and there is no adequate evidence that these market failures arise;

(2) ensuring the quality of the services provided by football agents at fair and reasonable fees that are uniformly applicable – fixing prices cannot be a legitimate aim in itself;

(3) improving financial and administrative transparency – removing uncertainties between competitors concerning their intended conduct is not a legitimate aim but the essence of an object infringement;

(4) promoting a spirit of solidarity between elite and grassroots football and protecting players who lack experience – this is just another way of saying that agents' fees should be lower;

(5) it may also give rise to conflicting incentives between agents and their clients. A player may wish to leave a club and take a lower salary at another club in order to increase their game time. Under the FFAR the agent is incentivised to encourage them to stay.

*The Tribunal's view*

219. First, in the view of the Tribunal, an analysis of the history of the Fee Cap shows that (1) it was originally driven (and continued to be driven) by the view that agents' fees were excessive; (2) doubts as to the legality were raised from an early stage; (3) the rationale of the hidden information/hold-up/gatekeeper problems for the Fee Cap made an appearance after the policy had been developed.

220. Second, the evidence on the alleged abuses and market failures is not compelling.

221. But, third and critically, whether or not the rationale was simply an *ex post facto* justification for a policy which had been decided upon, or whether or not the alleged abuses and market failures do take place on a scale large enough to cause concern, the overriding point is that the Tribunal has not been able to discern any justifiable connection between the Fee Cap and the claimed abuses and market failures or with the avowed reasons to apply it.

222. The internal FIFA documents on the evolution of the Fee Cap (including those to which the Tribunal was referred in the chronologies supplied by the parties) show clearly that (1) the initial concern was with the level of agents' fees, not because they contributed to the three problems of hidden information/hold-up/gatekeeper, but because they were very large compared with solidarity payments and training compensation; (2) from the outset FIFA knew that EU competition law might present a problem if a fee cap were to be introduced; and (3) in order to deal with the legal problem, FIFA recognised that it would have to find a legal justification to support it. Those three points will be taken in turn, and will, at the risk of repetition, reproduce some of the extracts from the documents already detailed in section VI above.

(1) *The original (and continuing) purpose was to reduce agents' fees because it was thought that they were excessive*

223. The background and discussion paper prepared by the FIFA administration prior to the first meeting of the Task Force[131] recommended restrictions on agents' fees and emphasised: (1) the amounts "going out" of football to agents continues to

[131] E3/6/1, 10, 12.

increase while the money "staying in" football via solidarity and training compensation mechanisms had stalled; (2) the current lack of regulation, had resulted in increasing fees being paid to intermediaries; (3) the money being paid to intermediaries in football was drastically increasing.

224. The recommended: "Restrictions on the amount of fees which agents/intermediaries can receive as commission from a transfer. An example of this may be a cap on the percentage of commission which an intermediary can receive when acting in connection with a domestic or international transfer."[132]

225. Mr Alasdair Bell, the then Deputy Secretary General for administration at FIFA, was present at the meeting and was cross-examined about the background and discussion paper. Mr Bell confirmed that the Fee Cap had always been the subject of a live legal issue.[133] He maintained that the references to commissions being too high was motivated by concerns about contractual stability and clubs being held to ransom by agents.[134] The Tribunal is satisfied that his evidence was given in good faith, but that it was influenced by later justifications, and considers that the whole thrust of the paper is simply that agents are receiving too much commission.

226. The FSC "WHITE PAPER -Transfer System Reform 2018" of June 29, 2018 is a document which strikingly illustrates that the problem which was being addressed was the level of fees itself, rather than a problem of market failure. The White Paper recommended placing a fee cap to "ensure consistency with the objectives of the transfer rules by protecting solidarity and not facilitating speculation" and "promote the protection of the players' interests and stability." Consistently with all the preceding documents, the emphasis of the White Paper is on agents' fees being excessive. The only additional reason given is that the high level of fees encourages engineering of transfers by agents.

227. Among the points which the White Paper made were these:[135] (1) as regards agents, the market was driven by speculation and not solidarity, when the amount spent on

[132] E3/6/14
[133] Transcript, Day 2, p 213.
[134] Transcript, Day 2, pp 170-176.
[135] E3/107/6, 10-11, 34, 46-48, 53-56.

agents' fees had risen to more than US 446 million compared with US $20 million in solidarity payments; (2) while the flow of money to agents had increased, the amounts of money used to make sustainable investments in football via solidarity contributions had stalled; (3) agents' fees paid by clubs generated US $1,586 million between 2013 and 2017 while solidarity contributions raised US $277 million over the same period; (4) in 2017 US $20 million was paid in training compensation compared with US $446 million in agents' fees by clubs; (5) it could not be right that agents' fee far outstripped the amount of money given to those clubs who helped train the player as well as the solidarity contributions to the development of football as whole (which was used to train up the next generation of players); (6) the fees were not linked to services to players, with the result that there was a risk that players' salaries would be affected by the high fees being paid to agents; (7) the possibility for agents, to make huge financial windfalls for the transfer of a player while still under contract might be contributing significantly to increased player mobility, but the statistics made clear that the stability of contract and the interests of the players were being undermined.

228. When on September 24, 2018 the FSC endorsed the principles recommended by the Task Force, the minutes indicate that FIFA emphasised that "the amount of commission paid to intermediaries had increased significantly, while funds invested in football via solidarity and training compensation mechanisms had stalled."[136]

229. The PowerPoint presentation made by FIFA on November 19, 2019 under the title "FIFA's Reform of the Transfer System" is a striking confirmation that FIFA was primarily concerned with the fees which agents were earning. It not only showed the great increase in intermediary fees, with a slide showing agents' fees compared with solidarity contribution and training compensation, but also (as indicated above in the account of the background to the FFAR) it contained an offensive caricature representing an agent with dollar signs above his head and a money bag in one hand and bank notes in the other.[137]

[136] E3/15/4.
[137] E3/643/15, 16.

*(2) FIFA knew, and acknowledged, from the beginning of the exercise that a fee cap risked infringement of competition law*

230. When the FSC met on October 19, 2017, to consider the terms of reference of the Task Force, Mr Infantino, the President of FIFA, is minuted as acknowledging that "there may be legal obstacles associated with" a fee cap.[138]

231. Not long after, the Task Force was being advised that the argument of money leaving the football cycle, via intermediary and agent fees, was increasing was not suitable from a legal point view to justify a fee cap.[139]

232. The documents show that, in the course of, and following, consultation meetings with agents and other interested parties from April/May 2018 and continuing at least until 2020, agents and their lawyers (Bryan Cave Leighton Paisners on behalf of Stellar Group Ltd and Linklaters on behalf of the Association of Football Agents[140]) were expressing the view that a fee cap would infringe competition law.[141]

233. The FIFA administration recognised that the proposed representation provisions and cap modalities were the most controversial proposals and legal action by the agents should be anticipated.[142]

*(3) In order to deal with the legal problem, FIFA recognised that it would have to find a legal justification to support it*

234. On January 22, 2018 the Task Force agreed that, in order to deal with the legal issue, further analysis would be conducted to prove that the current intermediary system did not meet its objectives and the introduction of the proposed measures would improve the situation.[143]

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[138] E3/3.
[139] January 22, 2018: E3/5.
[140] Harman 1, Exhibit, Experts Reports Bundle, tab 61, pp 329, 342.
[141] E.g. April 20, 2020: E3/36; E3/4/4; May 25, 2018: E3/38; April 30, 2019: E3/44; February 7, 2020: E3/47/5.
[142] At a meeting of the Task Force on May 24, 2018: E3/9/3.
[143] E3/5.

235. The undated FIFA memorandum, which was prepared at some time after the Task Force meeting on January 22, 2019, indicated that FIFA was still looking for material which would justify a cap in legal terms. It said:[144]

> … there are still concerns as to how robust the legal arguments in defence of certain aspects of the suggested model are.
>
> Based on the information available today and on the market analysis that has been performed, it has not been possible to arrive at cap levels which are considered sufficiently reasonable and proportionate, and which provide an adequate level of legal certainty. In particular, a lack of information and consistent (documentary) evidence justifying a certain percentage rather than another has been identified. This would, however, be an essential element when having to defend such approach.

236. When on February 26, 2020, at a meeting with the FA, Premier League and DFL, FIFA was asked about the legality of the proposed fee caps, FIFA said that it was taking the matter very seriously and that it would do everything in its power to draft and structure the fee caps "in a way that they are confirmed on a European level in case of a legal challenge."[145]

237. It is apparent from the RBB Economics Report, which was delivered to FIFA in September 2021, that at the time it was commissioned FIFA began to take the competition law issue seriously, since, as the Report says, FIFA's external lawyers had instructed RBB Economics to prepare an economic report that "details the major inefficiencies that affect the transfer system" because "some agents and their legal counsel were expected to challenge" the new rules.[146]

238. Dr Kleiner's evidence[147] was that from the outset in 2017 FIFA was concerned with the specific problems subsequently elaborated in the FIFA Consultation Report, problems association with hidden information, the agent as gatekeeper, and the hold-up. But Dr Kleiner did not have first-hand information of the nature of FIFA's concerns at this stage. The documents show that it was only in July 2018 that the market failures became the cornerstone of the justification for the Fee Cap, and Dr Kleiner did not have relevant responsibilities at that time. He

[144] E3/29/4.
[145] E3/176/11.
[146] E3/90/3.
[147] Kleiner 2, [26]-[27], [38]-[46].

worked with FIFA between 2010 and 2012 as Legal Counsel in the Player Status Department and joined FIFA again in July 2022.[148]

*Conclusion on the purpose of the Fee Cap and its relationship with alleged abuses and market failure*

239. Accordingly the Fee Cap was originally conceived because of concern of the level of agent fees compared with solidarity payments and training compensation. The internal documents and the history of the discussions lead to the almost inevitable conclusion that the rationale of the engineering transfers/hidden information/hold-up/gatekeeper issues was developed as a response to the growing concerns and complaints that a fee cap would infringe competition law.

240. The next question is whether there is evidence to support the theory.

*Evidence on the engineering transfers/hidden information/hold-up/gatekeeper issues*

241. The Consultation Report relies mainly on the surveys, commissioned by FIFA, of the Premier League, players (FIFPRO) and European Clubs (ECA). Ms Demetriou KC, for the Claimants, drew attention to their deficiencies, and, in the view of the Tribunal, only the Premier League survey goes some way to showing that the problems were prevalent. The FIFPRO survey[149] was mainly about conflicts of interest, although about 300 out of about 950 respondents reported that an agent had tried to convince them to request a transfer; but there was only 1 respondent from England in the survey. The ECA survey[150] had only 3 responses from English clubs, and the survey reported only a small minority who had experience of agents demanding access fees.

242. The Consultation Report also relied on the RBB Economics Report, which, as has been seen, said that it had found evidence of the alleged abuses and market failures, in relation to each of which it says that it had found evidence. The evidence was based on the ECA and FIFPRO surveys and also on FIFA data. According to the Claimants, the econometric analysis underlying this Report was not disclosed to the Claimants, and they rely on the fact that FIFA did not call the

[148] Kleiner 2, [9].
[149] I/162.
[150] I/163.

authors of the Report to give evidence before the Tribunal with the result that the content and conclusions of that Report could not be tested in cross-examination.[151]

243. It is not suggested by the Governing Bodies that the Claimants were guilty of the abuses on which the Governing Bodies rely as justification for the Fee Cap, and the Claimants themselves made it clear that they were not part of any abuses of the system.[152]

244. , executive director of , made a witness statement in which he described his experience of agents holding up or preventing transfers in their own interests.[153] He accepted in cross-examination that, if the agent's conduct was not in the interests of the player, complaint could have been made to the FA under existing regulations.[154] , former head of football at , made a witness statement giving an example of a hold-up issue in relation to the signing of .[155] , the , accepted that he had had experience of the gatekeeper/hold-up issues.[156] , gave evidence for the Governing Bodies in her witness statement in general terms of experiences of abuses by agents, including gatekeeper fees, but she was not available for cross-examination.

245. Mr Bayliff's evidence was that he had heard only rumours of the hold-up problem, and that he had never experienced or even heard rumours of the gatekeeper problem.[157] He accepted that the hidden information problem existed,[158] but he had only heard rumours of agents engineering transfers.[159] Mr Angel's evidence was that he did not recognise the suggestion that agents deliberately engineer

[151] Transcript, Day 5, pp 10, 30.
[152] Bayliff 2, [23]-[24]; Angel 2, [61]-[63]; Ecvet 2, [32].
[153] [15]-[20].
[154] Transcript, Day 3, pp 140-141.
[155] [29]-[31].
[156] Transcript, Day 2, pp 103-105.
[157] Transcript, Day 1, pp 127128.
[158] Transcript, Day 1, pp 137-138.
[159] Transcript, Day 1, p 139.

transfers,[160] but he had heard rumours of the gatekeeper problem,[161] and Mr Ecvet's evidence was that he had not come across the alleged market failures,[162] and he did not accept that he had heard rumours about agents engineering transfers[163] or the other issues.[164]

246. The Tribunal is prepared to accept, even on the very limited concrete evidence before it, that the abuses on which the Governing Bodies concentrate do exist in the market, but it does not have enough material to form a conclusion on how prevalent they are. But it should add that there has not been any suggestion that any of the Claimants is guilty of any such conduct.

*No link between the Fee Cap and the alleged abuses and market failures*

247. But, as indicated above, and irrespective of whether the claimed abuses or market failures were the real reason for the Fee Cap, and irrespective of whether they have been proved to exist, the Tribunal has not been able to discern any justifiable connection between the Fee Cap and the claimed abuses or market failures or with the avowed reasons to apply it. Indeed, it sees considerable force in the point made by [165] that an unintended consequence of removing clubs' flexibility to incentivise agents will be the creation of a perverse incentive for agents to focus only on the money.

248. Both points are made forcefully by Mr Angel:[166]

> Even assuming that - contrary to my own experience in in the industry - FIFA or the FA have found evidence that some agents can and do "engineer" transfers, I am at a loss to understand how the introduction of a cap on agents' fees could help address this issue. In fact, I am concerned that capping the fees of agents who might engage in such practices would have the opposite effect: since they would not be earning as much from transactions, then this would seem to incentivise certain agents (who are less worried about their long term reputation) to encourage players to negotiate more frequent transfers/renegotiations in order to increase their commission income.

[160] Angel 1, [61].
[161] Transcript, Day 1, p 220.
[162] Transcript, Day 2, p 33.
[163] Transcript, Day 2, p 69.
[164] Transcript, Day 2, p 97.
[165] , [18] .
[166] Angel, [65].

249. The Tribunal can see no answer to the point that not only is there no connection between a fee cap and the alleged abuses and market failures, but that a fee cap would incentivise agents to recoup the difference by encouraging more transfers on which fees would be earned.

250. The Tribunal, therefore, concludes that the Fee Cap is not justified by a legitimate objective and hence not reasonably necessary for any such objective.

*Mainz and Dortmund decisions*

251. The Tribunal notes that the Landgericht Mainz, in its Order of Reference to the European Court dated March 30, 2023 in *FT and RRC Sports Gmbh v FIFA I* (now Case C-209/23) appears, on the basis of the evidence before it, to question whether, on the assumption the FFAR fall within the scope of the *Wouters/Meca-Medina* principle*,* the Fee Cap is indeed a necessary and proportionate response to the alleged abuses and market failures identified by FIFA. The decision of the Landgericht Dortmund, May 24, 2023,[167] granting an injunction to football agents prohibiting FIFA from implementing certain provisions of the FFAR, including the Fee Cap and Pro Rata Payment Rules, takes a similar approach.

***(ii) The Pro Rata Payment Rules***

252. The purpose of the Pro Rata Payment Rules is said to be directed at agents encouraging their clients to leave clubs before the end of the contractual period.

253. First, the undated FIFA memorandum (prepared at some time after the Task Force meeting on January 22, 2019)[168] states that a *pro rata* rule should help to act as a deterrent to an agent encouraging a player to leave and therefore promote contractual stability.

254. Second, a March 2022 FIFA document on “Football agent reform: Consultation process- Feedback” said that the Pro Rata Payment Rules were justified on grounds of contractual stability to prevent engineering of transfers.[169]

[167] ECLI :DE :LGDO :2023 :0524 :0801 :23KART.00
[168] E3/29/3.
[169] E3/65/49.

255. Third, the FIFA Consultation Report (2022) said: "**To protect contractual stability** the FFAR contemplates that service fees shall be paid in instalments every three months for the duration of the negotiated employment contract …"[170]

256. Fourth, Dr Kleiner said that the Pro Rata Payment Rules help to protect contractual stability by ensuring that the agent has an interest in their client's contract remaining in force and prevents engineered transfers.[171]

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

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

***(iii) Dual Representation and Client Pays Rules***

259. As to whether these two Rules can be considered to be reasonably necessary to tackle the market failures and abuses identified by FIFA, the Tribunal can be brief. This is because the Tribunal finds that neither rule is in any event restrictive of competition by object or effect.[172] The Tribunal's assessment is that the Dual Representation Rules and the Client Pays Rule can be regarded as reasonably necessary for, respectively, the avoidance of conflicts of interest and the promotion of transparency.

***5. Ancillary restraints principle***

260. The Governing Bodies' primary position is that the *Wouters/Meca-Medina* principle applies, but they also rely on the ancillary restraints principle in the alternative.[173] But they did not develop the point in their Written Submissions

[170] E3/1/60 (emphasis in original).
[171] Kleiner 2, [55].
[172] [353]-[354], [371]-[373], below.
[173] Points of Defence, [7.1]; Written Submissions, [71], n. 87.

(merely noting that the *Wouters/Meca-Medina* principle has sometimes been regarded as a specific application of the ancillary restraints principle), nor did they rely on it in their submissions at the hearing.

261. An "ancillary restraint" is a restriction which is outside the Chapter I prohibition because it directly related to and is objectively necessary for the implementation of the main transaction, which is not itself anti-competitive in nature, such as a non-compete clause in a commercial agreement for the sale of a business: Bellamy & Child, *European Law of Competition* (8th ed 2018), [2.199].

262. In *European Superleague Company SL v UEFA and FIFA* Rantos A.-G. treated[174] the *Wouters/Meca-Medina* line of cases as a development of the commercial ancillary restraints principle by applying it to professional bodies and then to sports organisations, so that non-commercial objectives could be weighed against a restriction of competition, and that those objectives could be found to take precedence over that restriction, with the result that there was no infringement of Chapter I restrictions. But he emphasised[175] that it was not enough to rely on vague or general objectives in the abstract; it was also necessary, if the existence of the objectives is established, that the restraint be objectively necessary for the implementation of the main transaction and proportionate to it.

263. In his Opinion of the same date in the appeal[176] from *International Skating Union v Commission*[177] Rantos A.-G. added[178] that application of the concept of ancillary restraints did not require the balancing of pro-competitive and anti-competitive effects, since that analysis could be carried out only within the specific framework of Article 101(3) TFEU.

264. In these proceedings the Governing Bodies are not relying on the commercial ancillary restraints principle but are doing no more than re-stating, and relying upon, the *Wouters/Meca-Medina* principle, and, in the view of the Tribunal, fail for the same reasons.

[174] Case C-331/21, Opinion, December 15, 2022, at [87] et seq.
[175] At [89].
[176] Case C-124/21P.
[177] Case T-93/18 EU:T:2020:610 [2021] 4 CMLR 9.
[178] At [42].

## D Would the Proposed Rules (or any of them) prevent, restrict or distort competition by object or effect?

### *1. The legal principles: object restriction*

265. The only section 2(2) example in the Chapter I prohibition relied on by the Claimants is section 2(2)(a): decisions or agreements which "directly or indirectly fix purchase or selling prices or any other trading conditions."

266. The Claimants say that the Fee Cap is the fixing of purchase prices; and that the Pro Rata Payment Rules, the Dual Representation Rule, and the Client Pays Rule fall within the category of fixing "other trading conditions."[179]

267. The parties accept that the test for object infringement is that expressed in, especially, *Groupement des Cartes Bancaires v Commission*,[180] that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that they can be regarded as being, by their very nature, harmful to the proper functioning of normal competition, such that there is no need to examine their actual effects on the market.

268. In that decision the European Court said:

> 49 …it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects …
>
> 50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition …
>
> 51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
>
> 52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show

[179] Claimants' Written Submissions, [36].
[180] C-67/13P EU:C:2014:2204 [2014] 5 CMLR 22.

> that competition has in fact been prevented, restricted or distorted to an appreciable extent …
>
> 53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question …
>
> 54 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account ….
>
> 58. Secondly, … the General Court erred in finding … that the concept of restriction of competition by "object" must not be interpreted "restrictively". The concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by art.81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.
>
> …
>
> 70. Although …the fact that the measures at issue pursue [a] … legitimate objective … does not preclude their being regarded as having an object restrictive of competition, the fact remains that that restrictive object must be established.

269. In *Gazdasági Versenyhivatal v Budapest Bank Nyrt*,[181] the European Court ruled that the same anti-competitive conduct could regarded as having the restriction of competition as both its object and its effect.

270. That ruling is also one of many to repeat[182] that the concept of restriction of competition "by object" must be interpreted restrictively. See also *Super Bock Bebidas SA v Autoridade da Concorrencia*.[183]

[181] Case C-228/18 C-228/18 EU:C:2020:265, at [58].
[182] At [54].
[183] Case C-211/22 EU:C:2023:529, at [32].

271. In this context it is also relevant that the European Court held in *Competition Authority v. Beef Industry Development Society*[184] that in considering competition by object:

> … close regard must be paid to the wording of … [the] provisions [of an agreement] and to the objectives which it is intended to obtain. In that regard, even supposing it is to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.

272. A buyers' price cartel will generally be an object restriction. In *Campine NV v Commission* the General Court said:[185]

> In cases where the anticompetitive object is readily apparent, the analysis of the economic and legal context in which the practice occurs may naturally be limited to what is strictly necessary …. Just such a readily apparent anticompetitive object is present where competitors enter into price-fixing agreements with each other …
>
> …
>
> Such coordination of purchase prices, with the aim of reducing or preventing their increase and thus, ultimately, increasing the cartel participants' profit margins, reveals a sufficient degree of harm to competition that it may be found that there is no need to examine its effects. A price cartel can be regarded, by its very nature, as being harmful to the proper functioning of normal competition. In that regard, it must be borne in mind that the first example of a cartel given in Article 101(1)(a) TFEU, expressly declared incompatible with the internal market, is precisely one which 'directly or indirectly [fixes] purchase or selling prices or any other trading conditions'. The practice that was the object of the cartel is thus expressly prohibited by Article 101(1) TFEU, as it involves inherent restrictions on competition in the internal market …

273. According to the CMA, buyer cartels, including those which coordinate purchasers' individual competitive behaviour "through, for example, fixing or coordinating purchase prices or aspects of purchase prices", amount to object infringements: CMA, *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* ("the CMA Guidance").[186]

[184] Case C-209/07 EU:C:2008:643 [2008] E.C.R. I-8637, at [21].
[185] Case T-240/17 EU:T:2019:778 at [295], [297].
[186] CMA184, August 2023): [6.9], [6.12].

274. In *Cartes Bancaires*, above, the European Court said that "it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant …to prove that they have actual effects on the market …"[187]

### 2. *The legal principles: effects restriction*

275. The basic test is set out in the CMA Guidance[188]:

> A horizontal agreement that does not in itself reveal a sufficient degree of harm to competition may still be prohibited by the Chapter I prohibition where it has restrictive effects on competition. For a horizontal agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case (and unlike where the agreement restricts competition by object), it is necessary to establish a counterfactual, that is, to assess competition within the actual context in which it would occur if the agreement had not existed.
>
> Agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and a third party. The agreement must reduce the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties, for example, by causing a change in its incentives. It is well-settled that to determine whether a restriction of competition has an appreciable effect on competition, it is necessary to determine the relevant market both in terms of product and geography and the market power of the undertakings who are party to the restriction and indeed the scope and impact of the restriction.[189]

276. It is well-settled that, in order to determine whether a restriction of competition has an appreciable effect on competition, it is necessary to determine the relevant market both in terms of product and geography and the market power of the undertakings which are party to the restriction and the scope and impact of the restriction.

[187] At [51].
[188] OJ 2023 C259/1, footnotes omitted.
[189] [3.42]-[3.43], footnotes omitted.

### *3. Application to the Proposed Rules*

### *(i) The Fee Cap*

*Restriction by object*

277. The Claimants assert that the Fee Cap involves an agreement/decision "directly [to] .. fix purchase … prices" within the meaning of s. 2(2)(a) of the 1998 Act and by fixing the maximum price (in terms of a percentage) is an object restriction. The Claimants submit that the imposition of a price cap in a competitive market is an extraordinary measure; such a power is generally reserved to independent statutory regulators where a market is *not* competitive. There is no dispute between the experts that the markets for agents' services are competitive.

278. The Governing Bodies put forward essentially three points against the conclusion that the Fee Cap is an object restriction.

279. First, they say that not all agreements or decisions of associations concerning price measures constitute object infringements. For this proposition they cite three decisions. Two of the cases do no more than decide that recommended or mandatory fees for professionals could be justified on the basis of the *Wouters* principle: *Consiglio nazionale dei geoligi v Autorità garante della concorrenza e del mercato*[190] (recommended expert fees); *CHEZ Elektro Bulgaria*[191] (mandatory scale imposed by legislation of legal fees). But the Tribunal has already found, applying the test set out by the European Court, that the *Wouters/Meca-Medina* principle is not applicable to the facts of this case. The third case indicates no more than that, in vertical agreements (which the European Court observed are, by their nature, often less damaging to competition than horizontal agreements), it is for the national court to ascertain, pursuant to the ruling in *Cartes Bancaires*, whether price fixing in such an agreement presented a sufficient degree of competitive harm to competition: *Super Bock Bebidas SA v Autoridade da Concorrencia.*[192]

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[190] Case C-136/12 EU:C:2013:489.
[191] Joined Cases C-427/16 etc *AD* EU:C:2017:890.
[192] Case C-211/22 EU:C:2023:529, at [33]-[35].

280. Second, they say that the rules cannot be assimilated to a horizontal cartel between competitors, since the rules were not made by the football clubs but by FIFA, which represents a number of stakeholders in football of which the clubs form only a small part.

281. Third, they argue that the purpose of the Fee Cap was to correct market failures and reduce the incidence of abuses by agents in the transfer market.

282. There can be no dispute that (1) agents operate in a competitive market, (2) the Fee Cap fixes the price at which the agents can offer their services on that market and (3) that price caps imposed horizontally by purchasers constitute an object restriction.

283. As to the submission that this price fixing cannot be assimilated to a horizontal cartel by purchasers, the answer was, in the Tribunal's view, provided by the Claimants in their closing submissions that the clubs were "not adopting unilateral policies on the market in respect to the fees that they pay agents and that is as a result of an agreement between them or a decision of association of which they are members."[193]

284. Nor can the Tribunal accept the submission that the purpose of the Fee Cap was to reduce abuses by agents or correct abuses or market failures for the reasons already given above.[194]

285. So far as the abuses or market failures point is concerned the Tribunal accepts the Claimants' submission that competition law views with disfavour the imposition of price caps by private bodies in a competitive market.

286. The Tribunal therefore rejects the Governing Bodies' submission that the price cap in the present case is not an object restriction.

287. In reaching this conclusion, the Tribunal is reaching a different one from that of the CAS Award. Given the general importance of this case, it is appropriate for the Tribunal to make the following brief observations on that Award. First, it is unable to agree with the conclusion that there is no price fixing because the price

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[193] Transcript, Day 5, pp 53-54.
[194] [219]-[250].

cap "leaves room for agents to compete beneath the cap."[195] As the Claimants point out, no consideration in the CAS Award was given to the point that the price cap operates as a buyers' cartel. Rather, it appears to analyse the price cap as if it were equivalent to the imposition of a maximum resale price imposed by an individual supplier pursuant to a vertical agreement with its reseller, hence, the reference to the Guidelines on Vertical Restraints.[196] Second, it does not appear that the CAS had the benefit of the evidence of the genesis of the Fee Cap that this Tribunal has had through the process of documentary disclosure. In the Tribunal's view, it is not possible to reach a proper conclusion as to the context within which the Fee Cap was adopted without access to that evidence.

*Restriction by effect*

288. The Claimants' case was that the Fee Cap would significantly reduce agents' revenue and threaten their profitability particularly as their business models (not unlike writers' and actors' agents) depend on a minority of higher value deals to subsidise their work for less profitable clients (including the young, lower-league and/or women players) and the provision of Other Services. Such a reduction in revenue would distort competition on the market for agents' services as it would reduce agents' ability and incentive to invest in the services they provide to as wide a range of customers.

289. The Governing Bodies' position was that the majority of transactions will not be affected at all by the caps since the vast majority of any reduction in revenue will be attributable to a very small proportion of the affected transactions (c. 5%) and that in any event agents should be able to charge for Other Services so that in fact the revenue reductions will not be as high as those being put forward by the Claimants.

290. The Claimants' witnesses gave evidence of the anticipated losses from the Fee Cap.[197] Mr Holt said[198] that Mr Harman's analysis showed that the impact of the Fee Cap on agents' revenues would be a 42% reduction in the Premier League

[195] At [238].
[196] At [240].
[197] Bayliff 2, [33]-[34]; Angel 1, [80]-[85]; Ecvet 2, [21]-29]; Ismail, [9].
[198] Joint Expert Statement, p 5; Holt 2, [4.2.5].

and 54% in lower leagues. He agreed with Mr Harman that a large share of the revenue impact due to the Fee Cap is driven by the top 5% of affected transactions, which means that it will have a more limited impact on revenues for most agents. The loss in revenues would be likely to be increased by the Pro Rata Payment Rules' requirement to pay fees in quarterly instalments. Those revenue losses would inevitably reduce agents' ability and incentives to incur costs and make investments by reducing the return they would make on such costs/investments, particularly in an environment where the agents' market is competitive, and would also lead to redundancies. The fact that a large share of the revenue impact due to the Fee Cap was driven by the top 5% of affected transactions did not lessen their impact. This supported the Claimants' case that such transactions cross-subside other transactions which would inevitably be affected by the Fee Cap.

291. Mr Harman disagreed. His view was that the Claimants represented only four agencies and had a small sample of a market. There were thousands of agents and the market was unconcentrated. Three of the four Claimants' analyses were based on a small sample (i.e., 15 or less) of their highest-value transactions involving star players. The Claimants' calculations relied on a forecast of future revenues (for which full supporting evidence had not been provided), which might introduce additional uncertainty to the analyses. Correcting for the issues and assuming 30% revenue relates to Other Services, yielded the following revenue reductions: (i) for Wasserman from █████ to █████; (ii) for Areté from █████ to ████; (iii) for CAA Base from ████ to ███ (maximum compensation scenario); and (iv) for Stellar from ███ to ████ (maximum compensation scenario).

292. In his Reply Report Mr. Holt commented on Mr. Harman's figures on revenue reductions, relying on FIFA's or the FA's dataset[199] to which Mr. Holt had not had access until shortly before he submitted his first Report. Mr. Holt noted that Mr. Harman's figures showed that 46% of all transactions in the Premier League would have been affected by the Fee Cap and the Premier League accounted for 87.6% of total agent fees reported to the FA. This meant that the Fee Cap alone would affect nearly half of the English agents market in volume terms. He

[199] There were three data sets, FIFA's TMS data which covered 4,607 international transfers from 2013/14 to 2022/23, the Premier League data which covered 420 transactions in 2019, and a sample of 150 transactions for English Lower leagues in 2019.

considered that Mr. Harman's figure, based on those data sets, of a reduction in agents' revenue between 40-55% was substantial and clear evidence of anti-competitive effect.[200] This was disputed by Mr. Harman in his Reply Evidence. In his view Mr. Holt relied uncritically on the evidence put forward by the Claimants which contained numerous errors and did not take account of unbundling.

293. The experts disagreed on whether the effect of the Fee Cap could be mitigated by "unbundling," i.e. the agents charging separately for the services which are presently included in their fee. In addition to Football Agent Services, most football agents provide a range of Other Services (as defined in the FFAR) to their clients, e.g. negotiating players' marketing and endorsement contracts; providing legal counselling and dispute resolution services; providing assistance with career and post-career planning; providing assistance with personal care; and providing assistance with financial planning. Agents currently bundle Other Services with Football Agent Services.

294. Mr Holt's view was that bundling is efficient as players and coaches may not know what Other Services they will need over time and the extent to which they will need them. A pay-as-you-go arrangement which Mr Harman suggests would be impractical because players and coaches would not have access to services at short notice, and the frictions associated with negotiating the price for such services (e.g., time required for negotiation and contracting) would make it impractical to ensure that players and coaches have access to the services when they need them. If charging separately for Other Services was an efficient and commercially sensible course of action for football agents, then the question would arise why they had not already done so, particularly given that the agents market was competitive.[201]

295. In his oral evidence Mr Holt re-affirmed his view that unbundling would be economically inefficient, including the point that there would be issues about the affordability of offering services which the players might not wish to purchase.[202]

[200] Holt 2, [4.2.13].
[201] Joint Expert Statement, pp 13-15; Holt 1, [4.2.8]-[4.2.15]; Holt 2, [4.2.21]-[4.2.23].
[202] Transcript, Day 4, pp 90, 103.

296. Mr Harman's view was that unbundling is likely to be feasible because: (i) the Claimants' witnesses state that Other Services are valuable to players and clubs, and so logically they should be willing to pay for them separately; (ii) for some Other Services, such as sponsorship deals, agents already separately contract for such services; (iii) pricing structures already exist in many markets where customers' demands are uncertain on an ex ante basis; (iv) Mr Holt provides no evidence that a pay-as-you-go arrangement would be impractical ; and (v) as many Other Services are available from providers other than agents, it must be possible to sell them on an unbundled basis.[203]

297. As regards efficiency: (i) if the bundled prices currently charged are competitively determined, they should reflect the value of Other Services; and (ii) no evidence has been provided that bundling is efficient in this case. Economics predicts that, if players' needs are not known on an *ex ante* basis, unbundling is likely to result in an increase in player welfare (e.g., due to transparency).

298. The effect of unbundling may be material. Assuming that 40% of total revenue relates to Other Services, the estimated impact of the Fee Cap would reduce from 40%-54% to 13%-22% on dual-representation transactions.

299. Mr Harman accepted that he was not giving evidence that unbundling would actually happen, but simply that it would be economically efficient.[204] He accepted that, for example in the case of PR services, an agent would come under competitive pressure from other PR service providers,[205] and he had no answer to the question how, if revenues were to be maintained, a player on a very large salary would be prepared to pay more for the same service as a player on a lower salary.[206]

300. The only other evidence on this point came from a statement in evidence from ██ ████████, a former ████████████ player, that he would choose to pay

[203] Joint Expert Statement, pp 13-15; Harman 2, [2.4.4]; [5.4.3]-[5.4.14].
[204] p 193.
[205] p 198.
[206] pp 204-205.

for advice and assistance services if they were no longer included in the agent's fee.[207]

*The Tribunal's view*

301. The first question is identification of the relevant product and geographic market. For the purpose of this exercise the Tribunal will proceed on the basis, advanced by Mr Harman, that the relevant market is a single market for football agent services to clubs and players/coaches which is at least Europe-wide.[208]

302. The next question is whether the Fee Cap is likely to have an appreciable effect on competition on that market compared to competition as it currently takes place, which is the appropriate counter-factual in the present case. In examining this issue, it is important to emphasise that section 2 of the 1998 Act refers not simply to the prevention, and restriction of competition, but also to its distortion. A distortion occurs when competition takes a different form from what it would have in the absence of the agreement.

303. The Tribunal considers that the Fee Cap is likely to have an appreciable effect on competition.

304. The Fee Cap has been introduced by FIFA, the global regulator of football, with the averred intention of addressing the "problem" of large amount of revenue "leaving" the global football "family". It is required to be implemented by all national associations, including the FA.

305. There is no dispute that the Fee Cap will reduce very considerably payments made to agents. Indeed, as the Tribunal has found, that was its sole original and continuing purpose.[209] Further, according to Mr Harman's own figures, 46% of all transactions in the Premier League would be affected by the Fee Cap.[210] The Premier League is the most important league in the world in terms of revenue.[211]

[207] Transcript, Day 1, p 104.
[208] See Harman 1, at [4.5.29].
[209] [223]-[239], above.
[210] [292], above.
[211] [20], above.

306. The beneficiaries of revenue reductions will include large and well-resourced football clubs who pay agents' fees and who currently have to compete with each other when fixing the agents' remuneration without any Fee Cap. Inevitably the Fee Cap will distort competition between those clubs.

307. The evidence shows that such revenue reductions are also likely to adversely affect, in a substantial manner, the business model of such agencies in terms of reduction of investment in areas of the business that are less profitable such as young and female players. This is likely to occur even though only a proportion of future transfers are likely to have significant knock-on effects, due to the loss of revenue, on all other aspects of such agents' businesses as well as a transfer of resources from agents to the clubs.

308. The Tribunal does not accept the Governing Bodies' "unbundling" theory that charging for Other Services would be feasible and effectively alleviate such a distortion of competition. If agents were to start charging for Other Services they would face competition for the first time for such Other Services from other service providers, such as PR consultants. Moreover, even if such a scenario were likely to occur, far from being an answer to the distortion of competition, it would result in a further distortion of competition as services which were provided by the agents at no extra cost to all players would be charged for. Such a major change in the market would not be driven by the forces of competition but by the imposition of a Fee Cap.

***(ii) Pro Rata Payment Rules***

*Claimants*

309. The Claimants' case[212] is that the Pro Rata Payment Rules are among the Rules which purport to set the terms on which agents can contract with clubs, and which will restrict competition (1) by object, in that they amount to a collective fixing of terms by the clubs, and (2) by effect, as they will reduce fees, the level of investment, and services.

[212] Points of Claim, [51(1)]), [52]. [57]-[58], [62]; Written Submissions, [120]-[122].

310. They will reduce fees actually payable below the caps for these reasons: (1) at present, when a contract between a player and an engaging club is concluded, it is common for any fees owed to an agent by the player to be paid over the course of the contract, while, often, fees owed to an agent by the engaging club are paid at the start of the contract, or over a shorter timescale; (2) players' contracts tend to be renegotiated well before they expire, generally before the contract enters its final 18 months; (3) in such cases, the Rules, by spreading the fee owed by the engaging club over the term of the contract, and restricting the amount of the fee payable to that relating to the remuneration actually received, will lead to the engaging club only being liable for a fraction of the fee actually agreed.; (4) engaging clubs who sell a player on during the term of their contract will be able to take the benefit of that contract (through receipt of a transfer fee and having the services of the player) while avoiding paying the agent who arranged that contract on behalf of the club their full fee for that service.

*Governing Bodies*

311. The Governing Bodies' case[213] is that the Pro Rata Payment Rules do not amount to an infringement by object or effect because whether the Rules will reduce agents' revenues can only be determined on a transaction-by-transaction basis. Taking account of the overall context in which the Pro Rata Payment Rules were adopted and in which they will be implemented and their objectives, any restrictions arising out of those rules are inherent in the pursuit of legitimate objectives and proportionate to those legitimate objectives.

312. The Rules pursue legitimate objectives, namely to ensure the proper functioning of the player/transfer system and thereby to protect the integrity of the sport, by limiting conflicts of interests, enhancing contractual stability, protecting players, and ensuring financial and administrative transparency. They ensure that the agent has a financial stake in the continuation of the existing negotiated employment contract, to counterbalance their potential financial stake at the inception of a new employment contract; and that an agent engaged by a player has a continuing interest in ensuring that the client continues to be paid by the employing club. As to financial and administrative transparency, the Rules promote transparency by

[213] Points of Defence, [129]-[130]; Written Submissions, [128]-[134].

establishing a uniform rule which applies to all transactions involving agents, viz. payment on a *pro rata* basis by reference to either the remuneration or the transfer compensation; and the rules also thereby ensure that agents' fees are commensurate with the value actually generated by the service they provide. The Rules go no further than necessary in pursuing those objectives. In order to reduce any financial incentive agents might have to destabilise a player's contract, it is necessary to make agents' fees contingent on the subsistence of that contract. A uniform rule applicable to all types of transaction is necessary in order to avoid incentivising agents to act for one type of client over another.

313. Consequently they do not fall within the *Cartes Bancaires* test of a sufficient degree of harm to competition.

314. A full analysis of the effects is therefore required, and whether the Rules will reduce agents' revenues depends on: (1) the payment terms which would have been agreed in the absence of the Proposed Rules; and (2) when the relevant player's contract is renegotiated or when the relevant player transfers to a new club (and whether the duration of players' contracts and/or the length of time players stay with a club are affected by the Proposed Rules). The Governing Bodies say that neither the Claimants nor their expert have sought properly to analyse the likely effects of the Pro Rata Payment Rules, for example using historical data, and no estimate of the alleged effects of these rules on agents' revenues is provided.

*Restriction by object: the Tribunal's view*

315. It is common ground between the parties that, in determining whether the Pro Rata Payment Rules are an object restriction, it is not necessary to look at evidence of effect.

316. In the view of the Tribunal, the Pro Rata Payment Rules are an object restriction. Their intention is to "promote contractual stability," i.e. to discourage agents from encouraging, or participating in, transfers before the end of the contractual period, or, as it was put in submissions on behalf of FIFA, "less incentive to move [players] on with a view to earning a lump sum on the transfer."[214] The terms of

[214] Transcript, Day 1, p 81.

those Rules are therefore clearly intended to interfere with, and reduce, the payments actually made by engaging clubs to agents for services provided by the agents. In the words of the CMA Guidance this amounts to "fixing or coordinating … aspects of purchase prices." Indeed their avowed objective is to change the structure of the market not only by changing the method of remuneration of agents but also to disincentivise and reduce economic activity by the agents

317. The purpose is set out clearly in the evidence. These examples will be sufficient.

318. First, an undated FIFA memorandum (prepared at some time after the Task Force meeting on January 22, 2019) states that a *pro rata* rule should help to act as a deterrent to an agent encouraging a player to leave and therefore promote contractual stability.[215]

319. Second, a March 2022 FIFA document on "Football agent reform: Consultation process- Feedback" said[216] that the Pro Rata Payment Rules were justified on ground of contractual stability to prevent engineering of transfers.

320. Third, the FIFA Consultation Report (2022) said:[217] "**To protect contractual stability** the FFAR contemplates that service fees shall be paid in instalments every three months for the duration of the negotiated employment contract …" (emphasis in original).

321. Fourth, Dr Kleiner said that the Pro Rata Payment Rules help to protect contractual stability by ensuring that the agent has an interest in their client's contract remaining in force and prevents engineered transfers.[218]

322. The argument of the Governing Bodies is that the Pro Rata Payment Rules pursue the legitimate object of furthering contract stability. However, without it being necessary to reach a conclusion on whether the object is legitimate, it is well-settled that the pursuit of a legitimate objective does not preclude a restriction

[215] E3/29, prepared for May 9, 2019 meeting of Task Force: evidence of Mr Bell: Transcript, Day 2, p 213.
[216] E3/65/49.
[217] E3/1/60 (emphasis in original).
[218] Kleiner 2, [55]; Transcript, Day 3, pp 45-46.

constituting an object restriction: *Competition Authority v. Beef Industry Development Society*.[219]

*Restriction by effect*

*Evidence*

323. The evidence from the Claimants[220] is that this rule will result in a reduction in revenues, because agents generally negotiate most of the club-side fees to be paid within the first year on the basis that it is a fair commercial reward for the services they have provided in securing them a valuable asset (i.e. the player), and all of the work involved in negotiating that contract will already have been completed. Where the player's contract is re-negotiated during the currency of the contract (as is common when players have two to three years left on their contract), the remainder of the fee will be forfeited.

324. The experts agree that the Pro Rata Payment Rules are mostly concerned with engaging club-side payments, but disagree on its effect.[221]

325. In his first report Mr Holt expressed the view[222] that the Pro Rata Payment Rules would reduce agents' expected revenues and distort their incentives, market outcomes, and competition.

326. In his first report Mr Harman said[223] that based on the Premier League dataset, only about 17% of the transactions involve an engaging club agent only were paid by a single fixed instalment, whereas about 75% of the transactions were paid by multiple instalments. This implied, in his provisional view, that the Pro Rata Payment Rules only affected a relatively small proportion of transactions. He limited his conclusion to a calculation of the reduction in the net present value (NPV) of fees as a result of agents being paid over a longer period of time. But he did not express a view on the amount which they would lose if a new contract

[219] Case C-209/07 EU:C:2008:643 [2008] E.C.R. I-8637, [21].
[220] Angel, [93]-[94]; Bayliff 1, [22]-[23]; Bayliff 2, [35]; Ecvet 1, [9].
[221] Holt 1, [4.2.39]-[4.2.45]; Holt 2, [4.4.2]-[4.4.8]; Harman 1, [6.5.5]-[6.5.14]; Joint Expert Statement, [11].
[222] [4.4.42].
[223] [6.5.8]-[6.5.9].

were agreed before the expiry of the old contract, how far in advance of expiry, because he did not have the necessary data.[224]

327. In response, Mr Holt said[225] that Mr Harman had erroneously assumed that front loading of agent fees was equal to agents being paid by a single fixed instalment by clubs. In fact agents typically front load club-side fees such that there are no outstanding fees by the time a player has one or two years left on his contract, as this is often the time when a player's contract is re-negotiated. Mr Harman had also excluded Premier League transfers with dual representation (agents working for the player and the engaging club) from his analysis (which accounted for about 85% of transfers in the Premier League data). The effect was that it was likely that Mr Harman had under-estimated the number of contracts which would be affected by the Rule. Accordingly, the requirement to pay club-side fees in quarterly instalments will further reduce agents' revenues as it will prevent agents from recovering even the capped percentage of the originally agreed club-side fees once a contract is re-negotiated (or expires before the agreed end date, e.g., if the club is relegated).

328. Mr Harman's response[226] repeated that his analysis suggested that only a small proportion of transactions would be affected, and would have a limited impact on Agents' revenues.

*Restriction by effect: the Tribunal's view*

329. In the light of this material, the Tribunal concludes that the Claimants have produced sufficient evidence that they will incur significant loss of revenue by reason of the Pro Rata Payment Rules. As to whether such loss of revenue is likely to have an appreciable effect on competition in the relevant market, the Tribunal considers that its analysis on the effects of the Fee Cap is, by parity of reasoning, applicable to the Pro Rata Payment Rules. Accordingly the Tribunal finds that such Rules constitute a restriction of competition by effect.

[224] Harman 1, [6.5.7].
[225] Holt 2, [4.4.6] et seq.
[226] Harman 2, [5.5.4]-5.5.5].

### *(iii) Dual Representation Rule*

330. The effect of Article 12(8)-(10) of the FFAR is that the only dual representation which is allowed is that of player and engaging club, provided that prior explicit consent is given by both the player and the engaging club. Acting for both the player and the releasing club (which Mr Harman estimates[227] occurs in 0.7% of transfers in the top 5 leagues, and which is not defended by any party to these proceedings), or acting for all three of the player, releasing club and engaging club, is prohibited.

*Claimants*

331. The Claimants include[228] the Dual Representation Rule as one of those Rules which purport to set the detailed terms on which football agents can contract with football clubs and restrict competition by object, in that they amount to a collective fixing of those terms by the club; and also by effect,[229] including the claim that preventing market participants from choosing the option of multiple representation will make the market for players' and coaches' labour less efficient. They say that the combination of the Dual Representation Rule and the higher cap for representing releasing clubs will distort agents' incentives by making it significantly more attractive to represent those clubs than other potential parties to a transfer.[230]

332. They say[231] that it is common, when contracts and transfers are being negotiated, for one agent to provide services to both the player and the engaging club (which they describe as "dual representation"). In some transfers, services can be provided to the player and both clubs involved (which they describe as "multiple representation"), although often the two clubs are represented by different individual agents within the same agency; or two smaller agencies that may work together regularly for such purposes.

333. Mr Angel's evidence is:[232]

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[227] Harman 1, [7.7.3].
[228] Points of Claim, [52]; Written Submissions, [36].
[229] Points of Claim, [61], [62(4)].
[230] Written Submissions, [56(2)].
[231] Points of Claim, [21], [23].
[232] Angel, [46].

> In certain circumstances, albeit much less frequently, an agent may act for all three of the parties to a transfer; the releasing club, the engaging club and the player. We may act for the releasing club where they ask us to sell a player or, in an international transfer, where one of our local offices is involved. In some circumstances we will have already negotiated the terms of the player's contract with the engaging club, and so our role will shift to brokering the transfer fee between the releasing club and the engaging club. The benefits of the agent acting in this brokering role are largely linked to convenience and ensuring that transfers are conducted as efficiently as possible. Ultimately it is relationship-driven, good agents are well connected and will have a relationship with most, if not all, clubs in the top divisions. Their player clients will want the transfer to proceed and well- connected and experienced agents can play a significant role in bridging the gap between the two clubs to get the transfer done. We are open with our clients about the fact that, where we do act for multiple parties in a transfer, there are occasions (although they are rare) on which we are also paid by the releasing club in addition. Our fees to a releasing club are typically based on a percentage of the transfer fee paid from the releasing club to the engaging club.

334. Mr Angel does not give figures, but he refers to multiple representation being much less frequent.

335. Dual and multiple representation is a long-established practice in the industry, as recognised and governed by Regulations E1–E3 of the FA WWIR, which the FA intends to replace with the Proposed Rules. The Regulations set out conditions that must be satisfied for such representation to occur. These include the disclosure to all parties to the transaction of the intended arrangements; including any proposed fees; all parties having a reasonable opportunity to take independent legal advice (or, in the case of players, advice from the Professional Footballers' Association); and all parties providing their prior written consent, in a from prescribed by the FA, to the agent providing services to any other party to the transaction.

336. The Claimants submit[233] that in so far as multiple representation may in theory give rise to potential conflicts of interest, the restriction on multiple representation is not necessary or proportionate for the purpose of managing such conflicts, given the agent's fiduciary duty to act in the best interests of their client under FFAR, Article 16(2)(a) (and the general law), and the existing FA rules on disclosure. Even if additional regulation were necessary, the measures which

[233] Points of Claim, [69(1)]; Written Submissions, [123] et seq.

already apply under the FA WWIR are less restrictive ways of achieving such an aim.

337. As regards effects, the Claimants say[234] that, in addition to contributing to a reduction in agents' fees, and thereby in other services to players and in investment, the Dual Representation Rule will also eliminate other existing forms of multiple representation which clubs and players/coaches sometimes find helpful, thereby reducing efficiency; the combination of that Rule and the higher cap for representing releasing clubs will distort agents' incentives by making it significantly more attractive to represent those clubs than other potential parties to a transfer; that will have knock-on effects on the markets for the labour of players and coaches, who will have less access to high-quality representation, and so be less optimally matched, and have reduced bargaining power, vis-à-vis clubs.

*Governing Bodies*

338. The Governing Bodies deny that the Dual Representation Rule is an infringement by object or effect. They say[235] that the proper functioning of the player/transfer system has been undermined by the practice of certain agents in acting for multiple clients with conflicting interests in the same transaction. In particular, the interests of the player/coach and the releasing club, and the engaging club and releasing club, are not aligned. An agent purporting to represent all three parties is subject to a serious conflict of interest and cannot properly advance the interests of each of their clients.

339. If there are conflicts of interest, transfers may take place not because they are in the interests of a player, but because they are in the interests of the agent. The prohibition on multiple representation prevents agents from acting for different parties whose interests are diametrically opposed.[236] According to the FIFA Consultation Report: "A limitation on triple representation is necessary to raise professional and ethical standards by **preventing conflicts of interest.**"[237]

[234] Written Submissions, [56].
[235] Points of Defence, [34].
[236] Kleiner 2, [55(b)].
[237] E3/1/20 (emphasis in original).

340. The Report goes on to say that football agents are able to exploit conflicts of interest in the transfer system and the speculative nature of agents' fees to generate excessive fees from multiple parties. The Report gives examples of a transfer within the Italian Serie A involving a serious breach of trust; and of the transfer of a famous player from the Bundesliga to the Premier League, where the agent acted for both clubs and received a total fee of about €45.5 million on the single transfer, amounting to about 70% of the total fixed remuneration of the player.

341. Taking account of the overall context in which the Dual Representation Rule was adopted and in which it will be implemented and its objectives, any restrictions arising out of that Rule are inherent in the pursuit of legitimate objectives and proportionate to those legitimate objectives (and in any event, applying the appropriate margin of discretion, are reasonably considered to be so by the Governing Bodies). The Dual Representation Rule is therefore outside the scope of the Chapter I prohibition.

342. The Dual Representation Rule pursues legitimate objectives. The ultimate objective of the rule is to ensure the proper functioning of the player/transfer system and thereby to protect the integrity of the sport. In seeking to do so, the rule pursues the following key objectives: (1) raising and setting minimum professional and ethical standards for the occupation of football agents; (2) ensuring the quality of the service provided by football agents at fair and reasonable service fees that are uniformly applicable; (3) limiting conflicts of interest to protect clients from unethical conduct; and (4) protecting players who lack experience or information relating to the football player/transfer system.

343. The Rule is an appropriate means of pursuing those objectives. A rule precluding agents from acting for particular parties where to do so would give rise to a conflict of interest is a suitable means of limiting potential conflicts of interest. In so doing, the rule raises professional standards for agents, ensures the quality of the service provided, and protects players.

344. The Rule goes no further than necessary in pursuing those objectives, and takes a gradated approach requiring informed consent where potential conflicts of interests are less acute (as between an individual and an engaging club) and only prohibiting dual representation where the conflict of interest is intractable and

informed consent is therefore not sufficient (as between individuals and releasing clubs; releasing clubs and engaging clubs; and all parties).

*Expert reports*

345. The experts deal with this issue mainly in the context of the economic consequences of the agents' drop in income if they cannot act for all three parties.

*Mr Holt*

346. Mr Holt[238] says that there are benefits in multiple representation which may be driving some clubs, players, and coaches to choose multiple representation under certain circumstances. For example, if the same agent has good existing relationships with the different parties, then it may be easier for such an agent to identify an efficiency-enhancing match between the parties. In such circumstances it would be more efficient to negotiate a transfer if the agent is trusted by all parties. If the parties consent to be represented by the same agent, there is no reason why this should be prohibited. Restricting multiple representation can lead to inefficiencies by increasing the risk of a no-deal outcome and preventing an efficient match from being realised (or it might be realised with a delay and higher costs of search and negotiations) thus decreasing the probability of a beneficial trade. Even where an efficient match might otherwise be realised, it may be with a delay and/or higher costs associated with the search and negotiations.

347. Multiple representation may facilitate solutions and trades to be agreed which are mutually beneficial. Prohibiting multiple representation may cause disputes and delays due to unresolved conflicts between the parties and agents who may have incomplete information about the other side's needs and may be unable to identify common ground. Using only one agent can also save costs, time, and effort and increase the probability of an efficient transfer occurring.

348. He agrees with Mr Harman that cases of multiple representation which would be prohibited under the Proposed Rules are relatively rare. But in certain situations clubs and players find it helpful to have all parties (buying club, selling club, and

[238] Holt 1, [4.2.54]-[4.2.61]; Holt 2, [4.5.14]-[4.5.17].

players) represented by the same agent and rules precluding such representation will prevent efficiencies associated with it. Using only one agent can save costs, time, and effort and increase the probability of an efficient transfer occurring.

349. According to Mr Holt's Second Expert Report[239] dual representation for player and engaging club is the norm, accounting for 85% of Premier League transfers. This will continue to be allowed under the Proposed Rules, subject to the provisions on prior written consent.

*Mr Harman*

350. Mr Harman[240] says that prohibited instances of multiple representation make up a minority of total transfers involving agents. Based on the FIFA Dataset, there is a distribution of 0.7% dual releasing-engaging club, 1.2% dual releasing club - player, and 0.9% tripartite representation in the top five leagues, which means that the total percentage of prohibited representations in the FIFA dataset is 2.8%. This element of the FFAR is unlikely to significantly alter the pattern of activity in the market for agent services.

351. The prohibition on multiple representation would not have any material effect because there is a strong economic incentive on clubs to identify and procure the best talent for their team, within the relevant labour markets. If there were to be any marginal affect, the aggregate effect on market efficiency would be de minimis.

*The Tribunal's view*

352. Since in the present proceedings the Claimants do not complain about that aspect of the Rule which prohibits dual representation in the case of the releasing club and the player, the practical question relating to the Rule is limited to multiple representation, i.e. the agent receiving fees from all three parties to a transfer, the player, the releasing club and the engaging club, and that is the Claimants' real complaint.

[239] [4.2.25].
[240] Harman 1, [7.7.1]-[7.7.4].

353. In the view of the Tribunal, the Claimants have not established that the prohibition of multiple representation is an object restriction. They have not made out a case that the rule "reveals a sufficient degree of harm to competition that it can be regarded as being, by its very nature, harmful to the proper functioning of normal competition" for the purposes of the *Cartes Bancaires v Commission* test. This is a rule of a very different character to that of the Fee Cap and the Pro Rata Payment Rules which limit the remuneration of agents in respect of permitted transactions.

354. Nor, in view of the very small proportion of cases in which multiple representation occurs, amounting to less than 1% according to the FIFA dataset (tripartite representation), can there be said to be an appreciable effect on competition.

***(iv) Client Pays Rule***

355. Under the FFAR payment of the fee due to an agent is to be made exclusively by the client, i.e. the player or coach, and the client may not contract with or authorise a club to make such payment ("the Client Pays Rule"): Article 14(2). This is subject to an exception, where an agent represents a client whose remuneration is below US $200,000, and the client consents to payment by the club: Article 14(3).

356. The Governing Bodies have confirmed that clubs will be allowed to pay agents' fees on behalf of the client by deducting the fees from their remuneration (provided the client expressly consents). But, by virtue of the Client Pays Rule, the practice of clubs paying agents on behalf of players/coaches by way of an additional taxable payroll benefit (in England, by way of a taxable P11D payment) is not permitted under the FFAR and will not be permitted under the NFAR.

*Claimants*

357. The Claimants say that the Client Pays Rule (as explained by the Governing Bodies) fixes a key trading condition, and, like the Pro Rata Payment and Dual Representation Rules, amounts to a collective refusal to deal on terms which clubs are currently willing, and commonly do, with agents. Accordingly, the Client Pays Rule infringes the Chapter I prohibition by object. It is also alleged to be a restriction by effect.

*Governing Bodies*

358. The Governing Bodies say that the Client Pays Rule is not an infringement by object or effect.

359. In particular it pursues legitimate aims, in particular limiting conflicts of interest, improving transparency and protecting players. It is an appropriate means of pursuing those objectives: it reduces the risk of any conflict of interest arising from a scenario in which the party responsible for paying the agent is the counterparty to the client, rather than the client themselves; by providing that the person by whom the agent is hired is also the person who pays the agent, the rule ensures that clients (and, in particular, players) are acutely aware of the fees charged by agents and thereby improves transparency and protects players; it goes no further than necessary in pursuing those objectives. As a result of the limited experience and knowledge of many players in relation to the operation of the player/transfer system, the objectives pursued could not be achieved merely by ensuring the transparency of payments made by a club to a player's agent.

*Evidence*

360. According to the evidence of the Claimants' witnesses:[241] (1) it is usual for the club to pay agents on behalf of players/coaches by way of a taxable payroll benefit; (2) the Client Pays Rule will have a significant impact on the relationships between agents and players/coaches, because it will put the significant administrative burden of payment on players; and there will be additional administrative costs involved with having to send quarterly invoices to clients; (3) the players will see that they now have to pay upfront, something which they did not have to pay before, which is likely to cause confusion and points of tension; and (4) the players will be worse off because they will have to pay VAT on the benefit paid by the club in this way.

361. For the Governing Bodies, Dr Kleiner said that it was standard practice for clubs, rather than players, to pay agent fees. As a result, players often had little or no knowledge of (or interest in) the value of the services provided by their agent, or of the service fee charged, or how those fees could affect their own salaries. The

[241] Angel, [44], [91]-[92] (and Transcript, Day 1, pp 232, 262); Ecvet 2, [18].

Client Pays Rule promotes accountability and transparency and helps to avoid conflicts of interest, and if players were paying for agent services, they would have an interest in knowing exactly what they were paying for and why.[242] Mr Newton said that the FA recognised the benefits of requiring that the client of an agent be responsible for paying the agent directly. The client would have absolute clarity as to the payments they were making to their agent. In contrast, where a club made a payment on behalf of a player there was a risk that the player was insufficiently aware of the payments that were being made on their behalf to their agent.[243]

362. The expert evidence throws little light on the Client Pays Rule. The experts were asked for their opinion on whether the Client Pays Rule (inter alia) had a material effect on agents' revenues. In the Joint Expert Statement[244] Mr Holt said that it was unclear, but added that the Client Pays Rule created additional (administrative) costs for agents and/or players and risked that players would overpay for agent services relative to clubs (under dual representation) if a majority of the services were provided to clubs.[245] He said in cross-examination that the Client Pays Rule did not lend itself to economic analysis.[246]

363. Mr Harman[247] was unable to assess the likely impact on revenue of the Client Pays Rule, because of a lack of historical transaction data, but he had not identified any economic basis to conclude that payment of fees by the clubs had material economic value to agents in itself. Mr Harman considered that the Client Pays Rule did not have a material impact on agents' revenue: the basis for an alleged effect was unclear as neither the Claimants nor Mr Holt had articulated on what basis it was a valuable service from the agents' perspective.

364. The documents to which the attention of the Tribunal was drawn (although not in the present context) throw little light on the justification for the Rule. On January 22, 2018, the Task Force minutes[248] recorded that stakeholders had agreed on

[242] Kleiner 2, [49], [55(c)].
[243] Newton, [97].
[244] p 15.
[245] Holt 1, [4.2.46]-[4.2.50].
[246] Transcript, Day 4, pp 91-92.
[247] Harman 1, [2.5.6].
[248] E3/5.

these key principles (inter alia) “Cap on agent commissions and only allowing actual client (player or club) to pay.”

365. In July 2018 the CIES Report (which was commissioned by UEFA) said: “A wide consensus exists about the fact that players should assume the responsibility to pay their agents.”[249]

366. At a meeting of the FSC on September 24, 2018 members of the FSC said that a “Client Pays” rule would address current abuses and avoid conflicts of interest and increase transparency.[250]

367. The Parrish Interim Report said[251] in November 2018 that the arguments for a Client Pays Rule included that there would be no confusion regarding whether an agent was acting in the best interests of the player, and it “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.” The arguments against included: “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.”

368. An undated FIFA memorandum probably prepared for the May 9, 2019 meeting of Task Force said that a Client Pays Rule would enhance transparency and should also lead to the amounts being paid better reflecting the real value of the services actually provided: the client will be aware of the cost of the services being provided and eventually may question them if deemed to be excessive: “It is assumed that this will lead to the market beginning to correct itself.” [252]

369. In September 2021, the RBB Economics Report (which, as indicated above, was commissioned by external legal counsel to FIFA in the light of expected legal action, to detail the major inefficiencies in the transfer market) suggested that there was a need for a Client Pays Rule because agents were being paid by parties

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[249] J1/26/86.
[250] E3/16/7.
[251] E3/109/21-22.
[252] E3/29/2.

they did not represent or represent parties who did not pay, giving rise to a conflict of interest.[253]

370. Of most direct relevance is the FIFA Consultation Report in 2022,[254] which said that the FFAR contemplated the Client Pays Rule pursuing the following objectives: (1) to limit conflicts of interest to protect clients from unethical behaviour; (2) to improve financial and administrative transparency; (3) to ensure the quality of the services provided by agents to their clients; (4) to establish and improve minimum professional and ethical standards for the activities of agents; and (5) to eliminate abusive, disproportionate and speculative practices.

*The Tribunal's view*

371. Applying the test in *Cartes Bancaires v Commission,* the Tribunal is satisfied that the Claimants have not shown that the Rule reveals sufficient, or indeed any, degree of harm to competition that it can be regarded as being, by its very nature, harmful to the proper functioning of normal competition. Once again, this is a rule of a very different character to that of the Fee Cap and the Pro Rata Payment Rules which limit the remuneration of agents in respect of permitted transactions.

372. Nor have the Claimants shown any appreciable effect on the market.

373. Consequently the Tribunal's conclusion is that the Client Pays Rule is neither an object or effect restriction.

## E In so far as any of the Proposed Rules are considered to infringe the Chapter I prohibition, do they fulfil the conditions for exemption set out in Competition Act 1998, section 9?

374. Section 9 of the 1998 Act provides:

> **Exempt agreements**
>
> (1) An agreement is exempt from the Chapter I prohibition if it—
>
> (a) contributes to—
>
> (i) improving production or distribution, or
>
> (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

[253] E3/90/9.
[254] E3/1/59.

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.

375. Section 9 lays down four cumulative conditions that need to be met for an exemption. The Proposed Rules that need to be examined under this heading are the Fee Cap and the Pro Rata Payment Rules which the Tribunal has found infringe the Chapter I prohibition. In this respect, in accordance with section 9(2), the burden of proof lies on the Governing Bodies.

376. The Commission Guidelines on the application of Article 81(3) of the Treaty[255] ("the Exemption Guidelines") state:[256]

> 3.2 **First condition of Article 81(3): Efficiency gains**
>
> 3.2.1. *General remarks*
>
> 48. According to the first condition of Article 81(3) the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The provision refers expressly only to goods, but applies by analogy to services.
>
> 49. It follows from the case law of the Court of Justice that only objective benefits can be taken into account. This means that efficiencies are not assessed from the subjective point of view of the parties. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Such cost reductions are a direct consequence of a reduction in output and value. The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Article 81(3).

[255] OJ 2004 C101/97.

[256] Footnotes omitted. See, to the same effect, the CMA Guidance [3.47]-[3.50]. The CMA will have regard to the Commission Guidelines in accordance with the 1998 Act, s. 60A: [347], n. 70.

> 50. The purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.
>
> 51. All efficiency claims must therefore be substantiated so that the following can be verified:
>
> (a) The nature of the claimed efficiencies;
>
> (b) The link between the agreement and the efficiencies;
>
> (c) The likelihood and magnitude of each claimed efficiency; and
>
> (d) How and when each claimed efficiency would be achieved.

377. The subsequent paragraphs of the Exemption Guidelines provide further guidance on how such efficiencies are to be assessed. The message is clear: vague assertions are not sufficient. As the CMA Guidance puts it:[257]

> Cogent empirical evidence is needed to carry out the required evaluation of any claimed efficiencies for the purposes of fulfilling the conditions of the section 9 exemption.

378. The Governing Bodies' written submissions on this were short and did not differentiate between any of the Proposed Rules. On the first condition in section 9, namely "improving production or distribution or promoting technical or economic progress", the Governing Bodies submitted that the FFAR/NFAR improve (i) the quality of the services provided by football agents and (ii) the efficiency of the player/transfer system. In support of this, they relied on the expert evidence of Mr Harman.

### *1. The Fee Cap*

379. Mr. Harman's evidence was that the Fee Cap "*may* elevate the importance of other dimensions of competition [between agents], in particular quality of service,"[258] "*potentially* increases"[259] the alignment of agent and player outcomes; and increases transparency on agent fees as a result of unbundling. To the extent that

[257] [3.49].
[258] Harman 1, [10.2.3] (emphasis added).
[259] Harman 1, [10.2.4.] (emphasis added).

the Fee Cap resulted in some reduction in agent fees, it was likely to represent an overall cost saving for players and clubs within the transfer system. Taken together, continued matching of players and clubs at a lower cost would mean that the Proposed Rules enhanced the efficiency of the transfer system. In cross-examination he, in effect, accepted that he had carried no analysis to support his conclusions which were based on "something that I see in many regulatory markets."[260] In the Tribunal's view this goes nowhere near enough meeting the test to satisfy the first condition of section 9, as explained in the Exemption Guidelines and the CMA Guidance.

380. As regards specifically the potential cost savings, the Exemption Guidelines state[261] that cost savings that arise from the mere exercise of market power by the parties to an agreement cannot be taken into account. This reasoning applies to the imposition of the Fee Cap by the FFAR and NFAR.

381. Mr. Harman also considered that agents will remain incentivised to achieve the best possible outcome for their players,[262] However, what the first condition of section 9 requires is an improvement in the position compared to the position prior to the agreement. It is not sufficient that the agreement merely maintains the *status quo ante*.

382. Since the Governing Bodies' case on exemption fails on the first condition, it is unnecessary to consider the other three conditions set out in section 9.

### *2. Pro Rata Payment Rules*

383. No separate argument has been put forward to justify the Pro Rata Payment Rules. Insofar as the Governing Bodies rely on the same arguments as under the Fee Cap, the Tribunal rejects it for the reasons given above.

[260] Transcript, Day 4, p 35.
[261] [94].
[262] Harman 1, [10.2.4].

## F Does the FA have a dominant position within the meaning of the Competition Act 1998, section 18, in one or more relevant markets? If so, would the Proposed Rules (or any of them) amount to an abuse of such dominant position?

384. At the hearing, both the Claimants and the FA accepted that the question of abuse under Chapter II stands or falls with the Chapter I infringement, but there is still an issue on the market in which the FA is said to be dominant.[263]

385. In view of the conclusions which the Tribunal has reached on the Proposed Rules, it follows that, on the basis that the introduction of the Fee Cap and the Pro Rata Payment Rules in the NFAR would be an abuse, the only issue is whether the FA is dominant in a relevant market.

*Claimants*

386. The Claimants' case is broadly as follows.

387. The FA has a dominant position in (indeed, monopolises) these markets: (i) the market for the governance of professional football in England; (ii) the markets for the provision of football agents' services to (a) English football clubs, and/or (b) the players and coaches with which they deal; and (iii) the market(s) for the labour of such players and coaches. The FA, as the emanation of the clubs, itself holds a collectively dominant position on those markets. The Claimants rely on *Piau v Commission (FIFA intervening)*,[264] and its application to FIFA in the CAS Award.[265]

388. The English football clubs that, through the FA, agree and impose the rules that bind them and other key stakeholders in the English sport are collectively dominant in those markets.

389. As a result of the clubs' collective conduct, the agents, players and coaches are forced to comply with the NFAR in order to participate in those markets.

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[263] Transcript, Day 5, p 62 (Claimants); p 71 (Governing Bodies).
[264] Case T-193/02 EU:T:2005:22 [2005] E.C.R. II-209.
[265] At [206].

*Governing Bodies*

390. The Governing Bodies say[266] that the FA is not an emanation of the English clubs. It is made up of a broad church of representatives from all levels and aspects of the sport in England, and is not controlled by the clubs which deal with agents. Neither *Piau v Commission* nor the CAS Award is determinative because the FA was not a party to either case, and so they did not consider the facts relating to the FA, which show that it is not subject to the control of the clubs which engage with agents and cannot be characterised as an emanation of the buyers of agents' services. In any event, they are not collectively dominant in the markets for agents or players.

*Expert evidence*

391. The experts were asked whether there was a market for the governance of professional football.[267] In summary, the view of Mr Holt, the Claimants' expert, was that there was a market for the governance of professional football in England. In this market, the FA's ability to implement and enforce the set of rules which govern professional English football (including the regulation of football agents) stemmed from its control over the organisation and authorisation of football competitions, and the commercialisation of professional football. Football clubs need to participate in competitions against other clubs to commercialise their activities, and no professional football competition in England can effectively be organised without being sanctioned by the FA. The FA's consent would be required for clubs to establish their own competitions and that clubs' participation in the European Super League would require them to be affiliated with the FA and the League itself recognised by FIFA.

392. The view of the Governing Bodies' expert, Mr Harman, was that there was no separate market for the governance of professional football. From an economic perspective, the FA's governance function does not entail offering any goods or services on a market and is therefore not an economic activity, and therefore a market for governance of professional football does not exist. Governance is a

[266] Written Submissions, [160]-[162].
[267] Holt 1, [3.3.2] et seq; Holt 2, [3.2.1] et seq; Harman 1, [4.4] et seq; Harman 2, [3.2.2] et seq; Joint Expert Statement, pp 1-2.

separate activity and should not be analysed as part of the organisation or commercialisation of professional football. His assessment is not affected by the FA's role in authorising competitions. He considered that Mr Holt's analysis did not relate to a governance market, but to the organisation or commercialisation of professional football.

*The Tribunal's view*

393. The Tribunal considers, essentially for the reasons given by Mr Harman, that the theory of a market in the governance of football is artificial and unrealistic in the context of this case.

394. The only real question is whether the professional clubs, through the FA, are collectively dominant in the market for football services, as the CAS Award held in relation to FIFA.

395. In the view of the Tribunal that question turns on whether the decision of the Court of First Instance in *Piau v Commission* is applicable to this case. That decision proceeds on the basis that FIFA, as an association of football associations, is both (a) acting on behalf of football clubs and therefore has a collective dominance in the market for the provision of services[268] and also (b) not that it has a dominant position in the market for governance, but that as a supervisory body, it holds a dominant position on the market for players' agents' services even though it is not an actor on that market.[269]

396. In particular, the Court said:[270]

> 112. In the present case, the market affected by the rules in question is a market for the provision of services where the buyers are players and clubs and the sellers are agents. In this market FIFA can be regarded as acting on behalf of football clubs since, as has already been stated, it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs.
>
> …
>
> 115. It seems unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players' agents in the present case,

[268] At [113].
[269] At [115].
[270] At [112], [115]-[116].

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

397. It is true that the FA has a very large constituency of stakeholders of whom the professional clubs are a small minority, but the position would not appear to be materially different from that of FIFA in *Piau*. The Court of First Instance considered that it was sufficient that FIFA was the emanation both of the national associations (which would have included the FA) and the clubs. It did not think it was necessary to determine whether FIFA was under the control of the clubs. If FIFA is to be treated as an emanation of the clubs, the same must be true of the national associations, such as the FA.

398. It follows, therefore, that the Tribunal accepts the approach in *Piau*, and decides that the FA has a dominant position in the market for agents’ services in England as an emanation of the clubs. On that basis the Tribunal concludes that the introduction of the Fee Cap and the Pro Rata Payment Rules would be an abuse of a dominant position.

## G Is the common law doctrine of restraint of trade excluded by the Competition Act 1998, such that, if the claims brought under that Act are dismissed, there can be no claims in restraint of trade? To the extent that the Proposed Rules (or any of them) amount to restraints of trade, are they reasonably necessary for the protection of a legitimate interest?

399. The unreasonable restraint of trade issue arises only in relation to the Client Pays Rule and the multiple representation rule aspect of the Dual Representation Rule, in the case of each of which the Tribunal has found that there is no Chapter I infringement by object or effect.

400. The traditional doctrine of public policy is summarised in *Chitty on Contracts*, 34th ed (2021) at [18-123]: “All covenants in restraint of trade are *prima facie*

unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public."

401. It is common ground that the Client Pays Rule and the multiple representation rule are *prima facie* restraints of trade.[271] The principal issues between the parties are these: (1) is, as the Governing Bodies submit, the restraint of trade doctrine excluded by a principle that where a statute covers the same ground as a common law doctrine, the statute must, as a matter of necessary implication, have excluded the common law doctrine? (2) if not, are (as the Governing Bodies submit and the Claimants deny) the restraints reasonable?

402. On the second issue, the Tribunal has come to the conclusion that the Dual Representation Rule as applied to multiple representation serves to reduce the risk of conflicts of interest and is a reasonable restriction. The Client Pays Rule serves a reasonable purpose of ensuring that the player/coach is aware of the fees being charged by the agent, and is therefore not unreasonable.

403. The Tribunal will therefore deal shortly with the issue of the effect of the 1998 Act.

404. In *R (Child Poverty Action Group) v Secretary of State for Work and Pensions*[272] Lord Dyson JSC said:[273]

> If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament. …
>
> The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme. The court should not be too ready to find that a common law remedy has been displaced by a statutory one, not least because it is always open to Parliament to make the position clear by stating explicitly whether the statute is intended to be exhaustive. … The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by coexist with it.

[271] Governing Bodies' Written Submissions, [172].
[272] [2010] UKSC 54, [2011] 2 AC 15.
[273] At [33]-[34].

405. If that test is applied, there is no possible reason to conclude that the common law restraint of trade doctrine, which has been developed over more than 300 years since *Mitchel v Reynolds* (1711) 1 P Wms 18, and which is a rule of public policy, has been impliedly abolished by the 1998 Act. There are no inconsistent remedies which are so substantial that Parliament could have intended that the common law remedy should not have survived.

406. The Governing Bodies relied on *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd*,[274] in which Langley J. decided that, in a case covered by the 1998 Act, the common law was superseded, but that case depended on the supremacy of EU law ("this court is precluded by Community law"[275]), and does not apply post-Brexit: see *Chitty*, [18-124].

## X Remedies, ancillary matters and operative part

407. The Claimants sought an order restraining the FA from passing or implementing the Proposed Rules.[276] The FA has indicated in correspondence and at the hearing[277] that it would not implement the NFAR pending the decision of the Tribunal. At this stage, the Tribunal will make a declaration, and reserve any further question on remedies to a further final award.

408. The Tribunal will give directions on the exchange of submissions on costs and the provision of costs schedules after hearing from the parties with (if possible) an agreed form of schedules and timetable for exchange of written submissions.

409. The Tribunal would wish to record its thanks to counsel and solicitors for all the assistance they gave the Tribunal and, in particular, for being able to present what was a complex case within the five days allotted for the hearing, when the electronic material for the hearing included more than 30 witness statements, almost 2000 documents, and more than 70 legal authorities.

410. Accordingly, the Tribunal:

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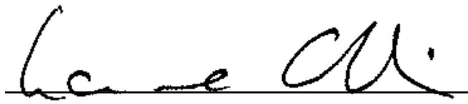
[274] [2004] EWHC 44 (Comm), [2004] 2 C.L.C. 489 (applied in *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch)).
[275] At [266].
[276] Points of Claim, [72(1)].
[277] Transcript, Day 5, pp 165-166.

(1) Declares that, if the FA implements the Fee Cap and the Pro Rata Payment Rules in the NFAR, it will be in breach of the Chapter I prohibition and the Chapter II prohibition.

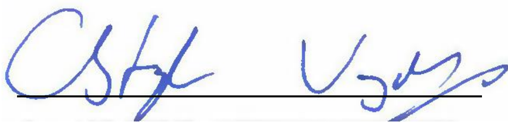
(2) Dismisses the Claimants' other claims.

(3) Reserves any further remedy to a further Final Award if not agreed by the parties.

(4) Reserves the incidence and quantum of legal costs and arbitration costs to a further Final Award if not agreed by the parties.



Rt Hon Lord Collins of Mapesbury



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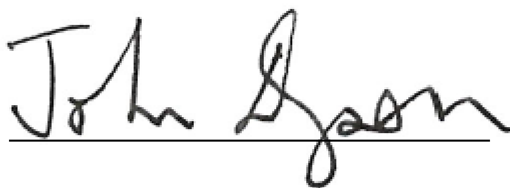

Rt Hon Lord Dyson

Place of arbitration: London,

Dated: November 30, 2023
[Rev 12/12/23]