CAS 2023/O/9370 Professional Football Agents Association (PROFAA) v. FIFA

ARBITRAL AWARD

rendered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Romano F. **Subiotto KC**, Avocat in Brussels, Belgium, and Solicitor-Advocate in London, United Kingdom

Arbitrators: Mr. Olivier **Carrard**, Attorney-at-law, Geneva, Switzerland
Mr. Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

in the arbitration between

Professional Football Agents Association (PROFAA), Zürich, Switzerland
Represented by Mr. Juan de Dios Crespo Pérez of Ruiz-Huerta & Crespo in Valencia, Spain
-Appellant-

and

Fédération Internationale de Football Association (FIFA), Zürich, Switzerland
Represented by Mr. Miguel Liétard in Zürich, Switzerland; Dr. Jan Kleiner in Zürich, Switzerland and Ms. Victoria Wakefield KC in London, United Kingdom
-Respondent-

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

TABLE OF CONTENTS

PAGE

I. THE PARTIES

1. The Professional Football Agents Association ("PROFAA" or the "Claimant") is an association under Swiss law with registered office in Zürich, Switzerland, According to its Statutes, an objective of PROFAA is to safeguard and promote the interests of global football agents worldwide.

2. The Fédération Internationale de Football Association ("FIFA" or the "Respondent) is the international governing body of football. FIFA is an association under Swiss law and has its registered office in Zürich, Switzerland.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and arguments based on the Parties' written submissions, oral pleadings, and evidence adduced at the hearing. While the Panel has considered all the facts, legal arguments and evidence submitted by the Parties in these proceedings, it refers in its Arbitral Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. This dispute concerns the legality of the new FIFA Football Agents Regulations ("FFAR"), that the FIFA Council approved on 16 December 2022, in its meeting in Doha, Qatar.

5. By letter of 18 October 2022, (the "Letter") PROFAA proposed to FIFA that the FFAR be assessed by CAS in ordinary proceedings with a view to achieving legal clarity prior to the enforcement of the FFAR.

6. By letter of 12 December 2022, FIFA notified to PROFAA its agreement to have the legality of the rules assessed by CAS in ordinary proceedings. FIFA further specified the following conditions, namely that the only object of a possible dispute to be submitted to the Court of Arbitration for Sport ("CAS") be a review of the validity of the FFAR under the FIFA Statutes and regulations, Swiss law and EU law, the dispute be submitted to a Panel of three arbitrators, with the President of the Panel to have specific knowledge of and experience with EU law, the language of the arbitration be English, the parties waive the right to request any provisional or conservatory measures, the parties agree on a procedural calendar at the onset of the proceedings, with the aim of CAS issuing a motivated award by 31 July 2023 at the latest, the parties agree that the CAS award rendered be public, the parties bear their respective share of the advance of costs, and each party remain solely liable for its respective legal costs. FIFA added that should, contrary to FIFA's position, CAS find that the FFAR are in breach of the relevant regulations under scrutiny, FIFA commits to accept such a ruling of CAS and amend the FFAR accordingly prior to their entry into force.

7. By email of 14 December 2022, PROFAA proposed to FIFA two modifications of these conditions, namely that the only object of a possible dispute to be submitted to CAS be a review of the validity of the FFAR under the FIFA Statutes and regulations, Swiss law,

EU law *and any other law that the panel may wish to use in the award*, and that the parties agree on a procedural calendar at the onset of the proceedings, with the aim of CAS issuing a motivated award by 31 July 2023 at the latest, *and in any case before the assumed entry into force of the approved Regulations*.

8. By return email of 14 December 2022, FIFA proposed two changes to PROFAA's proposed modifications, namely that the only object of a possible dispute to be submitted to CAS be a review of the validity of the FFAR under the FIFA Statutes and regulations, Swiss law and EU law. *If the Panel deems appropriate, it may additionally refer also to other laws*, and the parties agree on a procedural calendar at the onset of the proceedings, with the aim of CAS issuing a motivated award by 31 July 2023 at the latest, and in any case before the *full* entry into force of the approved Regulations.

9. FIFA further repeated the additional conditions that would apply to this dispute, namely that the dispute be submitted to a Panel of three arbitrators, with the President of the Panel to have specific knowledge of and experience with EU law, the language of the arbitration be English, the parties waive the right to request any provisional or conservatory measures, the parties agree that the CAS award rendered be public, the parties bear their respective share of the advance of costs, and each party remain solely liable for its respective legal costs.

10. By email of 15 December 2022, PROFAA notified to FIFA its agreement of the above conditions.

III. PROCEEDINGS BEFORE COURT OF ARBITRATION FOR SPORT

11. On 19 December 2022, PROFAA filed its Request for Arbitration.

12. On 11 January 2023, the Claimant nominated Mr Olivier Carrard as an arbitrator.

13. By letter of 17 January 2023, FIFA informed the CAS Court Office of the agreed procedural calendar, namely:

- 28 February 2023 – Statement of Claim to be submitted by the Claimant;
- 21 April 2023 – Answer to the Statement of Claim to be submitted by the Respondent;
- 2 May 2023 – Replica, if necessary, to be submitted by the Appellant;
- 13 May 2023 – Duplica, if necessary, to be submitted by the Respondent;
- 22 – 24 May 2023 – Hearing;
- 31 July 2023 – Motivated award to be notified at the latest on this date.

14. On 1 February 2023, FIFA filed its "*brief*" Statement of Defence in reply to PROFAA's Request for Arbitration.

15. In a separate of the same 1 February 2023, FIFA nominated Prof. Luigi Fumagalli as an

arbitrator.

16. On 28 February 2023, PROFAA filed its Statement of Claim.

17. On 6 March 2023, the CAS Court Office informed the Parties that, pursuant to Article R40.3 CAS Code, and on behalf of the President of the CAS Ordinary Arbitration Division, the Panel appointed to decide the present case was constituted as follows:

President: Mr Romano F. Subiotto, Attorney-at-Law, Brussels, Belgium

Arbitrators: Mr Olivier Carrard, Attorney-at-Law, Geneva, Switzerland
Prof. Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

18. On 29 March 2023, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in this arbitration (the "Oral Hearing") on 23 and 24 May 2023, and requested the Parties to provide the names of all persons who would attend it.

19. On 4 April 2023, PROFAA informed the CAS Court Office that its representatives at the Oral Hearing would be Messrs. Juan de Dios Crespo Pérez, Agustín Amorós Martínez, and Alexandre Zen-Ruffinen, counsel for the Claimant, and Mr. Patrick Domínguez, president of PROFAA.

20. On Friday 21 April 2023, FIFA filed its Answer to the Statement of Claim.

21. By letter dated 24 April 2023, the CAS Court Office acknowledged receipt of the Answer to the Statement of Claim. Due to the lapse in the transmission of the Answer to the Statement of Claim by the CAS Court Office to PROFAA, the Parties mutually agreed to modify the calendar by extending the deadline for submitting the Replica and Duplica by two days each.

22. On 24 April 2023, FIFA informed the CAS Court Office that its representatives at the Oral Hearing would be Messrs. Miguel Liétard, Director of Litigation, Dr. Jan Kleiner, Director of Football Regulatory, Luis Villas-Boas Pires, Head of Agents, Victoria Wakefield KC, Matthew Kennedy, Donald Slater and Benoit Keane, counsel for the Respondent.

23. On 4 May 2023, PROFAA filed its Replica.

24. By letter dated 5 May 2023, the CAS Court Office acknowledged receipt of the PROFAA's Replica.

25. On 11 May 2023, PROFAA informed the CAS Court Office that its witnesses at the Oral Hearing would include Messrs. Jonathan Booker and Kieran Maguire BA FCA.

26. By letter dated 11 May 2023, the CAS Court Office acknowledged PROFAA's request to call two new witnesses. and invited FIFA to comment on it.

27. On 12 May 2023, FIFA informed the CAS Court Office that it did not object to the

deposition of the two witnesses indicated by PROFAA, but requested that they be invited to provide written witness statements.

28. On 12 May 2023, the CAS Court Office invited the Claimant to explain the topics on which the two witnesses would be called to testify.

29. On 15 May 2023, FIFA filed its Duplica.

30. On 15 May 2023, FIFA informed the CAS Court Office that its witnesses at the Oral Hearing would include Messrs. Prof. Stephen Weatherhill, Benoit Durand, and Paul Rawnsley, as experts, and Messrs. Jonas Baer-Hoffman, Ramon Calderon, Dr. Michael Gerlinger, Nuno Gomes, Jerome Perlemuter and Tony Scholes as factual witnesses.

31. On 15 May 2023, PROFAA informed the CAS Court Office on the topics its witnesses, Messrs. Jonathan Booker and Kieran Maguire BA FCA, would be examined upon.

32. By letter dated 16 May 2023, the CAS Court Office acknowledged receipt of FIFA's Duplica.

33. On 17 May 2023, the CAS Court Office issued an order of procedure (the "Order of Procedure") on behalf of the President of the Panel and invited the Parties to return a signed copy of it.

34. On 19 May 2023, FIFA informed the CAS Court Office that its representatives at the Oral Hearing would include Messrs. Saverio Paolo Spera and Victor Rodrigo Zamora.

35. By letter dated 19 May 2023, the CAS Court Office provided the Parties with directions on the draft hearing schedule.

36. On 19 May 2023, FIFA signed the Order of Procedure. In the letter to the CAS Court Office transmitting it, however, FIFA made some remarks regarding its Sections 7 and 10.

37. On 22 May 2023, PROFAA submitted the Order of Procedure duly signed to the CAS Court Office.

38. By letter dated 22 May 2023, the CAS Court Office acknowledged receipt of the signed copy of the Order of Procedure by PROFAA.

39. By letter dated 22 May 2023, the CAS Court Office acknowledged receipt of the signed copy of the Order of Procedure by FIFA.

40. On 23 and 24 May 2023 the Oral Hearing took place in Lausanne, Switzerland. The Parties agreed to the use of videoconferencing as a means of conducting the hearing with regard to those people who were not in a position to attend personally.

41. The following persons attended the Oral Hearing

i. for the Claimant: Messrs. Juan de Dios Crespo, Agustín Amorós Martínez, Alexandre Zen-Ruffinen, Ms. Emilie Weible, Messrs. Patrick Domínguez, Jonathan Booker (remote) and Kieran Maguire BA FCA (remote).

ii. for the Respondent: Mr. Miguel Liétard, Dr. Jan Kleiner, Mr. Luis Villas-Boas Pires, Mr. Saverio Spera (remote on the first day), Ms. Victoria Wakefield KC, Messrs. Matthew Kennedy, Donald Slater, Benoit Keane, Victor Rodrigo (remote), Prof. Stephen Weatherill (remote), Messrs. Benoit Durand (remote) and Paul Rawnsley (remote).

IV. SUBMISSION OF THE PARTIES

1. The Claimant's Claims

42. In its Statement of Claim the Claimant requested the CAS:

"1.- To accept this Claim against the Respondent;

2.- To declare that:

(i) Article 15 FFAR violates Swiss competition law by introducing a mandatory cap on service charges.

(ii) Art. 15 FFAR violates Swiss competition law by differentiating the percentage of the applicable ceiling according to the parties involved without good reason.

(iii) Article 12 FFAR violates Swiss competition law by limiting the exercise of agent activities to licensed agents and by no longer allowing them to rely on unlicensed employees or auxiliaries.

(iv) Art. 12 FFAR violates Swiss competition law by allowing dual representation only where it concerns the player and the hiring club (to the exclusion of the releasing club), without any justification for such differential treatment.

(v) All of the above-mentioned provisions also constitute a violation of personal rights within the meaning of Article 28 CC, and more specifically of the right to development and economic fulfilment of the employees subject to the FFAR.

3.- To declare that the following Articles of FFAR infringe the EU Law:

(i) Article 5.1, c, i), as long as it does not distinguish between majority shareholders, directors or key office holders of a company declared in insolvency or bankruptcy who are not declared responsible or guilty of the liquidation of the company or who have not been obliged to assume liability to reimburse the company for any payments unlawfully made or to make a contribution to the assets of the company.

(ii) Art. 12, para. 8, 9, 12 and 13.

(iii) Art. 14, para. 5, lit. a), and paragraphs 6, 7, and 12.

(iv) Art. 15, para. 2 and 3.

(v) Art. 19.

4.- *To declare that FFAR are incompatible with national regulations as in the case of Italian, French and USA-Canada legal systems.*

5.- *To fix a sum of 20,000 CHF to be paid by the Respondent to the Claimant, as a payment of its legal fees and costs.*

6.- *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees.*"

43. In support of its requests, the Claimant argues as follows.

1.1. Swiss Law

1.1.1. Swiss Competition Law

1.1.1.1. Articles 4(1) and 5 of the Cartel Act on Restrictive Agreements

44. PROFAA states that Articles 4(1) and 5 of the Cartel Act of the Cartel Act on the control of restrictive agreements do not apply in the present proceedings, because (i) there is no agreement, (ii) FIFA is not acting on behalf of national associations or clubs, but instead (iii) FIFA is acting as an independent company imposing its decision on market players.

1.1.1.2. Articles 4(2) and 7 of the Cartel Act on Abuse of Dominance

45. PROFAA submits that FIFA has abused its dominant position infringing Articles 4(2) and 7 of the Cartel Act of the Cartel Act.

46. First, PROFAA claims that FIFA is dominant in the global market for the organisation and marketing of football competitions, given the effective power it exercises over clubs and players, and indirectly over football agents.

47. Second, PROFAA claims that FIFA has abused its dominant position by adopting a series of provisions in the FFAR concerning (i) the introduction of ceilings on commissions (Article 15 FFAR), as well as (ii) disparities in those ceilings (Article 15 FFAR), and (iii) restrictions on freedom of representation (Article 12 FFAR).

48. PROFAA argues that the mandatory ceilings for commissions introduced by Article 15 FFAR constitute an abuse of dominant position prohibited by Articles 7(1), 7(2)(b) and 7(2)(c) of the Cartel Act , because the ceilings impose unfair and discriminatory commercial conditions on small and medium-sized agents, *de facto* depriving them from earning a reasonable living or even covering costs, as opposed to agents representing high-profile players, thus hindering access of small and medium-sized agents to the market without legitimate considerations.

49. PROFAA argues that the disparities in the ceilings for commissions introduced by Article 15 FFAR constitute an abuse of dominant position prohibited by Articles 7(1) and 7(2)(b) of the Cartel Act, because the ceilings impose unfair and discriminatory commercial conditions by providing a more favourable regime for agents representing

a releasing entity than agents representing an engaging entity in the transfer of a player, without there being an objective difference in the contribution of the agents involved in the transfer, nor other legitimate considerations.

50. PROFAA argues that the restrictions on freedom of representation introduced by Articles 12(2), 12(8), 12(9) and 12(10) FFAR constitute an abuse of dominant position prohibited by Articles 7(1) and 7(2)(b) of the Cartel Act , because they (i) obstruct the access of agents to the market by precluding the use of unlicensed employees and auxiliaries, and (ii) disadvantage agents representing a releasing entity compared to agents representing the engaging entity in the transfer of a player, as the latter may represent both the engaging entity and the transferred player and receive cumulative compensation for the services, whereas the former may only represent the releasing entity and receive single compensation for the services, without there being a legitimate consideration for this difference.

1.1.2. Personality Rights – Article 28 Swiss Civil Code ("CC")

51. PROFAA submits that Articles 12 and 15 FFAR breach the personality rights of agents, particularly their right to development and economic fulfilment in professional sport pursuant to Article 28 CC, without an overriding private or public interest.

1.2. EU Law

52. PROFAA claims that EU law applies to the FFAR based on Article 19 of the Swiss Private International Law Act ("PILA") and the case law of CAS, because the FFAR concern (i) international transactions that have an impact on the EU territory under Article 2 FFAR, and (ii) the FFAR also concern national transactions with an impact in the territory of EU Member States to the extent that national associations are bound to implement the FFAR in their respective territories under Article 3 FFAR.

1.2.1. Freedom of Economic Activity and Freedom of Contract

1.2.1.1. Article 16 of the Charter of Fundamental Rights of the EU ("CFREU")

53. PROFAA submits that Article 5(1)(c)(i) on eligibility requirements, Articles 12(8), 12(9), 12(12) and 12(13) FFAR on representation, Articles 14(2), 14(3), 14(5), 14(6), 14(7) and 14(12) FFAR on service fees, and Articles 15(2) and 15(3) FFAR on service fee caps breach the fundamental right of agents to freedom of economic activity and freedom of contract laid down in Article 16 CFREU, because the FFAR provisions impose arbitrary restrictions on agents and do not effectively pursue the purported legitimate objectives, namely to (i) combat financial crime and the exploitation of young players, (ii) avoid conflicts of interest, (iii) limit exorbitant fees, (iv) protect football development through training rewards, and (v) enhance contract stability.

1.2.1.2. Article 16 of EU Directive 2006/123/EC on Services in the Internal Market (the "EU Services Directive")

54. PROFAA claims that as a regulatory professional association FIFA is caught by Articles

4(9) and 16 of the EU Services Directive, and submits that the fee caps restrict the freedom of football agents to determine their own price and hence provide their services on their own terms and conditions, without pursuing a legitimate objective in a necessary and proportionate manner in line with the case law of the EU Court of Justice.

1.2.2. EU Competition Law

1.2.2.1. Article 101 TFEU on Restrictive Agreements

55. PROFAA submits that the service fee caps infringe Article 101 of the Treaty of the functioning of the European Union ("TFEU") because it establishes a maximum price that equates to horizonal price-fixing, which is a restriction "by object" under Article 101 TFEU and the case law of the EU Court of Justice.

56. PROFAA argues that Article 14 FFAR imposing service fee caps constitutes a restriction "by effect" that infringes Article 101 TFEU, because the fee caps (i) prevent football agents from substantially competing on price, as they leave no room for differentiation on price, provided that the fee caps (a) are considerably low compared to the fees charged by agents (particularly those servicing low-profile players and clubs) and (b) the conditions of a transfer vary on a case-by-case basis, and (ii) could have a deterring effect on potential newcomers and create significant barriers to entry on the same basis.

57. PROFAA considers that the service fee cap does not pursue a legitimate objective recognized by the EU Court of Justice, such as the protection of the integrity of the sport, but instead appears to protect the economic interests of FIFA acting on behalf of the football clubs.

1.2.2.2. Article 102 TFEU on Abuse of Dominance

58. PROFAA submits that FIFA has abused its dominant position infringing Article 102 TFEU, because (i) FIFA holds a collective dominant position in the market for football agent services pursuant to the case law of the EU Court of Justice, and the fee caps introduced by Article 15 FFAR (ii) equate to horizontal price-fixing and (iii) impose an unfair purchase price or trading condition, given that the fee cap bears no reasonable relation to the economic value of the services provided by football agents.

1.2.3. Infringement of the Rights to Privacy and Data Protection

59. PROFAA submits that Article 19 FFAR infringes the General Data Protection Regulation ("GDPR"), and Articles 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and 7 CFREU laying down the fundamental right to privacy and the protection of business secrets, insofar as Article 19 FFAR allows FIFA to disclose (i) the name of the agents' clients and (ii) the amounts paid by clients to agents. PROFAA argues that the right to privacy of agents cannot be overridden by the right to information of journalists and whistle-blowers under Article 10 ECHR and that there are, in any event, other more proportionate measures available, such as the transmission of contracts on a confidential basis to a specialised supervisory

authority. PROFAA further claims that the consent provided by agents to FIFA for the processing of their data, as stated in the FFAR, is not voluntary, because the signature of the consent declaration is a pre-requisite to enter the market.

1.3. Italian Law

1.3.1. Federazione Italiana Giuoco Calcio ("FIGC") Football Agents Regulation of 4 December 2020, as Amended on 27 April 2022 and 28 June 2022

60. PROFAA argues that the Italian FIGC Football Agents Regulation of 4 December 2020 is hierarchically superior to the FFAR pursuant to Article 1(1) of the FIGC Football Agents Regulation and that, in the case of conflict, national law prevails over the rules set by a private organisation, such as FIFA.

61. First, PROFAA indicates that Article 2 FFAR and Article 1(2) of the Italian FIGC Football Agents Regulation provide potentially overlapping scopes of application, and therefore that Article 21 FFAR, establishing the competence of the FIFA Disciplinary Committee or an independent Ethics Committee to impose disciplinary sanctions on football agents violating the FFAR, and 24(1) FFAR, establishing a regime for the recognition of national licenses, may conflict with the Italian FIGC Football Agents Regulation.

62. Second, PROFAA indicates that Article 12(8) and (9) FFAR, which establishes certain limits on dual representation by football agents, conflicts with Articles 16(5) and 21(5) of the Italian FIGC Football Agents Regulation, insofar as the latter allows football agents to carry out negotiations or enter into mandates in conflicts of interests, where the agent signs a mandate with each interested party, indicating, by means of a specific declaration, the existence of a conflict, and obtains written consent from all parties prior to any negotiation.

63. Third, PROFAA indicates that Italian national law, including Article 21(8) of FIGC Football Agents Regulation, which provides that the remuneration of a sports agent must be determined between the parties as a lump sum or a percentage of the value of the transaction or the total gross salary of the football player resulting from the sports contract, does not provide limits on the amount of the remuneration of football agents. PROFAA also indicates that according to Italian jurisprudence, if a fee is agreed upon by parties, it cannot be determined by tariffs and customs or by a judge.

1.4. French Law

1.4.1. French Sports Code and Regulation of Sports Agents

64. PROFAA argues that the French Sports Code is hierarchically superior to the FFAR and that, in the case of conflict, national law prevails over the rules set by a private organisation, such as FIFA.

65. First, PROFAA indicates that Article 2 FFAR and Article 3(1) of the French Regulation

of Sports Agents provide potentially overlapping scopes of application, and therefore that, Article 21 FFAR, establishing the competence of the FIFA Disciplinary Committee or an independent Ethics Committee to impose disciplinary sanctions on football agents that violate the FFAR, and Article 24(1) FFAR, establishing a regime for the recognition of national licenses, may conflict with the French Regulation of Sports Agents.

66. Second, PROFAA indicates that Article 12(8) and (9) FFAR, which establishes certain limits on dual representation by football agents, conflicts with Article 6(2)(1) of the French Regulation of Sports Agents, insofar as the latter only allows football agents to represent a player, trainer or club in the conclusion of an employment contract.

67. Third, PROFAA indicates that Article 15 FFAR conflicts with Article L222-7 of the French Sports Code, insofar as the latter provides that the remuneration of a sports agent may not exceed 10% of the amount of the contract concluded by the parties he has brought together.

1.5. Collective Bargaining Agreement ("CBA") Negotiated Between Major League Soccer ("MLS") and the MLS Players' Association ("MLSPA")

68. PROFAA claims that the FFAR intend to apply to labor relations between the MLS and the MLSPA.

69. PROFAA submits that Articles 14 and 15 FFAR imposing limitations and caps on service fees of football agents infringe (i) Article 5 of the MLS-MLSPA CBA on management rights, insofar as the latter precludes FIFA from imposing mandatory requirements affecting "player benefits", and (ii) Article 18(3) of the MLS-MLSPA CBA, insofar as the latter addresses agent representation.

2. The Respondent's Answer

70. FIFA recalls that the FFAR were approved at the FIFA Council meeting of 16 December 2022 following a thorough and inclusive consultation process, which lasted over 4 years and during which many proposals concerning the reform were duly considered and analysed. FIFA adds that the FFAR were therefore approved in accordance with the applicable principles on football governance.

71. FIFA notes that, moreover, and as highlighted in the FIFA Circular n. 1827 of 6 January 2023, the consultation and reform process, which eventually led to the FFAR's approval was widely supported by various public institutions and bodies within the European Union. Above all, the European Commission, the European Parliament and the Council of Europe have publicly welcomed the concrete reform project of the FFAR of the FIFA.

72. The Respondent requested in its Answer to the Statement of Claim the CAS to issue an award:

"*a. rejecting the reliefs sought by the Claimant;*

b. ordering the Claimant to bear the full costs of these proceedings; and

c. *ordering the Claimant to make a contribution to FIFA's legal costs.*"

73. In support of its requests, the Respondent argues as follows.

2.1. EU Competition Law

74. FIFA submits that the FFAR are not restrictive of competition, neither "by object" nor "by effect", nor do they constitute an abuse of a dominant position. FIFA contends that, even if the FFAR are *prima facie* restrictive of competition, they fall outside the scope of EU competition law. This is because, applying the principles established in Case C-519/04 P *Meca-Medina* EU:C:2008:492, the FFAR pursue legitimate objectives, and any restrictions are inherent in and proportionate to the pursuit of those objectives.

75. Exclusively for the purpose of the case, FIFA agrees to be considered as an association of undertakings within the meaning of Article 101 TFEU. However, FIFA contests that it enjoys collective dominance in the market for players' agents services.

2.1.1. Article 15(2) FFAR

2.1.1.1. Restrictions

2.1.1.1.1. Restriction "by object"

76. FIFA claims that Article 15(2) FFAR does not fix prices for "*Football Agent Services*", because (i) the service fee cap still leaves room for agents to compete on price beneath the cap, (ii) not all agents will set their price necessarily at the maximum fee, (iii) the maximum service fee cap is variable according to the type of transaction and the amount the transaction is worth, and (iv) the service fee cap does not apply to "*Other Services*" that agents may charge their clients for.

77. FIFA therefore claims that Article 15(2) FFAR is not a "by object" infringement of Article 101 TFEU, but rather a regulatory measure adopted to deal with an acute and persistent market failure.

2.1.1.1.2. Restriction "by effect"

78. FIFA states that the level of service fee cap does not restrict or distort competition.

79. First, FIFA argues that (i) PROFAA did not produce sufficient evidence to show that the level of the service fee cap will have an anticompetitive effect contrary to Article 101 TFEU on small and medium-sized agents, nor (ii) to determine whether would-be-agents will be deterred from entering the market and/or whether the quality of new entrants will be lower.

80. FIFA claims that the service fee cap does not amount to the imposition of an unfairly low price contrary to Article 102(a) TFEU, because (i) PROFAA did not provide factual material on the economic value of the services required to reach a finding of abuse, (ii) agents can charge their clients for "*Other Services*", (iii) the departure from the market of some agents does not necessarily harm competition, but the departure of inefficient

firms is consistent with normal competition, and (iv) there is no proof of harm to consumers in the form of higher prices or lower output.

81. FIFA claims that the service fee cap does not discriminate between operators contrary to Article 102(c) TFEU, because (i) the service fee caps differ according to the remuneration of the players, and apply more favourable conditions to small and medium-agents by having a higher cap for transactions were the remuneration of the player is lower, and (ii) small and medium-sized agents, who work on low value transactions, are not in competition with larger agents, who work on high value transactions.

82. Second, FIFA accepts that Article 15(2) FFAR applies different service fee cap percentages to (i) agents acting for players and Engaging Entities and (ii) agents acting for Releasing Entities. However, FIFA explains that these are calculated on different reference figures to align the interests of the agents with the interests of their clients. FIFA claims that the difference in the service fee cap percentages does not put certain agents at a competitive disadvantage, because agents are free to choose which client to represent.

83. Therefore, FIFA submits that Article 15(2) FFAR does not restrict competition.

84. FIFA underlines that Articles 15(3) and 15(4) FFAR do not exacerbate any restrictive effects that may arise under Article 15(2) FFAR by making it more difficult for agents to compensate for any loss of revenue caused by the service fee cap. FIFA argues that Article 15(3) and (4) FFAR do not make it more difficult for agents to be paid for "*Other Services*" or create the risk that the fees paid for "*Other Services*" be subject to the service fee cap, as long as the agents keep proper records.

2.1.1.2. Proportionality

85. FIFA indicates that should the Panel assume that Article 15(2) FFAR is capable of having restrictive effects, these are inherent and proportionate to the legitimate objectives pursued.

86. FIFA argues that Article 15(2) FFAR ultimately seeks to ensure the proper functioning of the transfer system and, thereby, to protect the integrity of football.

87. First, FIFA states that Article 15(2) FFAR is a suitable means to ensure this objective because (i) by setting maximum service fees, the FFAR ensures that agent service fees are fair and reasonable, and that they apply uniformly, (ii) it limits conflicts of interests by aligning the agents' interests with the clients' interests, (iii) it improves transparency both from a financial and administrative standpoint, protecting players who lack experience in the sector, and (iv) it prevents agents from encouraging transfers that are not in the interest of the player and/or club in question, enhancing contractual stability for players, coaches and clubs, as well as preventing abusive, excessive and speculative practices.

88. Second, FIFA denies that Article 15(2) FFAR goes further than necessary to achieve the objectives, because (i) agent fees have to be considered relative to the salaries of the players they represent and not only in absolute amounts, (ii) the caps selected by FIFA are appropriate in relation to (a) caps set in other sports, (b) national legislation, (c) previous FIFA regulations, (d) a report commissioned by the Directorate-General for Education, Youth, Sport and Culture of the European Commission and (e) the solidarity mechanisms supporting the clubs involved in the training and education of the players, (iii) the threshold set for the individual's remuneration is less restrictive and more favourable to small and medium-sized agents, and (iv) none of the alternatives considered to the service fee cap would have achieved the objectives.

2.1.2. Article 12(2) FFAR

2.1.2.1. Abuse

89. FIFA states that Article 12(2) FFAR does not constitute an exclusionary abuse pursuant to Article 102 TFUE, because it does not prohibit (i) an agent from providing general assistance to a player, such as administrative assistance, as this would constitute "*Other Services*", and (ii) employees or contractors hired by agents or their agencies can also fulfil these administrative tasks or "*Other Services*", such as arranging meetings between agents and clients or assisting with other practical arrangements.

90. According to FIFA, Article 12(2) FFAR only restricts anyone other than a Football Agent to (i) solicit for Football Agent Services, (ii) enter into a contract for the provision of Football Agent Services, and (iii) actually provide these services. FIFA argues that Articles 12(2) and 11(2) FFAR simply provide for the fact that only regulated persons can carry out regulated activities.

2.1.2.2. Proportionality

91. FIFA claims that the licensing system serves to ensure that only people of good character and with the requisite knowledge of the football transfer system can act as agents, allowing to pursue the overall objective of the FFAR that is to protect the proper functioning of the transfer system and therefore the integrity of the sport. FIFA states that there is no less restrictive alternative to Article 12(2) FFAR that could meet the objectives, given that, in a licensed activity, who can perform it has to be clearly delineated.

2.1.3. Articles 12(8)-(10) FFAR

2.1.3.1. Abuse

92. FIFA claims that Articles 12(8)-(10) do not constitute discriminatory abuses under Article 102(c) TFEU.

93. First, FIFA accepts that Article 12 FFAR contains different rules for different possible dual representation scenarios, because (i) dual representation of a player and an Engaging Entity and (ii) dual representation of a player and a Releasing Entity are not

equivalent. According to FIFA, there is a clear conflict of interest between a Releasing Entity and a player, because the former seeks to maximise the transfer compensation, which detracts from the player's remuneration. By contrast, an Engaging Entity and a player have a common interest in negotiating a lower transfer fee in order to free up more funds for the player's remuneration. FIFA underlines that the conflicts of interests arising from dual representation of Engaging Entities and Realising Entities cannot be mitigated, because the former seeks to minimise the transfer fee, whereas the latter seeks to maximise it. The double conflict of interest (between player and Releasing Entity and Releasing Entity and Engaging Entity) arising in case of triple representation is also unavoidable.

94. Second, FIFA claims that Articles 12(8)-(10) FFAR do not disadvantage a category of agents, because agents are not required to represent only individuals or entities.

2.1.3.2. Proportionality

95. FIFA claims that the objectives pursued by Article 12(8)-(10) FFAR are similar to those pursued by Articles 15(2) and 12(2) FFAR, because their ultimate goal is to protect the proper functioning of the transfer system and therefore the integrity of the sport.

96. First, FIFA submits that Articles 12(8)-(10) FFAR are suitable to address the problem of conflicts of interest between agents and potential clients.

97. Second, FIFA states that Articles 12(8)-(10) FFAR go no further than necessary, because they take an approach requiring consent where potential conflicts are less acute (dual representation of player and Engaging Club), and prohibiting dual representation where the conflict of interest is unavoidable (triple representation, dual representation of Releasing Club and Engaging Club, and dual representation of Releasing Club and player).

2.1.4. Article 101(3) TFEU

98. FIFA submits that, should Articles 15(2), 12(2), and 12(8)-(10) FFAR be considered to fall within the scope and infringe Articles 101(1) and/or 102 TFUE, any restrictions are exempt under Article 101(3) TFEU and/or objectively justified in respect to Article 102 TFEU. In particular, FIFA claims that the provisions of the FFAR (i) give rise to efficiencies, (ii) provide a fair share of the benefits to consumers, (iii) are indispensable to achieve these efficiencies, and (iv) do not eliminate competition in respect of the provision of a substantial part of Football Agent Services.

2.2. Free Movement Rules

99. FIFA states that it is a basic principle of EU law that a directive cannot impose obligations directly on a private party, confirmed for the EU Services Directive by the CJEU in case C-261/20 Thelen Technopark Berlin GmbH v MN.

100. FIFA claims that in any event, the service fee cap falls outside the scope of Article 16

of the EU Services Directive, because the service fee cap applies universally throughout the EU and therefore does not restrict the free movement of services, but aims to harmonise the caps that apply in different Member States.

101. FIFA sustains that, should the EU Services Directive apply, the fee cap is justified under Article 56 TFEU. FIFA argues that EU law permits sport governing bodies to make rules that *prima facie* infringe a right, freedom or prohibition of EU law, but that are proportionate means of achieving a legitimate sporting aim. FIFA concludes that the same must be true under Article 16 of the EU Services Directive.

2.3. CFREU

102. FIFA states that, according to Article 51(1) CFREU, the CFREU is not addressed to private parties and, therefore, does not apply to FIFA.

103. FIFA claims that Article 16 CFREU cannot be relied on against it. FIFA recognises that some provisions of the CFREU have been declared to have horizontal direct effect, but there is no authority to the effect that Article 16 CFREU has horizontal direct effect. On the contrary, FIFA contends that there are strong indications that Article 16 CFREU lacks horizontal direct effect based on the wording of the provision and the case law of the EU Court of Justice. In particular, FIFA argues that Article 16 CFREU is not mandatory and unconditional in nature, but requires specific expression in EU or national law and is therefore incapable of having horizontal direct effect.

104. FIFA further expands in Annex E to the Answer to the Statement of Claim on the compliance of the FFAR with Article 16 CFREU. In particular, FIFA argues that, should the Panel conclude that Article 16 CFREU applies, the FFAR do not infringe Article 16 CFREU, because the contested provisions of the FFAR are justified under Article 52(1) CFREU.

2.3.1. Article 15(2) FFAR

105. FIFA claims that the service fee cap, even if it interferes with Article 16 CFREU, is a justified interference, because it (i) respects the essence of the right, as agents can conduct their business for reasonable remuneration, and (ii) is a proportionate means to achieve objectives of general interest recognised by the EU.

2.3.2. Articles 12(8)-(9) FFAR

106. FIFA argues that the dual representation provisions are justified, because they (i) respect the essence of the rights, as agents are free to contract with any client (player, Engaging Club or Releasing Club), but not with more than one of those parties (except player and Engaging Club) in the same transaction, and (ii) are proportionate means to achieve objectives of general interest recognised by the EU.

2.3.3. Articles 12(12)-(13) FFAR

107. FIFA submits that the exclusivity provision which aims at ensuring that agents cannot

interfere with transactions that their clients have negotiated and concluded independently is justified, because it (i) respects the essence of the rights, as agents can bring a claim for a fee that was properly payable under the Representation Agreement entered into by the agent and the client, and (ii) is proportionate in that the provision ultimately seeks to ensure the proper functioning of the transfer system, it is suitable to achieve that objective and does not go further than necessary.

2.3.4. Articles 14(6), (7), (12) FFAR

108. FIFA claims that these provisions, which provide that payment of reasonable remuneration should be conditional upon and tied to actual receipt by the individual of the benefits of the employment contract, are a justified interference, because (i) they respect the essence of the rights, as agents can conduct their business in return for reasonable remuneration, and (ii) they pursue FIFA's objective of protecting contractual stability by (a) reducing the financial incentives of the agent to offer unsuitable transfers and (b) ensuring that the agents have an interest in maintaining the client's existing employment contracts.

2.3.5. Article 14(5)(a) FFAR

109. FIFA denies that this provision, which obliges the agent to agree expressly with the client if service fee payments are to be made to the agent after the expiry of the Representation Agreement, interferes with Article 16 CFREU. In any event, FIFA states that the provision is proportionate, because it aims to protect players lacking experience or information relating to the transfer market by improving transparency.

2.3.6. Article 5(1)(c)(i) FFAR

110. FIFA claims that this provision, setting eligibility requirements to conduct business as agents, is a justified interference, because it (i) respects the essence of the rights, as it is in the nature of requirements that not all market operators fulfil them, (ii) fulfils the objective of raising and setting a minimum professional and ethical standards for the occupation of football agents, and (iii) is as such an appropriate means and does not go further than necessary.

2.4. Fundamental Right to Privacy under Articles 7 CFREU, 8 European Convention of Human Rights ("ECHR") and GDPR

111. FIFA submits that Articles 8 ECHR and 7 CFREU are not applicable to FIFA as an association of private law.

112. FIFA argues that, should Article 8 ECHR and Article 7 CFREU apply to FIFA, and should the consent given by the agents not comply with the requirements of the GDPR, FIFA's publication of details of football agents' clients and of the service fee is capable of interfering with the agents' rights under Article 8 ECHR and Article 7 CFREU. However, FIFA claims that such interference would be justified, because it (i) respects the essence of the rights, given that any interference does not extinguish the rights in

question, (ii) is in accordance with the law, (iii) pursues legitimate aims, namely to improve financial and administrative transparency of Football Agent Services, and (iv) is proportionate, because Article 19 FFAR (a) is a suitable means to achieve the pursued objectives, (b) does not go further than necessary, and (c) the advantages outweigh any disadvantages to the agents.

113. In addition, FIFA states that it obtains consent from agents and processes any personal data of the agents pursuant to Article 19 FFAR in accordance with the GDPR. In particular, FIFA accepts that the information published constitutes personal data within the meaning of the GDPR, but submits that FIFA lawfully processes the data pursuant to Articles 5 and 6(f) GDPR. Further, FIFA claims that the legitimate interests pursued are the achievement of the objectives set out in the FFAR, and that these interests are not overridden by countervailing interests or fundamental rights.

2.5. Swiss Law

2.5.1. Margin of Appreciation

114. FIFA claims that the regulatory steps taken fall within its regulatory autonomy, which is granted to FIFA by Swiss law and the previous jurisprudence of CAS. FIFA adds that (i) deference must be given to the autonomy of sports governing bodies, (ii) this deference is a basic principle of sports law, and (iii) emphasises that there is an extremely high threshold for CAS intervention in this discretion.

2.5.2. Swiss Personality Rights

115. FIFA refutes that the Claimant's personality rights were violated under Article 28 CC. FIFA underlines that, absent substantiated claims by the Claimant as to how the FFAR breached its personality rights, the FFAR do not jeopardise the economic existence of small and medium sized agents.

116. FIFA states that, should the personality rights of the Claimant be affected, this would be justified under Article 28(2) CC because of overriding private or public interests of all football stakeholders.

2.5.3. Swiss Competition Law

117. FIFA submits that the relevant Swiss norms in this case are comparable to EU norms, and thus refers back to the analysis made under EU competition law.

118. First, FIFA agrees with PROFAA that Article 5 of the Cartel Act does not apply in this case, (i) because Article 4(1) of the Cartel Act , in contrast with Article 101 TFEU, does not prohibit decisions of an association of undertakings with restrictive effects, (ii) the FFAR in general and the salary cap in particular do not constitute an unlawful agreement, and (iii) in any event any restriction would be justified on grounds of economic efficiency under Article 5(2) of the Cartel Act .

119. Second, FIFA claims that the FFAR do not amount to an abuse of a dominant position

under Article 7 of the Cartel Act, reiterating the reasoning put forward under Article 102 TFEU.

2.6. State Laws

120. FIFA submits by way of preliminary observation that it is unhelpful and a distraction to focus on a particular national law, because (i) the FFAR are being implemented by the 211 member associations and in each country different aspects could raise difficulties in relation to national laws, and (ii) the Panel should focus on matters in relation to which a global resolution is necessary, rather than local issues.

2.6.1. Italian Law

121. First, FIFA argues that the requirement under Article 1(2) of the Italian FIGC Football Agents Regulations to be registered does not create an immediate or irreconcilable conflict with the FFAR, because (i) the national law licensing system can be recognised by FIFA under Article 24 FFAR, and (ii) FIFA licenses can be recognised under Italian law.

122. Second, FIFA claims that the possibility under FIGC to have dual or triple representation, which Article 12 FFAR prohibits, does not generate a conflict between the two sets of rules, because (i) dual or triple representation under Italian law is not mandatory, and agents can therefore comply with the prohibition of dual representation laid down in the both the FIGC and the FFAR, and (ii) the Italian rules are hierarchically lower norms, which are intended to read compatibly with FIFA's rules and regulations.

123. Third, FIFA claims that the service fee cap is not in conflict with Italian law, because (i) Article 21(7)(a) of the Regolamento Comitato Olimpico Nazionale Italiano empowers national sports federations to introduce a cap to fees paid to sports agents, and (ii) for the reasons stated above, the Italian implementation of the EU Services Directive is not contrary to the cap.

2.6.2. French Law

124. First, FIFA states that the requirement to hold a licence issued by the Fédération Française de Football ("FFF") does not conflict with the FFAR, because Article 24 FFAR provides that national law licensing systems can be recognised by FIFA.

125. Second, FIFA claims that the difference between the FFF's rule that agents can only act on behalf of one of the parties to the contract and the FFAR's provisions allowing dual representation is not problematic, because (i) Article 3(3) FFAR provides the possibility to member associations to introduce stricter measures, and (ii) agents are free to adhere to stricter rules when the FFAR applies.

126. Third, FIFA argues that the remuneration cap of 10% imposed by the Code du sport does not conflict with the service fee cap set by the FFAR, because, when implementing the FFAR, the FFF can use the prerogative given to it by the French legislation to fix

stricter caps for Representation Agreements with an international dimension.

2.6.3. Collective Bargaining Agreement Negotiated Between the MLS and the MLSPA

127. FIFA contests that the FFAR violate the CBA negotiated between the MLS and MLSPA, because (i) it does not address the rules and regulations that apply to agents, (ii) even though the MLSPA has the exclusive authority to regulate the activity of football agents, it will have to develop regulations applying to football agents and there is no reason to believe that they will not be compatible with the FFAR, and (iii) Article 5 of the CBA, relating to the management rights of the MLS, does not apply, because agent regulation is a union right, not a management right.

3. The Claimant's Reply

128. In its Reply, the Claimant answers the Respondent's submissions as follows.

3.1. 2015 Regulations on Working with Intermediaries

129. PROFAA submits that FIFA has created an essential part of the alleged issues in the football agents market. Particularly, PROFAA claims that FIFA is responsible for the issues highlighted on the transfer market, because (i) the 2015 Regulations on Working with Intermediaries replaced the licensing system with a registration system at national level, implemented and policed by national football associations and their respective local regimes, (ii) operational Football Agents have increased since 2015, but national associations have implemented the 2015 Regulations on Working with Intermediaries inconsistently, (iii) it was difficult to be registered with national associations, which resulted in the need for players for certain transfers to resort to use the services of a "local" partner, which resulted in an increase in service fees and the empowerment of big firms, that have the capacity and resources to have delegate intermediaries registered in different national associations, and (iv) by changing the system of settling disputes and declaring that it was no longer competent to hear disputes involving intermediaries, FIFA forced players to contact "local" agents and lawyers to prepare and take legal action, thus incurring additional costs.

130. PROFAA argues that FIFA should readopt a system similar to that put in place by the 2008 Players' Agents Regulations, *i.e.,* (i) recommending fees or (ii) introducing a provision regarding a minimum fee.

3.2. EU Law

3.2.1. Whether the *Wouters/Meca-Medina* Case Law Applies

131. PROFAA submits that the *Wouters/Meca-Medina* principles do not apply, because the FFAR are not a regulation affecting participants in competitions or sport modalities, but a regulation of the economic and contractual activity of a professional sector that does not take part in any competition or sport. PROFAA also advances that the case law cited by FIFA only relates to participants in sporting competitions (AG Opinion in

International Skating Union, C-124/21; AG Opinion in *European Super League*, C-333/21; CAS, 2016/1/4492, CAS 2020/O/6689; CAS 2009/A/1778; and CAS 2007/A/1287). In addition, PROFAA claims, citing a number of national rulings, that the FFAR do not regulate a sporting discipline or sets the prerequisites that its participants must fulfil to take part in it. Instead, PROFAA submits that the compatibility of the FFAR should be reviewed following the assessment that the EU General Court laid down in a judgment of 26 January 2005, *Piau v. Commission* (Case T-193/02: "*Piau*"), because the FFAR do not fall under the so-called sporting exception, but it is the regulation of an economic activity involving the provision of services that is an accessory to the sporting activity.

132. PROFAA also submits that the margin of appreciation of sporting governing bodies does not include the ability to decide what topics relate to the sporting disciplines they rule.

3.2.2. Restriction of Competition "by Object"

133. PROFAA states that by admitting that the service fee cap is a harmonisation measure, FIFA admits that it is a restriction of competition "by object", because it indirectly fixes prices by providing a form of a price recommendation or incentive for coordination.

134. PROFAA rejects FIFA's argument that agents can compete beneath the service fee cap introduced by the FFAR, claiming that the level of maximum fees already entails that many agents would have to work incurring substantial losses and undermine the quality of agents' services. Therefore, the cap constitutes a *de facto* fixed tariff.

135. PROFAA claims that football agents do not have the ability to charge clients for "*Other Services*" due to the presumption laid down in Article 15(3) FFAR.

136. PROFAA disputes that FIFA acts as a public regulator, and claims that FIFA acts on behalf of national associations and football clubs, presenting itself as a collective buying entity in the market for football agent services, as noted by the EU General Court in *Piau*. PROFAA concludes that the service fee cap protects the economic interests of FIFA's members by setting a maximum purchase price, which constitutes a restriction "by object".

3.2.3. Objectives and Proportionality

137. PROFAA disputes the problems that FIFA identified in the football agent services market that motivated the adoption of the FFAR.

138. PROFAA rejects the so-called "hidden information problem", (i) alleging that agents usually agree their fees with the players in the representation contract, and (ii) submitting that the easiest way to tackle the lack of information and any conflict of interest is to include the fees paid to the player's agent in the players employment contract.

139. PROFAA rejects the so-called "*Gatekeeper Problem*", alleging that a situation where a few agents have access to a handful of star players is exceptional and, therefore, imposing the fee cap on all agents does not solve the problem.

140. PROFAA rejects the so-called "*Hold-up Problem*", submitting that players and their agents normally try to close a transaction as soon as possible for players, because clubs handle other possible candidates for the same position and circumstances may quickly change.

141. PROFAA alleges that capping the agents' fees will not reduce the number of transfers, but on the contrary increase the necessity to conclude more operations in order to achieve the same profits as before.

3.2.4. Infringement of the Freedom of Economic Activity and Contract

3.2.4.1. Freedom to conduct a business as a fundamental right

142. PROFAA argues that FIFA is in an exceptional position of power, which justifies the application of the CFREU to it, even if Article 16 CFREU refers to "Union law and national laws and practices".

3.2.4.2. Freedom to provide services according to the EU Services Directive

143. PROFAA cites that almost all Member States have transposed the directive and in light of procedural economy it would be more useful to analyse the validity of the FFAR before the CAS in relation to the EU Services Directive, rather than under multiple national jurisdictions.

3.3. Swiss Law

3.3.1. Margin of Appreciation

144. PROFAA argues that Swiss law limits the autonomy of associations by the mandatory provisions of law, such as the respect of personality rights and competition law.

3.3.2. Swiss Personality Rights

145. PROFAA submits that the right to development and economic fulfilment in professional sport falls within the scope of the personality rights protected under Article 28 CC. PROFAA considers that the disparity in the service fee caps introduced by the FFAR violates the right of agents to economic freedom, particularly (i) the free choice of profession, and (ii) the free access to and exercise of a private gainful activity. PROFAA claims that the burden of proof for the justification of an infringement of personality rights under Article 28(2) CC lies with FIFA, which, according to PROFAA, has not demonstrated that the public interest in the exercise of a transparent and ethical activity prevails over the private interests of the agents. PROFAA contends that the imposed measures are not appropriate and necessary to achieve the intended objective.

3.3.3. Swiss Competition Law

146. First, PROFAA submits that if the FFAR were to be acknowledged as an agreement amongst undertakings in the sense of Article 4(1) of the Cartel Act, it would not be justified by economic efficiency, because it would enable the parties involved to eliminate effective competition in the sense of Article 5(2) of the Cartel Act in such a serious manner that the efficiency reasoning would be neither necessary, sufficient nor adequate.

147. Second, PROFAA argues that the difference in treatment of the agents according to the players' salaries, is a violation of Article 7 of the Cartel Act in that it is discriminatory, because (i) the defined cap does not sufficiently take into account the economic reality of the agent's activity worldwide where the majority of players have a salary below USD 200,000, and (ii) the restrictions set by the regulations apply to all agents regardless of their financial means, and thus significantly hinder the activity of the smaller agents with regards to larger agents with more important financial means. However, PROFAA does not dispute FIFA's argument that wealthy agents are active in a different market than small- and medium-sized agents.

4. Respondent's Rejoinder

148. In its Rejoinder the Respondent rebutted the Claimant's argument as follows.

4.1. Factual Overview

4.1.1. 2015 Regulations on Working with Intermediaries

149. FIFA argues that the problems in the international transfer system were not created by the 2015 Regulations on Working with Intermediaries, because (i) the problems predate the decision in 2014 to cease regulating agents on an international basis, (ii) the excessive service fees charged by agents, who failed to comply with the service fee cap recommended under the 2015 Regulations on Working with Intermediaries, created or exacerbated the problems, and (iii) the 2008 Players' Agents Regulations could not form the basis to curb the problems identified by FIFA, given that they had themselves failed to ensure the consistent use of licensed agents, transparency, or clarity as to the remuneration of agents.

4.2. The Merits

4.2.1. Compliance of Article 15(2) of the FFAR with EU Competition Law

4.2.1.1. The *Wouters/Meca-Medina* Case Law

150. FIFA argues that the *Wouters/Meca-Medina* principles apply when the activity regulated by the measure is sufficiently closely connected to the relevant sport, regardless of whether the measure affects economic activities of non-participants. To underline their point, FIFA cites other CAS proceedings (CAS 2016/A/4490 and CAS 98/200). In particular, FIFA submits that agents play an important role in team composition and, therefore, in sporting competition. The *Wouters/Meca-Medina* principles therefore apply to determine whether the FFAR are compatible with EU competition law.

151. FIFA reminds that the regulatory nature of many of the functions carried out by sport governing bodies, such as FIFA, has been expressly recognised by the European Courts. Further, FIFA cites examples of regulators adopting regulations that have economic effects on persons who are not "participants" in the activity for which that regulator is responsible.

4.2.1.2. Margin of appreciation

152. FIFA reiterates that it enjoys a margin of discretion in determining whether the regulation of the activities of agents in connection with the international transfer system is necessary to ensure the proper conduct of competitive sport.

4.2.1.3. Restriction of Competition "by Object"

153. FIFA rejects that Article 15(2) FFAR constitutes a "by object" restriction of competition, because (i) not all similar or equivalent measures to maximum or recommended prices constitute a "by object" infringement of Article 101(1) TFEU in all circumstances, (ii) the maximum service fee does not constitute a *de facto* fixed tariff, (iii) Articles 15(3) and (4) FFAR do not make it more difficult for agents to be paid for "*Other Services*", (iv) FIFA is not acting on behalf of clubs, as the FFAR were adopted following (a) a review of the international transfer system by a task force whose membership was not limited to clubs, and (b) a consultation process that included engagement with stakeholders, including agents and PROFAA, and (v) FIFA enjoys margin of discretion to determine the concrete level of the service fee caps.

4.2.1.4. Discrimination under Article 102(c) TFEU

154. FIFA maintains that Article 15(2) FFAR does not discriminate against small- and medium-sized agents, because (i) even if the service fee caps were low, this does not entail that small- and medium-sized agents are treated the same as larger agents, and (ii) small and medium-sized agents are not in competition with larger agents.

4.2.1.5. Proportionality

155. FIFA argues that Article 15(2) FFAR pursues objectives that cannot be achieved by less restrictive means, because (i)(a) a recommended cap, as under the 2008 Players' Agents Regulations and included in the 2015 Regulations on Working with Intermediaries, had simply been ignored, and (b) a default service fee, as in the 2001 and 2008 Player' Agents Regulations, would not achieve the objectives pursued by the FFAR, (ii) there is an information asymmetry between agents and their clients that can be exploited by agents in order to increase their fees, which cannot be solved by making agents' fees fully transparent and by using a "*player pays*" model, (iii) the "*Gatekeeper Problem*" is widespread and not limited to agents of "*star players*" and the service fee cap can solve this problem, because it reduces the agents' incentives to withhold or control access to their players, (iv) the "*Hold-up Problem*" pertains to all kinds of players and not only "*star*" players, and (v) by removing the prospect of outsized fees, the FFAR seek to reduce or remove the incentive for agents to arrange transfers which otherwise might

not take place.

4.2.2. Compliance of the FFAR with Free Movement Rules

156. FIFA rejects that a Directive can have direct effect and that Article 15(2) FFAR falls in any event outside the scope of Article 16 of the Services Directive.

4.2.3. Compliance of the FFAR with the CFREU

157. FIFA rejects that Article 16 CFREU has horizontal direct effect, because the condition for a Charter provision to apply is whether it is mandatory and unconditional, as has been held by the EU Court of Justice in *AMS*.

4.2.4. Compliance of the FFAR with Swiss Law

4.2.4.1. Margin of Appreciation

158. FIFA argues that Swiss law grants a very substantial margin of appreciation to FIFA when (i) assessing whether there is a need for regulatory steps to ensure the good functioning of the transfer system, (ii) defining the exact regulatory steps that are needed, (iii) identifying the objectives it pursues and when assessing whether these are legitimate, and (iv) assessing whether the regulatory measures taken are necessary and proportionate.

4.2.4.2. Swiss Personality Rights

159. FIFA argues that any hypothetical limitation to personality rights under Article 28 CC can be justified by overriding interests, in this case, the public interest in a functioning and healthy football transfer system and the resulting need for effective regulation.

4.2.4.3. Swiss Competition Law

160. First, FIFA argues that the FFAR do not fall in the scope of Article 4(1) of the Cartel Act, but only in the scope of Article 7 of the Cartel Act.

161. Second, FIFA advances that the FFAR are appropriate to achieve the objectives pursued.

162. Third, FIFA relies *mutatis mutandis* on the reasoning adopted under EU competition law to argue that the service fee cap is not a discrimination prohibited by Article 7 of the Cartel Act.

V. JURISDICTION

163. R27 of the CAS Code provides that *"[t]hese Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body*

where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings). Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport."

164. PROFAA and FIFA have expressly agreed in writing to submit this dispute to CAS, by letter from PROFAA to FIFA of 18 October 2022, by letter from FIFA to PROFAA of 12 December 2022, and by a further exchange of emails between the parties of 14 and 15 December 2022, and have confirmed their choice by signing the Order of Procedure.

165. Furthermore, Article 56 of the FIFA Statutes provides that "*FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agent*".

166. As a result, the CAS has jurisdiction to hear the present case.

VI. ADMISSIBILITY

167. The Parties' submissions were filed within the deadlines agreed between PROFAA and FIFA. They complied with all other requirements of the CAS Code, including the payment of the CAS Court office fee. It follows that the Request for Arbitration is admissible.

VII. APPLICABLE LAW

168. Article R45 of the CAS Code provides that "*[t]he Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono*".

169. By an exchange of emails of 14 and 15 December 2022, PROFAA and FIFA agreed that the only object of this dispute is to review the validity of the FFAR under the FIFA Statutes and regulations, Swiss law and EU law. If the Panel deems appropriate, it may additionally refer also to other laws.

VIII. MERITS

1. Preliminary Observations

170. The summary of the Parties' submissions in this Award refers to the substance of the allegations and arguments, without listing them exhaustively. In its discussion of the case and its findings, the Panel nevertheless examined and took into account all of the allegations, arguments, and evidence submitted in writing and during the Oral Hearing,

whether or not expressly referred to herein. This Panel has sought to carefully and comprehensively review all discernible pleas in full, including, for completeness, all of the main subsidiary lines of reasoning to the extent that the evidence and arguments in the file allowed it.

2. FIFA Enjoys Legitimacy to Regulate Football Agent Services *A Priori*

171. The present proceedings raise one fundamental question of sports governance, namely: can FIFA extend its regulatory powers beyond the task of governing the sport of football itself and cover peripheral economic activities, particularly the market of football agent services?

172. The EU General Court previously faced this question in *Piau*, but decided to leave the question "open":

> "*With regard to FIFA's legitimacy* [...] *to enact* [rules governing football agent services], *which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football* [...], *is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.*" (See *Piau*, Case T-193/02, paras. 76-78; emphasis added.)

173. PROFAA invites this Panel to answer the "open question" of FIFA's legitimacy in the negative, essentially claiming that FIFA does not enjoy legitimacy to regulate football agent services because this economic activity is peripheral to the sport of football itself.

174. Conversely, FIFA invites this Panel to answer the open question in the affirmative, defending its legitimacy to regulate football agent services, as this market is intimately connected with, and has been proven to produce a series of negative effects on, the sport of football.

175. The Panel observes that PROFAA has failed to show that, as a matter of principle, FIFA does not enjoy legitimacy to regulate football agent services. On the contrary, the Panel observes that FIFA enjoys both so-called "technical" and "democratic" legitimacy to regulate football agent services *a priori*.

176. As Advocate General Rantos highlighted in *European Superleague* (Case C-333/21, para. 31):

> "*Sports federations* [such as FIFA] *play a key role in* [sports governance], *in particular from an organisational perspective, with a view to ensuring compliance with, and the uniform application of, the rules governing the sporting disciplines in question. That role has, moreover, been recognised by the Court, which has held that it falls to the sports federations to lay down appropriate rules for the organisation of a sporting discipline and that the delegation of such a task to sports federations is, in principle, justified by the fact that those federations have the necessary knowledge and experience to perform that task.* [...]."

177. Football is a competitive sport with a global reach. Therefore, the sporting conditions should be as harmonious as possible everywhere, in order to maintain a level-playing field. FIFA is the international governing body of football and organises all the main football competitions. At present, there are no substitute international organisations, either of private or public nature.

178. FIFA appears to have conducted a thorough consultation process, gathering input from many relevant stakeholders, including notably that of PROFAA (PROFAA participated in the consultation process and submitted its feedback to several drafts, where PROFAA recognised that the review of the football governance system is "*aimed at safeguarding all parties involved in football on and off the pitch*" - 2nd Submission from the Professional Football Agents Association to FIFA's consultation on the FFAR), other football agent organisations, UEFA, member associations and leagues, *inter alia*. The FFAR also garnered wide legislative support from a range of public authorities, including the European Commission (Answer of 20 September, 2021 given by Commissioner Ms. Gabriel), the European Parliament (European Parliament Resolution of 23 November 2021 on EU Sports Policy: Assessment and Possible Ways Forward (2021/2058(INI))), the Council of Europe (Technical Paper – FIFA Transfer System Reform – Analysis and Recommendations), and the Parliamentary Assembly of the Council of Europe (Football Governance: Business and Values). On this basis, FIFA has extensively reported the negative externalities of the market for football agent services on, and its intimate connection with, the sport of football itself, thus adequately justifying the need to regulate football agent services.

179. In that respect, the Panel notes that the activity of agents cannot be properly defined as being only "peripheral" to the world of football and its organization. Agents, in fact, as far as they represent the interests of clubs and players, directly engage in the organization and functioning of the market of players' services, with respect to their employment and transfer – i.e., with respect to one of the core aspects of the entire football system. As a result, FIFA appears to be entitled, in general terms, to adopt rules governing the activity of agents, in the same way as (and to the extent in which) it is entitled to issue regulations concerning the status and transfer of players.

180. In any event, parallel international and national legal systems remain free to depart from the principles set out in the FFAR by imposing so-called "mandatory requirements", which prevail over FIFA's system of private law. National associations that are members of FIFA may also deviate from the provisions of the FFAR to accommodate stricter mandatory provisions of national law (see Article 3(3) FFAR).

181. In sum, PROFAA fails to demonstrate that FIFA *a priori* does not enjoy legitimacy to regulate the football agent services.

182. Regardless of the above, the Panel must answer the "open question" whether FIFA enjoys legitimacy to regulate football agent services *in concreto*, that is, by examining whether FIFA's regulatory action, and specifically the contested provisions of the FFAR, complies with (i) EU competition law (see Section VIII.3 *infra*), (ii) EU internal market law and the EU Services Directive (see Section VIII.4 *infra*), (iii) Article 16 of the

CFREU (see Section VIII.5 *infra*), (iv) privacy and data protection rules (see Section VIII.6 *infra*), and (v) State laws, namely Swiss law, Italian law, French law and the MSL Collective Bargaining Agreement (see Sections VIII.7 *infra*). The Panel will examine the compatibility of the contested provisions of the FFAR with these legal benchmarks in this order.

183. At the core of this review lies the more specific question of whether FIFA's regulatory action pursues legitimate public objectives recognised by the EU Courts and is adequate, necessary and proportionate to achieve the intended objectives. The Panel will undertake this proportionality review, first, when assessing the compatibility of the contested provisions of the FFAR with EU competition law. But the findings set out therein will largely permeate the rest of the analysis. In any event, the Panel will still review the compliance of the contested provisions of the FFAR with each of the applicable legal benchmarks respecting their idiosyncrasies.

3. Whether the FFAR Comply with EU Competition Law

184. First, PROFAA submits that Article 14 FFAR imposing a service fee cap constitutes a restriction "by object" and "by effect" that infringes Article 101 TFEU. PROFAA however errs in referring to Article 14 FFAR as imposing the contested service fee cap. Article 14 FFAR merely establishes the general principles governing service fees. Article 15(2) FFAR imposes the contested service fee cap. Despite PROFAA's error, the Panel will review the compatibility of Article 15(2) FFAR, and associated Articles 15(3)-(4) FFAR, with Article 101 TFEU.

185. Second, PROFAA submits that, in adopting Article 15(2) FFAR, FIFA has abused its dominant position, thus infringing Article 102(a) and (c) TFEU. Accordingly, the Panel will review the compatibility of Article 15(2) FFAR with Article 102(a) and (c) TFEU.

186. Third, PROFAA submits that, in adopting Article 12(2) FFAR, limiting the provision of regulated football agent services to football agents, FIFA has abused its dominant position, thus infringing Article 102 TFEU. Accordingly, the Panel will review the compatibility of Article 12(2) FFAR with Article 102 TFEU.

187. Fourth, PROFAA submits that, in adopting Articles 12(8)-(10) FFAR, setting limitations on multiple representation, FIFA has abused its dominant position, thus infringing Article 102 TFEU. Accordingly, the Panel will review the compatibility of Articles 12(8)-(10) FFAR with Article 102 TFEU.

188. However, before assessing the merits of PROFAA's abovementioned submissions, the Panel will address the broader considerations below, namely whether:

(i) FIFA qualifies as an "association of undertakings" and the FFAR can be considered a "decision" thereof under Article 101(1) TFEU;

(ii) FIFA holds a "collective dominant" position under Article 102 TFEU;

(iii) the *Wouters/Meca-Medina* "regulatory ancillary restraints" framework applies to the present case and can justify conduct that infringes Articles 101 and/or 102

TFEU; and

(iv) FIFA enjoys certain margin of appreciation.

189. Subsequently, the Panel will assess the compatibility of the contested provisions of the FFAR with Articles 101 and 102 TFEU.

3.1. FIFA Qualifies as an "Association of Undertakings" and the FFAR as a "Decision" of that Association under Article 101(1) TFEU

190. PROFAA claims that FIFA qualifies as an "association of undertakings" and the FFAR can be considered a "decision" under Article 101(1) TFEU.

191. PROFAA's claim is well founded.

192. Article 101(1) TFEU prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market* [...]".

193. The EU Court of Justice has defined the term "association of undertakings" broadly, considering that it pertains to a group of entities involved in economic activities (*Wouters*, Case C-309/99, para. 64) that assumes the responsibility of representing and safeguarding the collective interests of its members (Opinion of the Advocate General Léger in *Wouters,* Case C-309/99, para. 61). The legal status and financial structure of such association are insignificant (*Wouters,* Case C-309/99, paras. 46-49). In particular, Advocate General Lenz stated in his Opinion in *Bosman* that national football federations "*are to be regarded as associations of undertakings*" (Opinion of the Advocate General Lenz in *Bosman,* Case C-415/93, para. 256).

194. The EU General Court has specifically confirmed that FIFA qualifies as an "*association of undertakings*" under Article 101(1) TFEU because:

(i) FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity (*Piau*, Case T-193/02, para. 69);

(ii) the national associations themselves are associations of undertakings, because (a) FIFA's statutes require them to participate in competitions organised by FIFA and (b) they are exclusive holders (with FIFA) of broadcasting and transmission rights for the sporting events (and must pay back a certain percentage to FIFA) - therefore, they also carry on an economic activity (*Piau*, Case T-193/02, para. 71); and

(iii) FIFA groups both national associations and football clubs - therefore, FIFA also constitutes an association of undertakings (*Piau*, Case T-193/02, para. 72).

195. The EU Court of Justice has defined the term "decisions" by associations of undertakings as "*a faithful expression of the members' intention to conduct themselves*

compulsorily on the market in conformity with the terms [of Article 101(1) TFEU]" (*Van Landewyck v Commission*, Joined Cases 209 to 215 and 218/78, point 9).

196. The EU General Court has specifically confirmed that FIFA's football agent regulations, such as the FFAR, constitute a "*decision by an association of undertakings*" under Article 101(1) TFEU, because:

(i) football agent services are an economic activity (*Piau*, Case T-193/02, para. 73);

(ii) the FFAR do not fall within the scope of the "specific nature of sport" as defined in the case law of the EU Court of Justice (*Piau*, Case T-193/02, para. 73 and the case law cited therein);

(iii) the FFAR are adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (*Piau*, Case T-193/02, para. 74; and *Wouters and Others*, Case C-309/99, paras. 68 and 69);

(iv) the FFAR do not fall within the scope of the freedom of internal organisation enjoyed by sports associations (*Piau*, Case T-193/02, para. 74; *Bosman*, Case C-415/93, para. 81; and *Deliège*, Cases C-51/96 and C-191/97, para. 47); and

(v) the FFAR are (a) binding on national associations that are members of FIFA, which are required to draw up similar rules that are subsequently approved by FIFA (see Arts. 2-3 FFAR), and (b) aim to coordinate the conduct of its members (*Piau*, Case T-193/02, para. 75; and *Wouters and Others*, Case C-309/99, para. 71).

197. FIFA concedes in its Answer to PROFAA's Statement of Claim that "*it is an association of undertakings within the meaning of Art. 101 TFEU for the purposes of the adoption and implementation of the FFAR*".

198. The Panel, therefore, concludes that FIFA qualifies as an "association of undertakings" and the FFAR can be considered as a "decision" thereby under Article 101(1) TFEU.

199. Accordingly, the Panel will review the compatibility of Article 15(2) FFAR, and associated Articles 15(3)-(4) FFAR, with Article 101 TFEU.

3.2. FIFA Holds a "Collective Dominant" Position under Article 102 TFEU

200. PROFAA claims that FIFA holds a "collective dominant" position under Article 102 TFEU in the relevant market of football agent services.

201. PROFAA's claim is well founded.

202. Article 102 TFEU prohibits "[a]*ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it* [...] *in so far as it may affect trade between Member States*".

203. The EU Court of Justice has found that a group of undertakings holds a "collective

dominant" position where they "*present themselves or act together on a particular market as a collective entity*" (*Compagnie Maritime Belge,* Case C-395/96, para. 36). The Court specified that such collective dominant position must be established "*by examining the economic links or factors which give rise to a connection between them*" (*Gemeente Almelo and Others*, Case C-393/92 para. 43; *France and Société commerciale des potasses,* Joined Cases C-68/94 and C-30/95, para. 221; *Compagnie Maritime Belge,* Case C-395/96, paras. 39-41). In particular, the Court has consistently held that three conditions have to be met: (i) the undertakings "*must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy*", (ii) the undertakings must have an incentive not to depart from the common policy on the market, and (iii) "*the foreseeable reaction of current and future competitors, as well as of consumers, should not jeopardise the results expected from the common policy*" (*Airtours v Commission*, Case T-342/99, para. 62; *Verband der freien Rohrwerke v Commission*, Case T-374/00, para. 121).

204. The EU General Court specifically confirmed in *Piau* that FIFA holds a "collective dominant" position under Article 102 TFEU in the relevant market of football agent services (*Piau*, Case T-193/02, paras. 110-116). In line with the EU General Court's findings in *Piau*, in the present case:

(i) the FFAR governs the market for the provision of football agent services, where players and clubs are the buyers, and agents are the sellers - in this market, FIFA can be regarded as an undertaking, given that FIFA emanates as a second-level association composed of national associations and clubs, which themselves are undertakings participating in the market of football agent services (*Piau*, Case T-193/02, para. 112);

(ii) the FFAR may result in the clubs operating on the market of football agent services being so linked as to their conduct that they present themselves as a collective entity vis-à-vis their competitors and their trading partners (*Piau*, Case T-193/02, para. 113);

(iii) the FFAR are binding on member national associations and clubs (see Articles 2-3 FFAR) and indirectly on other actors, such as players and the agents, which are moreover subject to sanctions where they infringe the FFAR that may even lead to their exclusion from the market (see Article 21 FFAR) - as a result, the conduct of these bodies is linked in the long term (*Piau*, Case T-193/02, para. 114); and

(iv) the fact that FIFA does not operate on the market for football agent services is not relevant because:

(a) FIFA holds supervisory powers over the sport-related activity of football and connected economic activities (*Piau*, Case T-193/02, para. 115); and

(b) FIFA is in any event the emanation of national associations and clubs, *i.e.*, the actual buyers of the services of players' agents, and FIFA therefore operates on this market through its members (*Piau*, Case T-193/02, para. 116).

205. FIFA "*does not admit that it holds a dominant position in the market for players' agent services*". FIFA essentially claims that (i) *Piau* is an outdated precedent and that (ii) neither the EU Commission nor the EU General Court in *Piau*, nor PROFAA in the present case, undertook a proper market definition assessment based on economic evidence to establish FIFA's collective dominant position. Yet, FIFA does not contest any of the specific elements that the EU General Court relied on to conclude that FIFA holds a collective dominant position in the market for football agent services.

206. For the purposes of the present proceedings, therefore, the Panel reiterates the EU General Court's finding in *Piau*, namely that FIFA may be considered to hold a "collective dominant" position under Article 102 TFEU in the market for football agent services, without precluding the EU Commission or EU Courts from concluding differently (or parties demonstrating otherwise) in future cases on the basis of updated and more detailed economic evidence.

207. Accordingly, the Panel will review the compatibility of Articles 15(2), 12(2) and 12(8)-(10) FFAR with Article 102 TFEU.

3.3. The *Wouters/Meca-Medina* "Regulatory Ancillary Restraints" Framework Applies to the Present Case and Can Justify Conduct that Infringes Article 101 and/or Article 102 TFEU

208. PROFAA contends that the so-called "regulatory ancillary restraints" framework laid down by the EU Court of Justice in *Wouters* (Case C-309/99) and *Meca-Medina* (Case C-519/04 P) does not apply to the present case (the "*Wouters/Meca-Medina* framework"). Instead, PROFAA invites the Panel to assess the compatibility of the contested provisions of the FFAR with EU competition law following the assessment set out by the EU General Court in *Piau*, particularly the EU General Court's finding that FIFA's agent regulations did not form part of the so-called "sporting exception" (*Piau*, Case T-193/02, para. 105).

209. Conversely, FIFA invites the Panel to assess the compatibility of the contested provisions of the FFAR with EU competition law following the *Wouters/Meca-Medina* framework.

210. FIFA's submission is well founded.

211. The EU Court of Justice has recognised that undertakings may justify anticompetitive conduct that is otherwise liable to infringe Article 101(1) TFEU, where:

(i) the conduct is ancillary to achieve legitimate objectives recognised by the EU legal order, including not just purely "commercial" objectives (*Metro*, Case C-26/76 and *Pronuptia de Paris*, Case C-161/84), but also broader "regulatory" objectives that may encompass a wide range of public interests (*Wouters and Others*, Case C-309/99, paras. 90 and 97; *Meca-Medina v Commission*, Case C-519/04 P, paras. 42-43; *International Skating Union*, T-93/18, paras. 77-78, pending appeal in Case C-124/21; and Opinion of AG Rantos in *European*

Superleague, Case C-333/21, paras. 40-42, 85 *et seq*, and 131, pending judgment of the EU Court of Justice in the same case); and

(ii) the conduct is appropriate and proportionate to achieve the intended objectives (see also the case law cited in this paragraph).

212. Equally, in the present case, the Panel finds that FIFA may, in adopting the FFAR, justifiably pursue public interest objectives recognised by the EU legal order, even if the contested provisions of the FFAR may be liable to infringe EU competition law, so long as the FFAR provisions are appropriate and proportionate to achieve the intended objectives. As FIFA correctly notes, the CAS follows this approach as standard practice (CAS 2020/O/6689, para. 816-820; CAS 2014/A/3561 & 3614 39 para. 179; CAS 2009/A/1788 14, paras. 38–46, CAS 2007/A/1287, paras. 35–41; CAS 2012/A/2852, paras. 76 and 111).

213. The Panel's conclusion is not called into question by PROFAA's arguments. It is indeed the case that the EU General Court found that the football agent regulations at issue in *Piau* did not fall under the so-called "sporting exception" (*Piau*, Case T-193/02, para. 105). However, as FIFA rightly points out, the EU General Court in *Piau* did not preclude, as a matter of principle, the possibility to justify anticompetitive conduct under the broader regulatory ancillary restraints framework based on a more detailed proportionality assessment. On the contrary, the EU General Court found in *Piau* that the alleged anticompetitive conduct was capable of justification under the related provision Article 101(3) TFEU (*Piau*, Case T-193/02, paras. 73 and 100-106).

214. This reading of *Piau* is confirmed by subsequent cases, where the EU Court of Justice has assessed the compatibility of rules of sporting bodies that impact economic activity peripheral to the relevant sport by reference to the regulatory ancillary restraints framework, even if the alleged restrictions did not benefit from the "sporting exception" (*Meca-Medina*, Case C-519/04 P, paras. 22-34). As is clear from the evolution of the case law, over time the EU Court of Justice has gradually limited the scope of the sporting exception, and instead more broadly recognised the economic character of sports, thus favouring a nuanced proportionality assessment in each case (see *Meca-Medina*, Case C-519/04 P, para. 26 and the case law cited)

215. It is also clear from *Wouters* that the EU Court of Justice did not intend to limit the applicability of the regulatory ancillary restraints framework to activities of purely sporting nature. In fact, the EU Court of Justice assessed whether a national prohibition on multidisciplinary partnerships involving members of the Dutch Bar and other professionals, which was liable to restrict Article 101(1) TFEU, could nevertheless be justified on the basis that it pursued legitimate consumer protection objectives (*Wouters*, Case C-309/99, para. 97). As further assessed below, the FFAR pursue legitimate objectives that, to a large extent, equally seek to protect consumers (*i.e.*, in this case, to protect players, coaches and clubs hiring the services of football agents), among other legitimate public interests.

216. Accordingly, were the Panel to find that the contested provisions of the FFAR infringe

EU competition law, the Panel would assess whether the anticompetitive conduct can nevertheless be justified by applying the *Wouters/Meca-Medina* framework.

217. To the Panel's best knowledge, the EU Courts have so far only applied the *Wouters/Meca-Medina* framework to justify conduct infringing Article 101(1) TFEU. The Panel, however, finds that the *Wouters/Meca-Medina* framework may also justify conduct infringing Article 102 TFEU.

218. In *European Superleague*, AG Rantos observed that: "*the analysis developed regarding the application of the case-law on 'ancillary restraints' in the context of* [Article 101(1) TFEU] *can be transposed when examining the measures at issue in the present case in the light of Article 102 TFEU*" (Opinion of AG Rantos in *European Superleague*, Case C-333/21, para. 131).

219. The Panel further notes that the *Wouters/Meca-Medina* framework does not stem from any specific textual elements of Article 101(1) TFEU, but arises instead from the general need to allow the EU Courts to balance restrictions of competition with the pursuit of public goals. Nothing in the text of Article 102 TFEU prevents this extension either. On the contrary, Articles 101 and 102 TFEU, being part of the same system of rules, must be interpreted consistently, particularly because certain anticompetitive conduct are liable to infringe both Articles 101 and 102 TFEU. The Panel's observation, moreover, flows from the fact that EU competition rules, as a whole normative system, are "*include*[d]" in EU internal market law (see TFEU Protocol No 27 on the internal market and competition), where restrictions to free movement provisions are routinely justified in light of general public interests (see, for example, *Reisebüro Broede*, Case C-3/95, para. 38, which the EU Court of Justice cross-referenced in *Wouters*, Case C-309/99, para. 97). Therefore, Articles 101-102 TFEU and EU free movement rules should follow similar principles.

220. Accordingly, the Panel will apply the *Wouters/Meca-Medina* framework to both restrictions of Article 101 and 102 TFEU. Equally, this assessment may be extrapolated largely on the same terms to the assessment of whether the FFAR infringe EU internal market provisions.

3.4. FIFA Enjoys Certain Margin of Appreciation

221. FIFA claims that it enjoys certain margin of appreciation when adopting the FFAR.

222. PROFAA disputes that FIFA enjoys any margin of discretion.

223. As FIFA rightly points out, *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. In particular, the EU Court of Justice indicated that the applicable standard is whether the contested provisions of the FFAR can "*reasonably*" be considered to be appropriate and proportionate to achieve the intended public objectives (*Wouters*, Case C-309/99, para. 107; see also Opinion AG Rantos in *ISU*, Case C-124/21, para. 39). Similarly, the EU Court of Justice has indicated that the

applicant has to establish that the challenged act is vitiated by a "*manifest error of assessment*" (*Meca-Medina*, Case C-519/04 P, paras. 49-50).

224. FIFA's margin of appreciation has also been recognised by the CAS (*e.g.*, CAS 2021/A/7678, para. 67).

225. Ultimately, FIFA's margin of discretion derives from its "technical legitimacy" mentioned above.

226. Accordingly, when examining whether the contested provisions of the FFAR are appropriate and proportionate to achieve the public objectives stated by FIFA, the Panel will take due account of FIFA's margin of appraisal.

3.5. Compatibility of Articles 15(2), and Associated Articles 15(3)-(4) and 16(3)(d) FFAR, with EU Competition Law under the *Wouters/Meca-Medina* Framework

227. Articles 15(2)-(4) FFAR provide as follows:

(2) The maximum service fee payable for the provision of Football Agent Services in a Transaction, regardless of the number of Football Agents providing Football Agent Services to a particular Client, is:

Client	Service fee cap	
	Individual's annual Remuneration less than or equal to USD 200,000 (or equivalent)	Individual's annual Remuneration above USD 200,000 (or equivalent)
Individual	5% of the Individual's Remuneration	3% of the Individual's Remuneration
Engaging Entity	5% of the Individual's Remuneration	3% of the Individual's Remuneration
Engaging Entity and Individual (permitted dual representation)	10% of the Individual's Remuneration	6% of the Individual's Remuneration
Releasing Entity (transfer compensation)	10% of the transfer compensation	

For the avoidance of doubt, the following shall apply:

a) The calculation to determine the relevant service fee cap of the Individual's Remuneration may not take into account any conditional payments.

b) If an Individual's Remuneration is above USD 200,000 (or equivalent), the annual excess above that amount shall be subject to a service fee cap of 3% if the Football Agent is representing an Individual or an Engaging Entity or 6% if they are representing both an Engaging Entity and an Individual (permitted dual representation).

c) The calculation of the transfer compensation may not include:

i. any amount paid as compensation for breach of contract pursuant to article 17 or Annexe 2 of the RSTP; and/or

ii. any sell-on fee.

(3) Where a Football Agent or a Connected Football Agent, in the 24 months prior to or following a Transaction, performs Other Services for a Client involved in that Transaction, it shall be presumed that the Other Services formed part of the Football Agent Services performed in that Transaction, unless proven to the contrary.

(4) Where a Football Agent and/or Client fails to rebut the presumption in paragraph 3 of this article, the fees paid for the Other Services shall be deemed to be part of the service fee paid for the Football Agent Services performed in that Transaction.

228. Article 16(3)(d) FFAR provides as follows:

(3) A Football Agent may not engage, or attempt to engage, in the following conduct:
[…]

(d) Circumvent the cap established by these Regulations, either directly or indirectly, by, for example and without limitation, intentionally increasing the service fee charged or that otherwise would have been charged to the Client for Other Services.

229. The FFAR define "*Football Agent Services*" 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.

230. The FFAR define "*Other Services*" as:

any services performed by a Football Agent for or on behalf of a Client other than Football Agent Services, including but not limited to, providing legal advice, financial planning, scouting, consultancy, management of image rights and negotiating commercial contracts.

231. Article 15(2) FFAR essentially imposes service fee caps on agent services, which are gradated depending on the client represented (individual, engaging entity and releasing entity) and the individual's annual remuneration (above or below the USD 200,000 threshold).

232. Articles 15(3)-(4) FFAR jointly establish a rebuttable presumption by which, where an agent provides "*Other Services*" to a client involved in a transaction, in the 24 months prior to or following the transaction, these services are presumed to be part of the transaction, *i.e.*, they are equated to "*Agent Services*" that are subject to the fee cap.

233. Article 16(3)(d) FFAR prohibits football agents from circumventing the service fee cap established by Article 15(2) FFAR.

3.5.1. Article 15(2) FFAR Does Not Qualify as a Restriction "By Object" under Article 101(1) TFEU

234. PROFAA submits that Article 15(2) FFAR qualifies as a restriction "by object" under Article 101(1) TFEU. In particular, PROFAA argues that by setting a service fee cap, FIFA "*explicitly establishes the (maximum) price*", depriving agents from the possibility of setting their own fees and therefore distorting competition. PROFAA also argues that FIFA fixes this maximum price jointly "*which its members (the football clubs) will pay for receiving football agent services*".

235. FIFA disputes PROFAA's submission.

236. According to the EU Court of Justice, certain types of coordination between undertakings reveal a sufficient degree of harm to competition so that they can be regarded, by their very nature, as being harmful to the proper functioning of normal competition, without the need to examine their effects (*Groupement des Cartes Bancaires,* Case C-67/13 P, paras. 49-50 and the case law cited). In order to determine whether an agreement between undertakings or a decision by an association of undertakings may be considered a restriction of competition "by object" within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (*Groupement des Cartes Bancaires,* Case C-67/13 P, para. 53 and the case law cited). 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 (*Groupement des Cartes Bancaires,* Case C-67/13 P, para. 53 and the case law cited). 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 EU Courts from taking that factor into account (*Groupement des Cartes Bancaires,* Case C-67/13 P, para. 54 and the case law cited).

237. PROFAA fails to substantiate and convince that Article 15(2) FFAR meets these criteria.

238. As FIFA rightly points out, Article 15(2) FFAR does not fix prices in itself. The service fee cap leaves room for agents to compete beneath the cap. And Article 15(2) FFAR gradates the service fee cap depending on the type of client (individual, engaging entity and releasing entity) and the level of renumeration of the transferred individual (above or below the USD 200,000 threshold).

239. For those reasons, the imposition of maximum prices in a vertical relationship does not qualify as a restriction "by object" under Article 101(1) TFEU; instead, it is necessary to assess whether the imposition of maximum prices is liable to restrict competition "by effect".

240. In this sense, the EU Court of Justice has indicated that "*it is necessary to ascertain whether the fixing of the maximum sale price does not remain, in reality, a fixed or minimum sale price, account being taken of all the contractual obligations and the*

conduct of the parties in the main proceedings" (*CEPSA,* Case C-279/06, para. 70). The EU Commission has also acknowledged that it "*no longer believes that an obligation not to exceed a maximum resale price* [...] *in itself necessarily restricts competition*" (*Nathan-Bricolux,* Case COMP.F.1/36.516, para. 87). Moreover, the EU Commission's Guidelines on Vertical Restraints (2022/C 248/01, OJ C 248, 30.6.2022, p. 1-85; hereafter, the "Vertical Guidelines") in principle only treat minimum (resale) prices as a "hardcore restriction" (Vertical Guidelines, paras. 185-187). On the contrary, the Vertical Guidelines indicate that, generally, "*the imposition by the supplier of a maximum resale price or the recommendation of a resale price is not a hardcore restriction*", but has to be assessed as a restriction by effect (Vertical Guidelines, para. 188). In the present case, Article 15(2) FFAR does not combine the imposition of a maximum price with any incentives for football agents to apply that price or disincentives to lower it (Vertical Guidelines, para. 188). Hence, in that case, the Vertical Guidelines provide concrete indications to assess the maximum price as a possible restriction by effect under Article 101(1) TFEU (Vertical Guidelines, paras. 198-201; see also e.g., *Repsol*, OJ 2004 C258/7, paras. 18-20 where the EU Commission applied these principles).

241. In light of the above, PROFAA fails to establish that Article 15(2) FFAR amounts to a restriction "by object" under Article 101(1) TFEU.

242. Accordingly, the Panel will assesses whether Article 15(2) FFAR constitutes a restriction "by effect" under Article 101(1) TFEU.

3.5.2. Article 15(2) FFAR Qualifies as a Restriction "By Effect" under Article 101(1) TFEU

243. PROFAA essentially submits that Article 15(2) FFAR qualifies as a restriction "by effect" under Article 101(1) TFEU because it sets the level of the service fee cap at a point that will effectively deprive small- and medium-sized agents ("SME agents"), who are the overwhelming majority, from being able to earn a reasonable living and often even to cover their costs. To illustrate this point, PROFAA submitted an economic report prepared by PROFAA itself ("FFAR Economic Impact", February 2023).

244. However, as FIFA rightly claims, the evidence produced by PROFAA is simply not sufficient for the Panel to assess the merit of PROFAA's submission. In particular, PROFAA's FFAR Economic Impact Report presents the following methodological weaknesses:

(i) PROFAA's Report merely contains (a) a very brief analysis of the rates established by Article 15(2) FFAR compared to the service fee rates prevailing in the market (pp. 4-5), including (b) three case studies looking at the alleged effect of the FFAR on agents operating in India, Southeast Asia and Australia (pp. 6-8), and (c) a summary of the results of a survey carried out by PROFAA itself (p. 10);

(ii) PROFAA fails to provide any cost-related details in its analyses, making it impossible to even approximate the average profitability of agents mentioned in

their case studies, let alone agents in general;

(iii) PROFAA does not include information regarding the cost of living in the countries examined in the case studies;

(iv) No information is given regarding whether the small sample group selected for the survey was representative of the agent population at large, or large enough to yield statistically significant results; and

(v) PROFAA solely takes into account the impact of the FFAR on the service fees that Football Agents receive for providing Football Agent Services.

245. PROFAA did not rebut any of these claims.

246. Moreover, FIFA rightly indicates that Article 15(2) FFAR is unlikely to have an effect on agents so as to effectively deprive them from being able to earn a reasonable living and cover their costs because:

(i) PROFAA's reasoning misses that football agents can still charge for "*Other Services*" than "*Agent Services*" without a limit, given that Article 15(2) FFAR only imposes the service fee cap on "Agent Services" under the specific definition set out in the FFAR - the "*Other Services*" that are not subject to the fee cap of Article 15(2) FFAR are, for example, making arrangements to satisfy players' and coaches' basic needs, including housing, transportation, medical services, insurance, administration and schooling for children and assisting with off-field duties directly related to the players' profession and status, *inter alia* (FIFA Football Agent FAQs);

(ii) the majority of football agents will benefit from the higher 5-10% service fee cap because most players earn less than USD 200,000 per annum, which is precisely the group of (SME) agents that PROFAA argues is most affected by the service fee cap; and

(iii) the lower fee caps of 3-6% that are applicable to football agents representing individuals or engaging entities are defined by reference to the *annual remuneration* of the transferred individual, which entails that those agents can perceive service fees *each year of the individual's contract* and, therefore, may effectively perceive more service fees than agents representing the releasing entity in the same transaction, who get a nominally higher percentage (of up to 10%) of a *one-off transfer compensation*.

247. Again, PROFAA did not rebut any of these claims.

248. Moreover, PROFAA appears to sustain a contradictory position, insofar as it had previously noted during the FFAR consultation process that in "[their] *opinion* [...] *a fairer cap would see agents able to earn 5% in a dual representation agreement where the player and the Engaging club pay 5% each so that the agent can earn 10% in this transaction as a maximum*" (2nd Submission from the Professional Football Agents Association to FIFA's consultation on the FFAR).

249. For completeness, the Panel notes that FIFA submitted its own economic report allegedly indicating that 80% of football agents achieved a profit before tax and that out of the bottom third of the list of agents the expert audited, 20 of the 30 football agent companies with the lowest revenues based on the latest revenues, over 50% have a profit margin over 10% and only 25% are loss-making (Report of Paul Rawnsley, FIFA Answer to the Statement of Claims, Annex ER-3, paras. 3.4 and 5.27).

250. PROFAA also did not rebut the findings contained therein and even explicitly rejected the Panel's invitation to cross-examine the author of FIFA's economic report, Mr. Paul Rawnsley, that attended the Oral Hearing as an expert for FIFA.

251. Nevertheless, FIFA's economic report does not allow the Panel to assess the merit of PROFAA's claims either because it also presents a number of methodological weaknesses. Notably, FIFA's economic report simply appears to assess whether (i) a limited pool of agents (30 agents for which profit and loss information was identified), which does not appear to be representative of the population group of SME agents, (ii) currently makes profit. Therefore, crucially, FIFA's economic report does not examine the key question whether the imposition of the service fee cap may or may not undermine the profitability prospects of SME agents. Indeed, the author of the report notes that he "[is] *unable to comment on whether the revenues or profits generated by football agent businesses, or remuneration to the agents themselves, will be significantly affected by changes brought in by FFAR*" (Report of Paul Rawnsley, para. 5.28).

252. In any event, the burden of proof to show that Article 15(2) FFAR constitutes a restriction "by effect" under Article 101(1) TFEU lies with PROFAA, which, as shown in paragraphs 243 above, it has failed to discharge.

253. Accordingly, PROFAA's submission is manifestly unfounded.

254. In any event, the Panel observes that Article 15(2) FFAR is liable to restrict competition "by effect" under Article 101(1) TFEU in these proceedings, without detriment to EU and/or national competition authorities concluding differently in future cases based on a more detailed economic assessment.

255. In particular, setting a maximum fee cap (i) limits the pricing possibilities of agents who are forced to compete below the established price, (ii) may act as a "*focal point for* [football agents] *and may be followed by most or all of them*" (Vertical Guidelines, para. 199), (iii) may "*facilitate collusion*" between football agents, given the increased transparency in the market created by the focal point (Vertical Guidelines, para. 199), and (iv) arguably may even discourage agents from offering better quality services in line with higher prices. In this regard, the Vertical Guidelines also indicate that "[a]n *important factor for assessing possible anti-competitive effects of* [...] *maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a* [...] *maximum resale price will lead to a more or less uniform application of that price level by the resellers* [...]" (Vertical Guidelines, para. 200). This factor concurs *a fortiori* in the present case because Article 15(2) FFAR imposes a service fee cap that is binding on and (even if gradated) uniformly applies to

all football agents.

256. FIFA also concedes in its Answer to PROFAA's Statement of Claim "*that* [Article] *15(2) FFAR is capable of having restrictive effects on competition under Article 101(1) TFEU insofar as it limits the service fees payable to agents in respect of Football Agent Services*".

257. Accordingly, despite PROFAA's unsubstantiated submissions, the Panel concludes that Article 15(2) FFAR is liable to restrict competition "by effect" under Article 101(1) TFEU, and will therefore examine whether this restriction is justified under the *Wouters/Meca-Medina* framework.

258. Before that, the Panel will assess the merits of PROFAA's parallel claims, namely whether Article 15(2) FFAR may also constitute an abuse of dominant position under Article 102(a) and (c) TFEU.

3.5.3. PROFAA Fails to Prove that Article 15(2) FFAR Imposes Unfair Prices Contrary to Article 102(a) TFEU

259. PROFAA submits that Article 15(2) FFAR imposes unfair prices that amount to an abuse of dominant position under Article 102(a) TFEU.

260. However, as FIFA rightly claims, PROFAA has not adduced sufficient evidence for the Panel to be able to draw any conclusions on this point.

261. According to the case law of the EU Court of Justice, to determine whether a price is "unfairly high" or "unfairly low", it is necessary to assess whether the dominant undertaking has charged a price that lacks a reasonable relation to the economic value of the relevant product or service, comparing that price with relevant cost information and appropriate benchmarks, while taking into account the unique circumstances of each particular good or service (*United Brands,* C-27/76, paras. 248-253.; *CICCE*, C-298/83, paras. 22 and 26, *AKKA/LAA*, C-177/16, paras. 36-37).

262. PROFAA manifestly fails to meet this standard.

263. PROFAA did not adduce any evidence on the economic value of the services provided by agents, nor provided relevant cost information, nor compared the prices with appropriate benchmarks. These factors are crucial for the analysis at stake because the notion of "unfair prices" is a relative, and not an absolute, threshold.

264. Therefore, the Panel cannot assess whether Article 15(2) FFAR imposes service fee caps that amount to unfair prices, and therefore an abuse of dominant position, in the sense of Article 102(a) TFEU and the case law of the EU Court of Justice.

265. Accordingly, the Panel dismisses PROFAA's submission.

266. In any event, the Panel will assess whether such an alleged abuse of dominant position *quod non* would be justified under the *Wouters/Meca-Medina* framework as part of a

joint determination below.

3.5.4. PROFAA Fails to Prove that Article 15(2) FFAR Discriminates Between Comparable Groups of Football Agents Contrary to Article 102(c) TFEU

267. In the first place, PROFAA essentially submits that Article 15(2) FFAR applies dissimilar conditions to equivalent transactions with trading partners in the sense of Article 102(c) TFEU, insofar as the service fee cap has a disproportionate effect on SME agents, going as far as excluding them from the market altogether and thereby placing them at a competitive disadvantage with regards to the "*big players' agents*". The Panel understands SME agents as PROFAA referring to agents representing an individual and/or an engaging entity in a transaction of an individual earning less than USD 200,000 *per annum*.

268. Again, as FIFA rightly claims, PROFAA has not adduced sufficient evidence for the Panel to be able to draw any conclusions on this point either.

269. According to the case law of the EU Court of Justice, a dominant undertaking infringes Article 102(c) TFEU where it applies dissimilar conditions to equivalent transactions (*Clearstream v Commission*, Case T-301/04, para. 179), which creates a competitive disadvantage to parties competing on the same market (*MEO,* Case C-525/16, paras. 27-28).

270. PROFAA manifestly fails to meet this standard.

271. Chiefly, the service fee cap does not create a "competitive disadvantage" to SME agents because, as FIFA noted and PROFAA conceded, SME agents do not even appear to compete with large agents (in particular, PROFAA states that "*it is not disputed that wealthy agents are active in a different market than small and medium agents*").

272. On the contrary, FIFA rightly indicates that, at least in principle, Article 15(2) FFAR does apply (dis)similar conditions to (dis)similar transactions in conformity with Article 102(c) TFEU: *i.e.*, Article 15(2) FFAR precisely provides (i) a higher remuneration for agents representing an individual and/or an engaging entity in a transaction of an individual earning less than USD 200,000 *per annum* (*i.e.*, 5-10%) compared to (ii) that of agents representing an individual or an engaging entity in transactions above the threshold (*i.e.*, 3-6%). Therefore, Article 15(2) FFAR accommodates to the economic reality of different groups of football agents based on objective differences between them.

273. Therefore, PROFAA's first submission is dismissed.

274. In the second place, PROFAA essentially claims that Article 15(2) FFAR applies dissimilar conditions to equivalent transactions with trading partners in the sense of Article 102(c) TFEU, insofar as Article 15(2) FFAR establishes different percentages of service fee caps for agents acting on behalf of individuals or engaging entities in a

transaction (*i.e.*, 3-6%) compared to agents acting on behalf of releasing entities (*i.e.*, 10%), thereby placing the former group of football agents at a competitive disadvantage.

275. PROFAA, again, manifestly fails to meet the standard of Article 102(c) TFEU as defined by the EU Court of Justice.

276. As FIFA rightly points out, PROFAA misses the point that Article 15(2) FFAR sets the level of the fee caps based on different reference figures, *i.e.*, a percentage of the transferred individual's annual remuneration *versus* a percentage of the transfer compensation. In this connection, PROFAA has not produced any evidence to show that the application of the different percentages, even if relating to different reference figures, would tendentially lead to discriminate between groups of football agents (*e.g.*, by demonstrating that *de facto* transfer compensation figures are normally higher than the transferred individual's annual remuneration). In fact, the lower fee caps applying to agents representing individuals or engaging entities (3-6%) are defined by reference to the *annual remuneration* of the transferred individual, which entails that those agents can perceive service fees *each year of the individual's contract* and, therefore, may effectively perceive higher service fees than agents representing the releasing entity in the same transaction that, in contrast, are only entitled to a percentage of a *one-off transfer compensation*, even if that percentage is nominally higher (10%).

277. In any event, as FIFA rightly points out, football agents can represent both individuals and engaging entities in the same transaction and obtain cumulative compensation of up to 6-10%, which particularly benefits agents representing individuals and engaging entities in smaller transactions of individuals earning less than USD 200,000 *per annum*. This group of agents are not precluded either from representing a releasing entity and benefiting from the 10% of the transfer compensation in any other transaction.

278. In light of the above, it is not possible to conclude, solely based on the fact that Article 15(2) FFAR sets different nominal percentages of service fee caps for agents representing different parties to a transaction, that Article 15(2) FFAR applies dissimilar conditions to equivalent transactions, thereby placing one group of agents at a disadvantage compared to others in the sense of Article 102(c) TFEU.

279. Therefore, PROFAA's second submission is also dismissed.

280. In any event, the Panel will assess whether such an alleged abuse of dominant position *quod non* would be justified under the *Wouters/Meca-Medina* framework as part of a joint determination below.

3.5.5. Whether Article 15(2) FFAR Can Be Justified under the *Wouters/Meca-Medina* Framework

281. The Panel will jointly assess whether Article 15(2) FFAR, to the extent it restricts competition "by effect" under Article 101(1) TFEU, or it may be considered to amount to an abuse of dominance under Articles 102(a) or (c) TFEU *quod non*, is justified under the *Wouters/Meca-Medina* framework.

282. Accordingly, the Panel will assess whether Article 15(2) FFAR (i) pursues legitimate objectives that are recognised by the EU legal order and the case law of the EU Court of Justice, (ii) is appropriate to pursue those objectives, and (iii) is proportionate.

3.5.5.1. Article 15(2) FFAR Pursues Legitimate Objectives

283. FIFA explains that the transfer market is integral to team composition, which, in turn, is a significant factor determining the performance of teams in national and international competitions. FIFA has reported a series of market failures in the agent services market (*i.e.*, Hidden Information Problem, Hold-Up Problem and Gatekeeper Problem), which allow agents to exploit their role as intermediaries to their own advantage, thus distorting the operation of the transfer system and, ultimately, team composition and competitive balance. FIFA also provides data illustrating these market failures, showing, for instance, (i) the increase in the number of international transfers, (ii) the increase in spending on international transfer compensation, and (iii) the disproportionate increase in service fees paid to football agents, particularly following the 2015 de-regularisation of the football agents market, as well as evidence of (iv) conflicts of interest and (v) abusive, unethical and illegal practices (*see* RBB Economics: Project Ball – The inefficiencies of the transfer system and how FIFA's proposed rules help to fix them; FIFA: Example of abusive and excessive conduct of football agents; Final Consultation Document). These issues were also identified during an extensive consultation process, where a variety of relevant stakeholders (including international organisations and EU institutions) supported, and even invited, FIFA to take legislative action to address them (*see* Final Consultation Document).

284. In particular, FIFA claims that Article 15(2) FFAR seeks to ensure the proper functioning of the transfer system (the "overarching objective") and thereby to protect the integrity of the sport, including the following subsidiary goals: (a) ensuring quality of the service of agents at fair and reasonable service fees that are uniformly applicable, (b) limiting conflicts of interest and unethical conduct, (c) improving financial and administrative transparency, (d) protecting players, (e) enhancing contractual stability between players, coaches and clubs, (f) preventing abusive, excessive and speculative practices, and (g) promoting spirit of solidarity between elite and grassroots football (the "subsidiary goals").

285. All of these objectives are legitimate and have been recognised by the EU Courts.

286. Notably, the EU Court of Justice has recognised that sport governing bodies may legitimately regulate the transfer market in order to maintain competitive balance and ensure the proper functioning of sporting competitions (see *Lehtonen*, Case C-176/96, para. 54, where the EU Court of Justice noted that: "*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.*"; see also *Bosman*, Case C-415/93, paras. 106-107 *a contrario*).

287. In any event, even if the connection between (i) regulating football agent services in the transfer market and (ii) the sport of football itself may be contested to some extent, which PROFAA failed to robustly rebut in its submissions, there is no question that FIFA, in adopting Article 15(2) FFAR, pursues a series of subsidiary goals that are *themselves* legitimate objectives recognised by the EU legal order and the EU Court of Justice:

(i) Subsidiary goals (a)-(d) and (f) all essentially aim to protect consumers, which is a legitimate general interest that has been recognised extensively by the case law of the EU Court of Justice (*e.g., Wouters*, Case C-309/99, para. 97; *Cipolla*, Cases C-94/04 and C-202/04, para. 64; *Reisebüro Broede*, Case C-3/95, para. 38; *Corsten*, Case C-58/98, para. 38; and the case law cited).

(ii) Subsidiary goal (a) is also recognised by Article 102(a) TFEU, which provides that an abuse of dominant position "*may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions* [...]" (*United Brands,* Case C-27/76, paras. 248-253.; *CICCE*, Case C-298/83, paras. 22 and 26, *AKKA/LAA*, Case C-177/16, paras. 36-37). Similarly, the EU Court of Justice has recognised that Member States may set a maximum tariff are potentially lawful as long as it is justified and proportionate (*Commission v Germany,* Case C-377/17, paras. 69 et seq).

(iii) The EU Court of Justice has also joined both headings (i)-(ii) above in later cases (*e.g.*, *Guimont*, Case C-448/98, para. 30).

(iv) Subsidiary goal (e) pursues a different objective, namely the protection and improvement of working conditions, which has been recognised extensively by the case law of the EU Court of Justice (*e.g., Oebel*, Case C-155/80, para. 12). And even more relevant for this case, the EU Court of Justice has recognised that legislation seeking to remediate disturbances on the labour market, due to large and immediate movements of workers, pursues a legitimate interest (see *Rush Portuguesa Lda*, Case C-113/89, para. 13).

(v) Subsidiary goal (g) is also consistent with the goals delineated in Article 165 TFEU, namely (i) "*promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports*" and (ii) "*protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*". In *Superleague*, AG Rantos observed that the European Sports Model is "*based on a financial solidarity regime, which allows the revenue generated through events and activities at the elite level to be redistributed and reinvested at the lower levels of the sport*" (Opinion of AG Rantos in *European Superleague*, Case C-333/21, para. 30).

288. Accordingly, the Panel concludes that Article 15(2) FFAR pursues legitimate objectives.

3.5.5.2. Article 15(2) FFAR Is Appropriate to Pursue the Intended Legitimate Objectives

289. As FIFA rightly argues, Article 15(2) FFAR is suitable to reach the overarching

objective of ensuring the proper functioning of the transfer system and thereby protect the integrity of the sport, while attaining subsidiary goals (a)-(f).

290. Overall, Article 15(2) FFAR shifts the incentives of football agents from (i) a business model largely based on transaction fees, which FIFA has sufficiently demonstrated that creates a series of market failures (*i.e.*, the Hidden Information Problem, the Gatekeeper Problem and the Hold-up Problem) and other identified issues (*e.g.*, contractual instability, conflicts of interest, abusive, unethical and illegal practices, lack of transparency, exploitation of young players) hindering the effective functioning of the transfer system, to (ii) a more comprehensive business model, where agents charge their clients instead for each of the services they provide ("*Other Services*").

291. Specifically, Article 15(2) FFAR ensures, by setting a cap on "*Football Agent Services*", that agents provide services at fair and reasonable prices, limiting the reported speculative practices (subsidiary goals (a) and (f)).

292. Article 15(2) FFAR is suitable to limit conflicts of interest, unethical conduct, and abusive practices, and thus protect players, because, in addition to the abovementioned factors, Article 15(2) FFAR defines the service fee caps by reference to parameters that align the interest of agents with that of their principal (*i.e.*, their clients) (subsidiary goals (b), (d) and (f)). For instance, the remuneration of an agent representing an individual is based on a percentage of the individual's annual remuneration, and the remuneration of an agent representing a releasing entity is based on a percentage of the transfer compensation.

293. Article 15(2) FFAR is suitable to promote contractual stability because, in addition to the abovementioned factors, Article 15(2) FFAR provides that the remuneration of agents representing individuals is based on the individual's *annual* remuneration, who therefore perceive service fees each year for as long as the individual's contract lasts (subsidiary goals (d) and (e)).

294. Article 15(2) FFAR is suitable to improve financial and administrative transparency because, in addition to the abovementioned factors, Article 15(2) FFAR imposes harmonised service fee caps, which are therefore equally applicable and known to all parties in a transaction (subsidiary goal (a) and (c)).

295. On the contrary, Article 15(2) FFAR is not suitable to promote solidary between elite and grassroots football because, as FIFA itself recognised in its Answer to the Statement of Claim, "*it is correct that limiting agents' service fees does not directly increase the level of payments made pursuant to the training and solidarity mechanisms*" (subsidiary goal (g)). Regardless, Article 15(2) FFAR is appropriate to pursue the overarching objective and all other subsidiary goals stated by FIFA above.

296. None of the above is called into question by PROFAA's argument that Article 15(2) FFAR is liable to incentivise football agents to generate even more transfers to compensate for the reduction in fees for agent services. PROFAA has not substantiated this argument with evidence. In contrast, FIFA did demonstrate that the prospect of

higher agent service fees incentivises agents to generate more transfers, which in turn produces a series of negative effects on the market of football agent services. Therefore, capping agent service fees is appropriate to remediate or mitigate the negative effects highlighted by FIFA.

297. Accordingly, the Panel concludes that Article 15(2) FFAR is suitable to reach the intended legitimate objectives.

3.5.5.3. Article 15(2) FFAR Is Proportionate

298. In the first place, FIFA demonstrated that the service fee caps laid down in Article 15(2) FFAR are proportionate.

299. Article 15(2) FFAR only imposes the service fee caps on "*Agent Services*" under the specific definition set out in the FFAR, which therefore does not limit the possibility for football agents to charge for "*Other Services*", such as making arrangements to satisfy players' and coaches' basic needs, including housing, transportation, medical services, insurance, administration and schooling for children and assisting with off-field duties directly related to the players' profession and status (see FIFA Football Agent FAQs).

300. Article 15(2) FFAR sets the lower fee caps of 3-6%, applicable to agents representing individuals or engaging entities, by reference to the *annual remuneration* of the transferred individual, which entails that those agents can perceive service fees *each year of the individual's contract* and, therefore, may effectively perceive more service fees than agents representing the releasing entity in the same transaction and getting up to a 10% of the *one-off transfer compensation.*

301. FIFA provided evidence indicating that the average service fees of agents (even if limited to agents representing engaging entities) was *prima facie* excessive in relation to the size of the players' total fixed remuneration in the period from 2015 to 2021. The average service fees appeared to be particularly excessive at the lower end of the salary scale (players making less than EUR 50,000), where agents made 192.5% of the player's fixed remuneration, but also in the higher tranches of the salary scale (players making over EUR 50,000), where agents made from 20.3% to 11.8% of the player's fixed remuneration (decreasing order). FIFA also submitted witness statements from Mr. T. Scholes (formerly CEO of Stoke City and currently Chief Football Officer at the Premier League), Dr. M. Gerlinger (Vice President of Sports Business and Competitions at FC Bayern München AG) and Mr. Baer-Hoffmann (General Secretary of FIFPro, the international football players' union) indicating that the problem of excessive fees for agent services is particularly acute at the lower end of the salary scale.

302. FIFA provided evidence showing that the service fee cap is proportionate, notably, by comparison to (i) fee caps in other sports, *e.g.*, 3% of the player's remuneration in the NFL and 4% in the NBA, and (ii) national legislation in Europe setting similar caps on agent services, *e.g.*, 10% of the player's remuneration in Portugal, 10% of the value of the contract in France, 8% of the player's remuneration in Greece, or 5% of the first gross annual salary of the player in Switzerland.

303. FIFA provided evidence showing that, during consultation process leading to the adoption of the FFAR, FIFA had originally proposed (i) a service fee cap of 3% of the transferred individual's remuneration for agents representing individuals or engaging entities, and (ii) a 10% of the transfer compensation for agents representing releasing entities. In that context, FIFA indicated that it amended its original proposal to the current service fee cap of 5% of the transferred individual's remuneration for agents representing individuals or engaging entities, so as to reflect the feedback from the consultation process, and particularly from PROFAA, which itself had accepted that "*Our opinion for a fairer cap would see agents able to earn 5% in a dual representation agreement where the player and the Engaging club pay 5% each so that the agent can earn 10% in this transaction as a maximum*" (2nd Submission from the Professional Football Agents Association to FIFA's consultation on the FFAR). PROFAA did not contest the veracity or accuracy of these statements subsequently.

304. Second, FIFA showed that the threshold of USD 200,000 is proportionate.

305. FIFA provided historical transaction data indicating that (i) the majority of transfers where the player is represented by an agent (c. 60%) would fall below the USD 200,000 threshold, which entails that the majority of agents, and in particular SME agents, would benefit from the higher 5-10% cap laid down in Article 15(2) FFAR, and (ii) an increase of the USD 200,000 threshold to USD 500,000 or even USD 1,000,000 would not yield a significant increase in the total fees earned, thus indirectly indicating that fees for agent services provided in the higher tranches of the individual remuneration salary scale tend to be more aligned with the proposed service fee caps in any event.

306. PROFAA has not contested any of the abovementioned elements and figures, and certainly not proven that FIFA has committed a manifest error of assessment, thus exceeding its margin of discretion. PROFAA has only argued that Article 15(2) FFAR places a disproportionate burden on SME agents, at the stage of assessing whether Article 15(2) FFAR produces restrictive effects under Article 101(1) TFEU or constitutes an abuse of dominant position under Article 102 TFEU. However, PROFAA has not adequately supported this claim with evidence. PROFAA's only economic analysis presents a number of critical methodological weaknesses indicated above.

307. Furthermore, FIFA pondered a number of alternatives to the mandatory service fee cap set out in Article 15(2) FFAR – *e.g.*, an absolute cap, a levy on agents' annual income, a cap with a threshold below which no cap applies, a recommended cap, a mandatory default cap, or greater transparency together with a "player pays" rule – and ultimately ruled them out because they did not attain the intended objectives.

308. PROFAA claims that FIFA should have adopted the alternatives of (i) setting a recommended cap, as in the 2015 Regulations on Working with Intermediaries, or (ii) a mandatory default cap, as in the 2008 Regulations governing Players' Agents ("RGPA") and the 2001 RGPA. Besides simply stating these alternatives, PROFAA does not substantiate how they could better achieve the objectives that FIFA pursues in adopting Article 15(2) FFAR. Yet, the burden lies with PROFAA to demonstrate that FIFA's regulatory intervention is not proportionate by showing that FIFA could have pursued

less restrictive, and at least as effective, alternatives.

309. On the contrary, FIFA showed that the previous regulatory models did not achieve the intended objectives. Particularly, the recommended cap of the 2015 Regulations on Working with Intermediaries, following FIFA's decision to liberalise the football agents market in 2014, only worsened the negative effects on the transfer market. FIFA also provided sufficient evidence to this effect.

310. Accordingly, the Panel concludes that Article 15(2) FFAR is proportionate to achieve the stated legitimate objectives.

311. The Panel will now turn to assess whether the provisions associated to Article 15(2) FFAR, namely Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR, are proportionate to achieve the stated legitimate objectives.

312. PROFAA merely claimed that Articles 15(3)-(4) FFAR exacerbate the restrictive effects of Article 15(2) FFAR, without however substantiating this argument. PROFAA did not argue that Articles 15(3)-(4) FFAR could be disproportionate, either independently from or jointly with Article 15(2) FFAR. PROFAA did not raise any complaints regarding the compatibility or the proportionality of Article 16(3)(d) FFAR.

313. FIFA claimed that Articles 15(3)-(4) FFAR do not exacerbate the restrictive effects of Article 15(2) FFAR so long as football agents keep proper records of the "*Other Services*" provided and the fees charged for them.

314. Briefly, Articles 15(3)-(4) FFAR jointly establish a rebuttable presumption by which, where an agent provides "*Other Services*" to a client involved in a transaction, in the 24 months prior to or following the transaction, these services are presumed to be part of the transaction, *i.e.*, they are equated to "Agent Services" that are subject to the fee caps set out in Article 15(2) FFAR. Article 16(3)(d) FFAR prohibits football agents from "*circumvent*[ing] *the cap* [...], *either directly or indirectly, by, for example and without limitation, intentionally increasing the service fee charged or that otherwise would have been charged to the Client for Other Services*".

315. In essence, Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR both seek to prevent football agents from circumventing the service fee caps laid down in Article 15(2) FFAR. As such, all of these provisions are intimately linked, and therefore, the Panel will assess whether Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR are proportionate to achieve the legitimate objectives pursued by Article 15(2) FFAR, as part of a joint proportionality assessment.

316. As PROFAA itself implied in its written submissions, the imposition of the service fee caps set out in Article 15(2) FFAR is liable to incentivise football agents to circumvent this provision in order to recoup the foregone revenues, *e.g.*, (i) by artificially generating additional cost items that would not typically be attributed to a transaction, or (ii) by artificially inflating the amount of existing cost items to compensate for the lower fees perceived for agent services. Precisely, Articles 15(3)-(4) FFAR and Article 16(3)(d)

FFAR respectively aim to prevent either of the two scenarios (i)-(ii) above, *inter alia*. Therefore, Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR maintain the effectiveness of Article 15(2) FFAR and, with it, contribute to achieving the legitimate objectives of the FFAR system as a whole.

317. Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR are proportionate.

318. In particular, Articles 15(3)-(4) FFAR rightfully place the burden on football agents to demonstrate that cost items surrounding the conclusion of a transaction are effectively not a part thereof. As FIFA rightly stated, football agents should in principle be able to rebut this presumption through adequate record keeping, which also contributes to the broader objectives of the FFAR, namely to professionalise and improve transparency of football agent services. FIFA reasonably places the burden of proof on agents to rebut the presumption of Articles 15(3)-(4) FFAR because football agents are better placed to keep their own records and demonstrate the effective purpose of their expenses. On the contrary, if the burden were placed on FIFA, the enforcement of Article 15(2) FFAR would not be practically manageable, which would seriously undermine its effectiveness, and with it, the legitimate objectives pursued by Article 15(2) FFAR.

319. Article 16(3)(d) FFAR complements Articles 15(3)-(4) FFAR by allowing FIFA to enforce that, in any event, football agents do not circumvent the service fee cap laid down in Article 15(2) FFAR by resorting to any other artificial mechanisms. The nature and open-ended character of Article 16(3)(d) FFAR is reasonable because football agents may find any number of methods to circumvent the service fee cap laid down in Article 15(2) FFAR, besides artificially creating cost items in the 24-month window prior to or following a transfer that Articles 15(3)-(4) FFAR aim to preclude. As such, Article 16(3)(d) FFAR also limits the scope of the accounting and evidentiary obligations placed on football agents by Articles 15(3)-(4) FFAR.

320. Accordingly, the Panel finds that the associated provisions of Article 15(2) FFAR, namely Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR, are proportionate.

321. While the Panel has duly taken into account FIFA's FFAR FAQs, which details key notions such as "*Other Services*" and "*Agent Services*", the Panel nevertheless invites FIFA to adopt additional guidance to clarify even further:

(i) the functioning of the presumption laid down in Articles 15(3)-(4) FFAR, particularly how and with what evidence specifically will football agents be able to rebut the presumption; and

(ii) the scope of Article 16(3)(d) FFAR, particularly to ensure that this provision remains as an anticircumvention provision and does not prevent football agents from (a) charging for "*Other Services*" in absolute terms or (b) increasing charges for "*Other Services*" where that is justified.

322. This guidance would provide additional legal certainty to football agents and, therefore, facilitate their transition from a transaction-based business model to a more comprehensive model, where they can effectively charge for "*Other Services*" than for

"*Agent Services*".

3.6. Compatibility of Article 12(2) FFAR with EU Competition Law under the *Wouters/Meca-Medina* Framework.

323. Article 5 FFAR provides as follows:

1. An applicant must:

a) upon submitting their licence application (and subsequently thereafter, including after being granted a licence):

i. have made no false or misleading or incomplete statements in their application;

ii. never have been convicted of a criminal charge, including any related settlements, regarding matters related to: organised crime, drug trafficking, corruption, bribery, money laundering, tax evasion, fraud, match manipulation, misappropriation of funds, conversion, breach of fiduciary duty, forgery, legal malpractice, sexual abuse, violent crimes, harassment, exploitation or child or vulnerable young adult trafficking;

iii. never have been the subject of a suspension of two years or more, disqualification or striking off by any regulatory authority or sports governing body for failure to comply with rules relating to ethics and professional conduct;

iv. not be an official or employee of FIFA, a confederation, a member association, a league, a club, a body that represents the interests of clubs or leagues or any organisation connected directly or indirectly with such organisations and entities; the only exception is where an applicant has been appointed or elected to a body of FIFA, a confederation or a member association, representing the interests of Football Agents;

v. not hold, either personally or through their Agency, any Interest in a club, academy, league or Single-Entity League.

b) in the twenty-four months before the submission of a licence application, never have been found performing Football Agent Services without the required licence;

c) in the five years before the submission of a licence application (and subsequently thereafter, including after being granted a licence):

i. never have declared or been declared personally bankrupt or been a majority shareholder, director or key office holder of a business that has declared bankruptcy, entered administration and/or undergone liquidation;

d) in the 12 months before the submission of a licence application (and subsequently thereafter, including after being granted a licence)):

i. not have held any Interest in any entity, company or organisation that brokers, arranges or conducts sports betting activities whereby a

wager is placed on the outcome of a sporting event in order to win money.

2. *An applicant must satisfy the eligibility requirements:*
   a) *at the time of their application, in order to take the exam; and*
   b) *at all times after obtaining a licence, in accordance with article 17.*
3. *The FIFA general secretariat is responsible for investigating compliance with the eligibility requirements.*

324. Article 6 FFAR provides as follows:

1. *If an applicant satisfies the eligibility requirements, FIFA will invite the applicant to sit the exam at the member association selected in their licence application.*
2. *The member association may charge the applicant an exam fee, exclusively to cover the reasonable costs of organising and holding the exam. Failure to pay the exam fee before the exam will disqualify the applicant from sitting the exam.*
3. *The frequency and date of exams shall be determined by FIFA and communicated by circular.*
4. *The exam will be a multiple-choice test prepared by FIFA and will test knowledge of current football regulations, as established in the circular.*

325. Article 9 FFAR provides as follows:

1. *To maintain their licence, a Football Agent shall comply with the CPD requirements on an annual basis.*
2. *The CPD requirements will be communicated annually by circular.*

326. Article 11(1) FFAR provides as follows:

Only a Football Agent may perform Football Agent Services.

327. Article 12(2) FFAR provides as follows:

Only a Football Agent may Approach a potential Client or enter into a Representation Agreement with a Client for the provision of Football Agent Services.

328. "*Football Agent*" is defined in the FFAR as follows:

a natural person licensed by FIFA to perform Football Agent Services.

329. "*Approach*" is defined in the FFAR as follows:

(i) any physical, in-person contact or contact via any means of electronic communication with a Client; (ii) any direct or indirect contact with another person or organisation linked to a Client, such as a family member or friend; or (iii) any action when a Football Agent uses or directs another person or organisation to contact a Client on their behalf in the manner described in (i) or (ii) above.

330. "*Client*" is defined in the FFAR as follows:

a member association, club, player, coach, or Single-Entity League that may engage a Football Agent to provide Football Agent Services.

331. "*Representation Agreement*" is defined in the FFAR as follows:

a written agreement for the purpose of establishing a legal relationship to provide Football Agent Services.

3.6.1. Article 12(2) FFAR Does Not Qualify as an Abuse of Dominant Position under Article 102 TFEU

332. PROFAA essentially claims that Article 12(2) FFAR precludes football agents from using employees or auxiliaries to assist them with their activities, hence "*significantly hindering agents' access to competition*", which allegedly constitutes an abuse of dominant position under Article 102 TFEU.

333. PROFAA does not substantiate how Article 12(2) FFAR constitutes an abuse of dominant position under Article 102 TFEU, meeting the specific criteria laid down by the EU Court of Justice.

334. In any event, PROFAA's claim is manifestly erroneous.

335. Article 12(2) FFAR only reserves to a "*Football Agent*" the performance of specific services, namely to "*Approach*" a "*potential Client*" or enter into a "*Representation Agreement*" with a "*Client*", which are all terms that are well defined in the FFAR. As FIFA rightly indicates, Article 12(2) FFAR essentially "*provide*[s] *that only regulated persons (Football Agents) can carry out regulated activities (provide Football Agent Services) or things preparatory to providing those regulated activities*". This is an existential feature of any regulated activity. For instance, in *Wouters*, the prohibition of multi-disciplinary partnerships limited how regulated persons (members of the Netherlands Bar) carried out regulated activities (legal services) (*Wouters*, Case C-309/99). The licensing system set out by the FFAR would be completely frustrated if unlicensed persons could carry out the licensed activity.

336. Article 12(2) FFAR does not preclude football agents from using employees or auxiliaries to assist them with the performance of regulated activities. This is clear from the text of Article 12(2) FFAR itself, but also from FIFA's FFAR FAQs Document, which provides a non-exhaustive list of tasks that employees and contractors can perform to assist football agents, *e.g.*, (i) providing normal secretarial support to a Football Agent in the production of documents or letters, whether in relation to a transfer or not, (ii) arranging meetings between Football Agents and Clients, where there is no fee sought or paid for the service, or (iii) assisting with the practical arrangements for the relocation of a Player or Coach, excluding contractual and financial arrangements, *inter alia* (see FIFA Football Agent FAQs). This interpretation of Article 12(2) FFAR is also supported by Article 11(3) FFAR, which reiterates the same prohibition of Article 12(2) FFAR, while adding that "[a] *Football Agent may conduct their business affairs*

through an Agency". Equally, Article 11(3) FFAR notes that "[a] *Football Agent remains fully responsible for any conduct by their Agency, its employees, contractors or other representatives should they violate these Regulations*", which indicates that football agents may use employees or auxiliaries to assist them in the performance of regulated activities, but in any event, as the only regulated actor authorised to perform such activities, football agents remain responsible where their employees or auxiliaries infringe the FFAR.

337. In conclusion, it is clear that Article 12(2) FFAR allows football agents to delegate administrative and other menial tasks to assistants and auxiliaries, while legitimately and proportionately only authorising football agents to provide football agent services.

338. Accordingly, the Panel dismisses PROFAA's claim.

339. In any event, for completeness, the Panel will assess whether such an alleged abuse of dominant position (*quod non)* would be justified under the *Wouters/Meca-Medina* framework.

3.6.2. Whether Article 12(2) FFAR Can Be Justified under the *Wouters/Meca-Medina* Framework

3.6.2.1. Article 12(2) FFAR Pursues Legitimate Objectives

340. FIFA claims that Article 12(2) FFAR pursues the following objectives: (a) raising and setting minimum professional and ethical standards for the occupation of Football Agents, (b) ensuring the quality of the service, (c) improving financial and administrative transparency, (d) protecting players who lack experience or information relating to the football transfer system, (e) enhancing contractual stability, (f) preventing abusive, excessive and speculative practices.

341. The Panel finds that these objectives are legitimate in line with the reasoning set out above.

3.6.2.2. Article 12(2) FFAR Is Appropriate to Pursue the Intended Legitimate Objectives

342. Article 12(2) FFAR is appropriate to attain the intended objectives (a)-(f) set out above.

343. Article 12(2) FFAR intends that only regulated actors (football agents) perform regulated activities (football agent services), and accordingly places a series of obligations on them.

344. Article 5 FFAR provides a series of eligibility criteria to become a football agent.

345. Article 6 FFAR provides that, to become a football agent, an applicant must pass an exam set by FIFA, the purpose of which is to "*test knowledge of current football regulations*".

346. Article 9(1) FFAR provides that, to maintain the license, a football agent has to comply with certain continuous education requirements on an annual basis.

347. As FIFA has rightly noted, Article 12(1) FFAR, jointly with associated provisions Articles 5, 6 and 9(1) FFAR *inter alia*, are appropriate to pursue the intended legitimate objectives because they seek "*in short, to ensure that only people of good character and with the requisite knowledge can act as agents*", thus raising the professional and ethical standards of football agents, which in turn clearly contributes to attaining the objectives (a)-(f) set out above.

348. Accordingly, the Panel finds that Article 12(2) FFAR is appropriate to attain the intended legitimate objectives.

3.6.2.3. Article 12(2) FFAR Is Proportionate

349. As FIFA rightly claims, there is no less restrictive alternative than Article 12(2) FFAR because only regulated persons can be allowed to perform regulated activities. This is an existential feature of any regulated activity. The licensing system set out by the FFAR would be completely frustrated if unlicensed persons could carry out the licensed activity.

350. PROFAA did not raise the incompatibility of any of the provisions associated with Article 12(2) FFAR, namely Articles 5, 6 and 9(1) FFAR, with EU competition rules. PROFAA only raised the incompatibility of the specific eligibility requirement set out in Article 5(1)(c)(i) FFAR with Article 16 of the CFREU, which the Panel will therefore review in turn below.

351. Accordingly, the Panel finds that Article 12(2) FFAR is proportionate to attain the intended legitimate objectives.

3.7. Compatibility of Articles 12(8)-(9) FFAR with EU Competition Law under the *Wouters/Meca-Medina* Framework

352. Articles 12(8)-(9) FFAR provide as follows:

> *8. A Football Agent may only perform Football Agent Services and Other Services for one party in a Transaction, subject to the sole exception in this article.*
>
> *a) Permitted dual representation: a Football Agent may perform Football Agent Services and Other Services for an Individual and an Engaging Entity in the same Transaction, provided that prior explicit written consent is given by both Clients.*
>
> *9. A Football Agent may, in particular, not perform Football Agent Services or Other Services in the same Transaction for:*
>
> *a) a Releasing Entity and Individual; or*
>
> *b) a Releasing Entity and Engaging Entity; or*
>
> *c) all parties within the same Transaction.*

353. Articles 12(8)-(9) FFAR essentially jointly prohibit agents from performing football "*Agent Services*" and "*Other Services*" for more than one party, with the sole exception of dual representation of players and engaging entities, provided that both clients grant prior explicit written consent.

3.7.1. Articles 12(8)-(9) FFAR Do Not Qualify as an Abuse of Dominant Position under Article 102 TFEU

354. PROFAA essentially submits that Articles 12(8)-(9) FFAR favour (i) agents representing engaging entities, who can perform dual representation with the transferred individual and get cumulative compensation, over (ii) agents representing releasing entities, who cannot perform dual representation and only receive single compensation, which would allegedly constitute an abuse of dominant position under Article 102 TFEU (even if PROFAA fails to cite this Article).

355. As FIFA rightly explains, Articles 12(8)-(9) FFAR prohibit multiple representation in a single transaction where the conflict is unavoidable, namely:

(i) dual representation by a football agent of the releasing entity and the engaging entity because the former seeks to maximize the transfer fee, whereas the latter seeks to minimize the transfer fee;

(ii) dual representation by a football agent of the releasing entity and the transferred individual because the former seeks to maximize the transfer fee, whereas the latter seeks to maximize its individual remuneration, which is likely to detract from the transfer fee because the engaging entity has a limited budget dedicated to the transaction; and

(iii) triple representation by a football agent of the releasing entity, the engaging entity and the transferred individual because this creates the two conflicts (i)-(ii) above.

356. In these scenarios, football agents cannot act in the best interests of their principal.

357. In contrast, Articles 12(8)-(9) FFAR allow multiple representation where the conflict is *a priori* less acute, namely dual representation by a football agent of the engaging entity and the transferred individual in a single transaction. As FIFA explained, the engaging entity and the transferred individual in principle have a joint interest in negotiating a lower transfer fee in order to free up more funds for the transferred individual's salary, even if, in the second stage of the transfer negotiations, the transferred individual and the engaging entity may pursue different goals, namely to maximize or minimize the remuneration of the individual. Articles 12(8)-(9) FFAR mitigate the latter conflict of interest by requiring that the football agent gather prior explicit written consent by both the transferred individual and the engaging entity (see Article 12(8)(a) FFAR).

358. PROFAA fails to contest FIFA's arguments.

359. The Panel notes, moreover, that there is an apparent contradiction between PROFAA's submission in this section and its arguments in relation to the incompatibility of Article

15(2) FFAR with EU competition rules above. On the one hand, PROFAA appears to argue that Article 15(2) FFAR places a disproportionate burden on (i) agents representing engaging entities (as well as transferred individuals), insofar as they are subject to a nominally lower service fee cap of 3-6% of the individual's annual remuneration, compared to (ii) football agents representing releasing entities, who are subject to a nominally higher service fee cap of 10% of the transfer compensation. On the other hand, in the present submission, PROFAA argues that Articles 12(8)-(9) FFAR favour (i) agents representing engaging entities, insofar as they can perform dual representation with the transferred individual and get cumulative compensation, compared to (ii) agents representing releasing entities, who cannot perform the said dual representation and only receive single compensation. PROFAA essentially fails to consider that the advantages that these FFAR provisions grant to a certain group of agents (*e.g.*, in terms of cumulative representation, cumulative compensation or nominally higher service fee caps) are meant to offset the disadvantages that other provisions of the FFAR place on the same group of agents (*e.g.*, in terms of single representation, single compensation or nominally lower service fee caps), while pursuing the intended legitimate objectives.

360. Accordingly, the Panel dismisses PROFAA's submission.

361. In any event, for completeness, the Panel will assess whether such an alleged abuse of dominant position (*quod non)* would be justified under the *Wouters/Meca-Medina* framework.

3.7.2. Whether Articles 12(8)-(9) FFAR Can Be Justified under the *Wouters/Meca-Medina* Framework

3.7.2.1. Articles 12(8)-(9) FFAR Pursue Legitimate Objectives

362. FIFA claims that Articles 12(8)-(9) FFAR pursue the following objectives: (a) raising and setting minimum professional and ethical standards for the occupation of Football Agents, (b) ensuring the quality of the service, (c) improving financial and administrative transparency, (d) protecting players who lack experience or information relating to the football transfer system, (e) enhancing contractual stability, (f) preventing abusive, excessive and speculative practices.

363. The Panel finds that these objectives are legitimate in line with the reasoning set out above.

3.7.2.2. Articles 12(8)-(9) FFAR Are Appropriate to Pursue the Intended Legitimate Objectives

364. Articles 12(8)-(9) FFAR are appropriate to attain the intended legitimate objectives (a)-(f) set out above.

365. Articles 12(8)-(9) FFAR preclude multiple representation where the conflict of interest is unavoidable, and exceptionally allow dual representation in the single case where the

conflict of interest is less acute, and therefore can be mitigated by requiring prior explicit written consent by both clients.

366. As mentioned above, Article 15(2) FFAR also contributes to avoiding conflicts of interest by aligning the interest of the football agents with that of their principal, particularly by fixing the service fee cap by reference to parameters that their principal seeks to maximize.

367. It is unquestionable that avoiding conflicts of interest and aligning the interests of the agents and their principal, in turn, raises the professional and ethical standards of football agent services, while ensuring the quality of the service, improving transparency, protecting players, preventing abusive, excessive and speculative practices, and indirectly enhancing contractual stability.

368. Accordingly, the Panel finds that Articles 12(8)-(9) FFAR are appropriate to attain the intended legitimate objectives.

3.7.2.3. Articles 12(8)-(9) FFAR Are Proportionate

369. As FIFA rightly indicates, Articles 12(8)-(9) FFAR are proportionate because they take a gradated approach. Articles 12(8)-(9) FFAR preclude multiple representation where the conflicts of interest are intractable, while exceptionally allowing double representation where the conflicts of interest are less acute, subject to mitigating measures, particularly requiring football agents to gather prior explicit written consent from both clients.

370. Accordingly, the Panel finds that Articles 12(8)-(9) FFAR are proportionate to attain the intended legitimate objectives.

3.8. Justification under Article 101(3) TFEU

371. The Panel notes that any alleged infringement by the contested FFAR provisions of Article 101(1) TFEU complies in any event with the requirements of the *Wouters/Meca-Medina* framework. This is sufficient ground to justify any alleged infringement of Article 101(1) TFEU, without having to cumulatively comply with the specific requirements of Article 101(3) TFEU.

3.9. Interim Conclusion

372. In light of all of the above, the Panel concludes that the Claimant has failed to provide the required evidence to prove that Article 15(2) FFAR (together with associated provisions Articles 15(3)-(4) FFAR and Article 16(3)(d) FFAR), Article 12(2) FFAR and Articles 12(8)-(9) FFAR are incompatible with Articles 101 and 102 TFEU.

4. Whether the FFAR Comply with EU Free Movement Rules

373. Article 4 of the EU Services Directive provides as follows:

For the purposes of this Directive, the following definitions shall apply: [...]

(9) 'competent authority' means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof; [...]

374. Article 16 of the EU Services Directive provides as follows:

(1) Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

(2) Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

(g) restrictions on the freedom to provide the services referred to in Article 19.

(3) The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

(4) By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

375. PROFAA submits that FIFA "*is caught by [Articles 4(9) and 16 of the EU Services Directive*" and immediately follows by claiming that "[b]*y setting a maximum price, football agents are restricted in their freedom to determine their own price and hence to provide their services on their own terms and conditions*." As such, PROFAA appears to submit that Article 15(2) FFAR (which PROFAA equally fails to specify) infringes Article 16 of the EU Services Directive, breaching the freedom of football agents to provide cross-border services within the EU.

376. Conversely, FIFA refutes PROFAA's submission, advancing that (i) the EU Services Directive does not apply to FIFA as a private party. Subsidiarily, FIFA argues that, (ii) even if the EU Services Directive did apply to FIFA, the fee cap would not infringe Article 16 of the EU Services Directive, and, (iii) even if the fee cap infringed Article 16 of the EU Services Directive, the service fee cap set out by Article 15(2) FFAR would be justified because it pursues legitimate objectives and is proportionate.

377. However, at the Oral Hearing, PROFAA explicitly rejected having made this submission and that, therefore, PROFAA did not contend that Article 15(2) FFAR infringes EU free movement rules.

378. Accordingly, PROFAA has failed to prove the incompatibility of Article 15(2) FFAR with free movement rules and the Panel has no reason to conclude that this provision contravenes the free movement rules.

379. In any event, for completeness, the Panel confirms the merits of FIFA's arguments.

4.1. The EU Services Directive Does Not Apply to FIFA

380. FIFA rightly claims that, as a matter of EU "constitutional law", EU directives do not have horizontal direct effect and, therefore, in principle cannot impose obligations on an individual in disputes concerning two private parties (see *Faccini Dori*, Case C-91/92, paras. 21-24 and *Marshall*, Case C-152/84, para 48; recently reiterated in *Smith v Meade*, Case C-122/17, para. 32 and *Thelen Technopark*, Case C-261/20, para. 32; among others).

381. This basic principle of EU law ultimately stems from Article 288 TFEU, third paragraph,

which provides that "[a] *directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed*" (emphasis added; see *Marshall*, Case C-152/84, para 48). By contrast, Article 288 TFEU, second paragraph, categorically provides that "[a] *regulation* [...] *shall be binding in its entirety and directly applicable in all Member States*" (emphasis added). In other words, EU directives, unlike regulations, as a matter of principle only impose obligations on Member States, and not individuals.

382. The CAS also endeavours to be consistent with the Court of Justice on this point. For instance, in *Jarmo Ahjupera*, the CAS held that EU directives are unable to have a direct effect on relations between individuals, as they must first be transposed into the respective national legal orders before an individual can have recourse to them in a dispute against another individual (CAS 2017/A/5051, para. 4 of the headnote).

383. Consequently, PROFAA's assertions that "*it was not necessary to refer to each national transposition of the Directive*" and "*it would be more useful to analyse the validity of the FFAR before CAS in the light of the Services Directive rather than wait for legal actions in every country according to each transposed legislation*" cannot be accepted in any event.

384. In line with the abovementioned principles, the EU Services Directive, and Article 16 in particular, only imposes obligations on Member States. Notably, this is clear from the various headers of Article 16 of the EU Services Directive, each of which provide that (i) "*Member States shall respect* [...] (Article 16(1) EU Services Directive), (ii) "*Member States may not restrict* [...]" (Article 16(2) EU Services Directive), and (iii) "[t]*he Member State to which the provider moves shall not be prevented* [...]" (Article 16(3) EU Services Directive).

385. This conclusion is not called into question either by PROFAA's argument that FIFA may fall within the definition of "*competent authority*" laid down in Article 4(9) of the EU Services Directive. As FIFA rightly pointed out, the definition of competent authorities relates to the scope of the obligations contained in the EU Services Directive that apply once Member States have transposed the Directive at the national level (see *e.g.*, Articles 6(1)(a), 7, 8(1), 9 read together with 10 and 13(3), 14(5)-(6), 16(2)(b) and (e), 19, 21, 22(c), 28, 29(2), 31 and 33 of the EU Services Directive, which all place first and foremost obligations on Member States, even if they indirectly refer to or concern competent authorities).

386. FIFA is a private organisation under Swiss law (see FIFA Statutes, Article 1(1)) and cannot be considered as a public authority for the purpose of the application of the EU Services Directive. In particular, FIFA is not "*subject to the authority or control of the State or* [...] *been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals*" (*Smith v Meade*, Case C-122/17, para. 45; *Foster*, Case 188/89, paras. 18 and 20; *Fratelli Costanzo*, Case 103/88, para. 31; among others).

387. Accordingly, the Panel concludes that the EU Services Directive does not apply to FIFA and, therefore, Article 16 of the EU Services Directive does not impose any obligations on FIFA to ensure that football agents are able to provide services in the EU without facing cross-border restrictions.

4.2. Even if the EU Services Directive Were to Apply to FIFA, the Fee Cap Would Not Restrict the Football Agents' Freedom to Provide Cross-border Services under Article 16 of the EU Services Directive

388. Even if the EU Services Directive were to apply to FIFA *quod non*, as FIFA argues, Article 15(2) FFAR would not restrict free provision of services within the meaning of Article 16 of the EU Services Directive.

389. Article 15(2) FFAR, and any other provisions thereof, do not constitute a restriction or an obstacle to the freedom of agents to provide cross-border services within the EU under Article 16 of the Services Directive, because the FFAR establish a harmonised regime that applies uniformly throughout the EU (and beyond). Therefore, Article 15(2) FFAR does not create any obstacles for football agents to provide cross-border services within the EU.

390. This conclusion is also in line with the spirit and the objectives of the EU Services Directive itself, which ultimately seeks to remove regulatory divergences between Member States by establishing uniform EU-wide rules (even if largely through so-called "negative harmonisation"), in order to facilitate the free movement of services (see EU Services Directive, Preamble, Recitals 2 and 3).

391. Accordingly, the Panel concludes that Article 15(2) FFAR does not restrict free provision of services within the meaning of Article 16 of the EU Services Directive.

4.3. Even if the Fee Cap Restricted the Football Agents' Freedom to Provide Cross-border Services under Article 16 of the EU Services Directive, the Fee Cap Would Be Justified under Article 16(3) thereof or the General Interest Derogations Developed by the EU Court of Justice

392. In any event, even if the EU Services Directive were to apply to FIFA, *quod non*, and even if Article 15(2) FFAR were to restrict the freedom of agents to provide cross-border services within the EU under Article 16 of the EU Services Directive, *quod non*, Article 15(2) FFAR would be justified under the explicit derogation grounds laid down in Article 16(3) of the EU Services Directive or the implicit derogation grounds developed by the case law of the EU Court of Justice (*Van Wesemael,* Joined Cases C-110/78 and C-111/78, para. 28; *Stichting Collectieve Antennevoorzieniag Gouda*, Case C-288/89), in line with the reasoning set out above under EU competition law.

4.4. Interim Conclusion

393. In light of all the above, the Panel finds that it cannot be concluded that Article 15(2) FFAR infringes Article 16 of the EU Services Directive because (i) PROFAA accepts

that Article 15(2) FFAR does not infringe the EU Services Directive, (ii) the EU Services Directive does not impose obligations on FIFA vis-à-vis private parties, (iii) Article 15(2) FFAR does not create obstacles on agents to provide cross-border services within the EU, and (iv) any obstacles would in any event be justified.

394. Subsidiarily, the Panel notes that the EU Courts have recognised that Article 56 TFEU (and related free movement rules), establishing the primary law obligation on Member States to guarantee free provision of services that find specific expression in the EU Services Directive and Article 16, may, under certain circumstances, impose obligations on private bodies regulating access to a profession, such as sporting bodies (see *Walrave*, Case C-36/74, para. 17; *Bosman*, Case C-415/93, para. 75, *Wouters,* C-309/99, para. 120, *inter alia*). Nevertheless, even if Article 56 TFEU were applicable to FIFA in the present case, which in any event PROFAA has failed to advance as an argument, the same reasoning would apply thereunder as that followed above under Article 16 of the EU Services Directive.

5. Whether the FFAR Comply with Article 16 CFREU

395. Article 16 CFREU provides as follows:

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

396. Article 51(1) CFREU provides as follows:

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

397. PROFAA alleges that a number of provisions of the FFAR infringe Article 16 CFREU. PROFAA's Statement of Claim is unclear, but it appears that PROFAA is advancing this claim in relation to the service fee cap laid down in Articles 15(2) FFAR, the prohibition on multiple representation laid down in Articles 12(8)-(9) FFAR, the exclusivity provisions laid down in Articles 12(12)-(13) FFAR, the provisions limiting agents' fees by reference to remuneration actually received by an individual laid down in Articles 14(6), (7) and (12) FFAR, the pendency of the Representation Agreement (subject to agreement to the contrary) laid down in Article 14(5) FFAR, and the bankruptcy eligibility provision laid down in Article 5(1)(c)(i) FFAR.

398. FIFA refutes these claims, arguing that the CFREU is not addressed to private parties and therefore does not apply to FIFA pursuant to Article 51(1) CFREU.

399. FIFA's claim is well-founded.

400. The addressees of the CFREU are "*the institutions, bodies, offices and agencies of the Union and of the Member States when implementing the Union*" (Article 51(1) CFREU).

It follows that, as a general rule, the CFREU is not binding on private parties.

401. Notwithstanding the terms of Article 51(1) CFREU, the EU Court of Justice has held that certain provisions of the CFREU have horizontal direct effect.

402. In *Shimizu* and *Bauer*, the Court held that Article 31(2) CFREU has horizontal direct effect because this provision does not need to be given concrete form in EU or national law, as the wording of Article 31(2) CFREU is both "*mandatory and unconditional*" (*Bauer,* Joined Cases C-569/16 and C-570/16, para. 85 and *Shimizu,* Case C-684/16, para. 74). The Court stated that Article 31(2) CFREU "*is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter*" (*Bauer,* Joined Cases C-569/16 and C-570/16, para. 85). The Court arrived to a similar conclusion concerning other CFREU provisions (with regard to Article 21(1) CFREU, see *Egenberger,* Case C-414/16, para. 76; with regard to Article 31(2) CFREU, see *Bauer,* Joined Cases C-569/16 and C-570/16, para. 92 and *Shimizu,* Case C-684/16, para. 78; with regard to Article 47 CFREU, *see Egenberger,* Case C-414/16, para.78).

403. Conversely, in *AMS,* the EU Court of Justice clarified that not all of the CFREU provisions are apt for horizontal application and impose obligations on private parties (*AMS,* Case C-176/12, para. 45). Notably, the Court held that Article 27 CFREU does not have horizontal direct effect because it is "*clear from the wording of Article 27* [CFREU] *that, for this Article to be fully effective, it must be given more specific expression in* [EU] *or national law*" (*AMS,* Case C-176/12, para. 45), insofar as Article 27 CFREU provides that "[w]*orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices*" (emphasis added).

404. Like Article 27 CFREU, Article 16 CFREU provides for "*the freedom to conduct a business in accordance with Union law and national practices*" (emphasis added). Therefore, in line with the case law of the EU Court of Justice, the right to conduct business under Article 16 CFREU is not mandatory and unconditional in nature, insofar as the conditions to exercise the right need be given concrete expression by provisions of EU or national law (*AMS,* Case C-176/12, para. 45).

405. This is clearly stated by Judge S, Prechal's article that PROFAA relies on in its reply. In particular, as Judge S. Prechal recognises, the key criterion is whether the CFREU article in question is (i) mandatory, in the sense that parties cannot derogate from it, and (ii) unconditional, in the sense that it does not need to be elaborated further before becoming a sufficiently operational standard to be applied by a court.

406. It falls to this Panel to apply EU law as it currently stands and not as it might in the future. Accordingly, the Panel dismisses PROFAA's submissions because Article 16 CFREU does not impose obligations on FIFA as a private party at this stage in the development of the case law of the EU Court of Justice.

6. Whether the FFAR Comply with the Right to Privacy and Data Protection

407. Article 19 FFAR provides:

> *FIFA shall make available:*
>
> *a) the names and details of all Football Agents;*
>
> *b) the Clients that Football Agents represent, the exclusivity or non exclusivity of their representation and the expiry date of the Representation Agreement;*
>
> *c) the Football Agent Services provided to each Client;*
>
> *d) any sanctions imposed on Football Agents and Clients; and*
>
> *e) details of all Transactions involving Football Agents, including the service fee amounts paid to Football Agents.*

408. PROFAA submits that Article 19 FFAR is an "*alarming*" provision because it gives FIFA "*the possibility to publish the clients that Football Agents represent*" and allows for "*the disclosure of even the details of all Transactions involving Football Agents, including the service fee amounts paid to Football Agents*". PROFAA states that "*the violation of the privacy right and the data protection regulation results absolutely blatant*". While PROFAA cites Article 8 ECHR and Article 7 CFREU, it does not specify any provision of the GDPR that Article 19 FFAR allegedly breaches. PROFAA also claims that the right to privacy cannot be overridden by the right to information of journalists and whistle-blowers under Article 10 ECHR, and that FIFA is not legitimate to claim "*for itself a freedom that benefits journalists (unthinkable) and whistle-blowers (why not?)*".

409. Conversely, FIFA denies that it has breached either Article 8 ECHR, Article 7 CFREU or the GDPR.

410. At the outset, this Panel notes that it will not assess the compliance of Article 19 FFAR with Article 10 ECHR, as this argument, to the extent it was raised, is not substantiated by the Claimant, nor is it relevant in this case.

6.1. Article 8 ECHR Does Not Apply to FIFA

411. Article 8 ECHR provides:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

412. PROFAA argues that Article 8 ECHR applies to FIFA, without however substantiating

this claim.

413. FIFA refutes this allegation and claims that Article 8 ECHR does not apply to FIFA as a private organisation.

414. FIFA's claim is well founded.

415. In principle, the ECHR is not applicable to private parties. As a Treaty of international law, the ECHR only applies to signatory States. Accordingly, the preamble to the ECHR states that the *"High Contracting Parties* [...] *have the primary responsibility to secure the rights and freedoms defined in this Convention"* (Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Preamble, Recital 7). Article 1 ECHR also underlines that "*High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*". This approach has also been followed by the CAS in previous cases, where it held that "*as a matter of principle, the fundamental rights and procedural guarantees granted by international treaties for the protection of human rights are not intended to apply directly in private relations between individuals and therefore are not applicable in disciplinary cases decided by private associations*" (see CAS 2011/A/2433, para. 23 ; CAS 2012/A/2862, para. 105).

416. In this sense, Article 8(2) ECHR specifically provides that "[t]*here shall be no interference by a public authority with the exercise of this right.*" The European Court of Human Rights has held that "*the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities*" (*Kroon and others v. the Netherlands,* 27 October 1994, no. 18535/91, para. 31).

417. FIFA does not qualify as a 'public authority' because it is not "*a public-law entity* [...], *placed under State supervision, and with State-appointed directors, which provides a public service, holds a monopoly and enjoys an implicit State guarantee*" (*Libert v. France*, 22 February 2018, no. 588/13, para. 38), in line with the above mentioned.

418. Therefore, the ECHR, and Article 8 ECHR in particular, in principle cannot be invoked by private parties against another private party, such as FIFA, in purely horizontal situations.

419. Accordingly, the Panel dismisses PROFAA's submission that Article 19 FFAR infringes Article 8 ECHR without the need for further examination. The Panel notes, however, that the same conclusion would be reached even assuming that Article 8 ECHR applies in the relations between private parties and prohibits interferences by FIFA in the private life of football agents (*quod non*). The Panel, in fact, preliminarily finds that any such interference, as allegedly caused by Article 19 FFAR, would be justified by the pursuance of a legitimate objective, and that the measures adopted are necessary and proportionate to the achievement of that objective. The Claimant contrary submissions are advanced with respect not only to Article 8 ECHR but jointly with its reference to Article 7 CFREU (see para. 59 above). As a result, the reasons for the

Panel's conclusion are explained below, in the sections which follow.

6.2. Article 7 CFREU and the GDPR Apply to FIFA

420. Article 7 CFREU provides:

> *Everyone has the right to respect for his or her private and family life, home and communications.*

421. PROFAA alleges that Article 19 FFAR breaches Article 7 CFREU protecting the right to privacy, including the right to business secrets, without however substantiating these claims.

422. FIFA argues that Article 7 CFREU does not apply to FIFA as a private law association.

423. As indicated above, the CFREU in principle does not apply to private parties. The EU Court of Justice has, nevertheless, widened the scope of addressees and established that specific provisions of the CFREU may have horizontal direct effect, thus applying in disputes between private parties. In particular, the EU Court of Justice recognised in *Google Spain* that Article 7 CFREU, in conjunction with secondary legislation, may create certain obligations on private parties (*Google Spain*, Case C-131/12, para. 97). In the same case, the EU Court of Justice also concluded that a distinct compatibility assessment with Article 7 CFREU is not strictly necessary insofar as Article 7 CFREU is implemented through secondary data protection legislation (*Google Spain*, Case C-131/12, para. 69). This principle is also underlined in recital 2 of the preamble of the GDPR that states that "*this Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data* [...]"

424. Accordingly, the Panel will review the compatibility of Article 19 FFAR with the specific requirements of the GDPR, insofar as they are aligned with the requirements of Article 7 CFREU. In this regard, the Panel notes that PROFAA has not raised any plea of illegality of the GDPR by reference to Article 7 CFREU.

425. The Panel's conclusion is without detriment to the EU Court of Justice finding in future cases that Article 7 CFREU should be autonomously reviewed beyond any specific provisions of the GDPR and other secondary data protection legislation.

6.3. PROFAA Does Not Substantiate How Article 19 FFAR Breaches the GDPR

426. Article 5 GDPR provides:

> *1. Personal data shall be:*
>
> *(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');*
>
> *(b) collected for specified, explicit and legitimate purposes and not further*

processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

427. Article 6(1)(a) and (f) GDPR provide:

Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

[...]

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

428. Article 3 of the October 2019 Data Protection Regulations provides:

These Regulations apply to all activities of FIFA, without limitation.

6.3.1. Preliminary Observations on Article 19 FFAR

429. PROFAA claims that the GDPR is applicable to the processing of data by FIFA, without

however substantiating (i) how FIFA generally or Article 19 FFAR specifically meet the scope of application of the GDPR, nor (ii) substantiating how Article 19 FFAR breaches any specific provisions of the GDPR.

430. FIFA "*notes that, during the consultation process, PROFAA expressly agreed with what is now* [Article 19 FFAR]" and argues that the processing of agents' data pursuant to Article 19 FFAR is lawful under Article 6(1)(f) GDPR and in accordance with Article 5 GDPR.

431. As PROFAA has not produced any cogent argument that would effectively allow the Panel to review the compatibility of Article 19 FFAR with the specific provisions of GDPR, the Panel dismisses PROFAA's submission.

432. In any event, the Panel reviews below the compatibility of Article 19 FFAR with GDPR, merely on a preliminary basis.

433. At the outset, the Panel notes that Article 19 FFAR is a general, incomplete and vague provision. FIFA provides more detail in its written submissions. In particular, FIFA explains that the processing of personal data pursuant to Article 19 FFAR seeks to improve financial and administrative transparency. By improving transparency, Article 19 FFAR aims to fulfil the general aims of the FFAR, namely to (i) raise professional and ethical standards, (ii) ensure the quality of the services provided by Football Agents, (iii) protect players, (iv) enhance contractual stability and (v) prevent abusive, excessive and speculative practices.

434. FIFA also expands on the data sets that will be made available, through which channels, and to whom, following a 'layered system' of disclosure. In particular, FIFA explains that:

> (i) the agent's name, gender, nationality, country of domicile, licence number, CPD course taken, office telephone number, office email address, agency name, agency website, information regarding authorisations to work with minors, and details of relevant social media channels will be made publicly available on FIFA.com;
>
> (ii) client names and duration/exclusivity of the relevant representation agreement will be made available to FIFA, players, coaches, clubs, Single-Entity Leagues, and Member Associations; and
>
> (iii) details of the football agent services provided to each client and details of service fees paid to Football Agents will be made available to FIFA, the relevant Member Association and to Football Agents only.

435. FIFA's final Consultation report on the Football Agent reform also indicates that the sanctions imposed on Football Agents and clients, referred to in Article 19(1)(d) FFAR, will be made available to FIFA, players, coaches, clubs, Single-Entity Leagues and Member Associations.

436. The Panel notes that neither the FFAR nor the corresponding FAQ document set out the

abovementioned processing information. The FFAR FAQ document merely enumerates the channels on which data relating to agents will be published, namely: the FIFA website, the FIFA Legal Hub, which is only available to clients, and the FIFA Agents Platform, available to Football Agents, member associations and FIFA. But neither the FFAR nor the corresponding FAQ document explain which data sets will be published through which one of the channels listed above (FIFA Football Agent FAQs, point 5.4).

437. Accordingly, the Panel observes that in the interest of legal certainty, transparency and accountability, it would be advisable for FIFA to integrate in the text of Article 19 FFAR the data processing framework mentioned above.

438. On this basis, the Panel will preliminarily assess the compliance of the FFAR data processing framework, as described by FIFA in its written pleadings, with GDPR.

6.3.2. FIFA's Data Processing Under Article 19 FFAR Is *A Priori* Lawful

439. Article 5 GDPR sets the principles that data controllers have to respect when processing personal data, namely: (i) lawfulness, fairness and transparency, (ii) purpose limitation, (iii) data minimisation, (iv) accuracy, (v) storage limitation, (vi) integrity and confidentiality, and (vii) accountability of the controller.

440. FIFA's October 2019 Data Protection Regulations state that FIFA processes data in compliance with the principles set out in Article 5 GDPR. Article 3 of the Data Protection Regulations extends the scope of application of the Data Protection Regulations "*to all activities of FIFA, without limitation*", making them also applicable to the FFAR.

441. PROFAA argues that, in this case, sports agents are "*placed under an obligation*", making "*his signature a pre-requisite for him entering the market.*" PROFAA, therefore, appears to submit that Article 19 FFAR only infringes the principle of lawfulness of data processing laid down in Article 5(a) GDPR.

442. Article 6 GDPR develops the principle of lawfulness of data processing laid down in Article 5(a) GDPR, enumerating the legal bases for data processing. Article 6(1) GDPR states that data processing is lawful "*to the extent that at least one of the following applies*" (emphasis added). Therefore, unlike PROFAA argues, consent is not necessary, as long as another legal basis for processing data is fulfilled under Article 6(1) GDPR.

443. FIFA invokes Article 6(1)(f) GDPR, which establishes that the pursuit of legitimate interests is a legal basis for data processing, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

444. The notion of legitimate interest is "*elastic*" and can accommodate a wide variety of objectives (AG Opinion in *Rīgas satiksme*, Case C-13/16, para. 65). Recital 47 of the GDPR also underlines the wide interpretation of the notion of legitimate interest. In particular, Recital 47 GDPR mentions that: "*such legitimate interest could exist for*

example where there is a relevant and appropriate relationship between the data subject and the controller"; "[t]*he processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest*"; and "[t]*he processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.*" Given the broad nature of the notion of "legitimate interest" under Article 6(1)(f) GDPR, which may even include data processing for marketing purposes, the Panel considers that the general interest objectives that FIFA pursues through Article 19 FFAR are legitimate. In any event, the EU Court of Justice has recognised that these objectives are legitimate (*see* Section 3.5.5.1 *supra*).

445. Pursuant Article 6(1)(f) and Recital 47 GDPR the Panel also finds that the interests or fundamental rights and freedoms of the football agents cannot override the pursuit of the stated legitimate objectives because football agents "*can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place*". In the context of the FFAR, there is a relevant relationship between FIFA and football agents, with FIFA imposing regulations on the football agents in order to create a regulated framework for the provision of regulated football agent services.

446. Furthermore, pursuant to Article 5(1)(c) GDPR, any processing of personal data must be limited to what is necessary in relation to the legitimate purposes for which they are processed ('data minimisation' principle). Therefore, the Panel reviews whether each level of the layered disclosure system described by FIFA above complies with the data minimisation principle.

447. First, the publication on FIFA's website of the football agents' name, country of domicile and licence number appear to be necessary and proportionate to fulfil the objectives pursued by Article 19 FFAR, particularly to allow all relevant stakeholders to identify football agents so that only licensed football agents provide regulated agent services. The publication on FIFA's website of the agents' contact details, such as the office telephone number, office email address, agency name, agency website, and relevant social media channels, also appear to be necessary and proportionate to allow all relevant stakeholders to identify and be able to contact the football agents. Information on the CPD courses taken and authorisations to work with minors equally appear to be necessary and proportionate, particularly to raise professional and ethical standards, as well as to protect minors.

448. In contrast, the publication of the agents' gender and nationality does not seem strictly necessary and proportionate because the publication of other data points, such as the agents' name, country of domicile, licence number and contact details already allow stakeholders to identify and contact football agents. The country of domicile, moreover, provides a territorial link that is more informative for stakeholders than the nationality of football agents.

449. Second, the disclosure to FIFA, players, coaches, clubs, Single-Entity Leagues, and Member Associations of the football agents' client names and duration/exclusivity of the relevant representation agreement are necessary and proportionate to ensure

compliance with the provisions of the FFAR, particularly the prohibition of multiple representation set out in Article 12(8)-(10) FFAR, as well as the prohibition for football agents to approach or enter into a representation agreement with a client that is bound by an exclusive representation agreement with another agent set out in Article 16(1)(b)-(c) FFAR.

450. Third, the disclosure to FIFA and the relevant Member Association of the details of the football agent services provided to each client and the details of service fees paid to football agents is necessary and proportionate to ensure financial transparency and to verify that the agents comply with the provisions of the FFAR, particularly those relating to service fees laid down in Articles 14-15 FFAR.

451. In contrast, the disclosure to football agents of the details of the services provided to each client and the fees paid does not appear to be necessary and proportionate to ensure compliance with any particular provisions of the FFAR. On the contrary, the disclosure to football agents of the services provided and the fees paid would qualify as a restriction of competition under Article 101(1) TFEU because it would remove strategic uncertainty over important competitive conditions in the market of football agent services, thus incentivising collusion, which would go against other general objectives of the FFAR, such as protecting consumers (*i.e.*, players, coaches and clubs).

452. Finally, the disclosure to FIFA, players, coaches, clubs, Single-Entity Leagues and Member Associations of the sanctions imposed on football agents is necessary and proportionate to ensure transparency about the misconduct of any agent, thus raising the professional and ethical standards and protecting players.

6.4. Interim Conclusion

453. In light of the above, the Panel cannot conclude, on the basis of PROFAA's submission, that Article 19 FFAR infringes Article 8 ECHR, Article 7 CFREU, or the GDPR.

454. Nevertheless, the Panel invites FIFA to (i) integrate in the text of Article 19 FFAR all relevant details regarding the disclosure of agents' personal data, particularly the sets of data that will be shared, with which particular stakeholders and under what conditions or channels, and (ii) ensure that the data published is strictly necessary and proportionate to attain the legitimate objectives of the FFAR.

7. Whether the FFAR Comply with Swiss Law

7.1. Swiss Competition Law

455. Article 4(1) and (2) of the Cartel Act provide:

> *(1) Agreements affecting competition are binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect.*

(2) Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market

456. Article 5 of the Cartel Act provides:

(1) Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful.

(2) Agreements affecting competition are deemed to be justified on grounds of economic efficiency if:

(a) they are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and

(b) they will under no circumstances enable the parties involved to eliminate effective competition.

(3) The following agreements between actual or potential competitors are presumed to lead to the elimination of effective competition:

(a) agreements to directly or indirectly fix prices;

(b) agreements to limit the quantities of goods or services to be produced, purchased or supplied;

(c) agreements to allocate markets geographically or according to trading partners.

(4) The elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.

457. Article 7 of the Cartel Act provides:

(1) Dominant undertakings and undertakings with relative market power behave unlawfully if, by abusing their position in the market, they hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

(2) The following behaviour is in particular considered unlawful:

(a) any refusal to deal (e.g. refusal to supply or to purchase goods);

(b) any discrimination between trading partners in relation to prices or other conditions of trade;

(c) any imposition of unfair prices or other unfair conditions of trade;

(d) any under-cutting of prices or other conditions directed against a specific competitor;

(e) any limitation of production, supply or technical development;

(f) any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services;

(g) the restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.

7.1.1. Articles 4(1) and 5 of the Cartel Act on Restrictive Agreements

458. PROFAA accepts that FIFA does not infringe Articles 4(1) and 5 of the Cartel Act because the FFAR cannot be considered as an 'agreement' under Article 4(1) Cartel Act and FIFA does not act on behalf of national associations or clubs.

459. FIFA concurs. Moreover, in line with the jurisprudence of the the Civil Court of the Cantonal Court of Vaud (Judgment of the Civil Court of the Canton of Vaud of 30 January 2018, No. 1/2018/JMN), FIFA rightly indicates that Article 4(1) of the Cartel Act, unlike Article 101 TFEU, does not forbid decisions of an association of undertakings with restrictive effects.

460. Accordingly, the Panel finds that neither Article 4(1) nor Article 5 of the Cartel Act are relevant to the present case. Hence, the contested provisions of the FFAR will not be assessed under Article 4(1) or Article 5 of the Cartel Act.

7.1.2. Articles 4(2) and 7 of the Cartel Act on Abuse of Dominance

461. PROFAA submits that FIFA has abused its dominant position in the in the global market for the organisation and marketing of football competitions infringing Articles 4(2) and 7 of the Cartel Act. PROFAA specifically argues that FIFA has abused its dominant position by adopting provisions in the FFAR concerning (i) the introduction of ceilings on commissions (Article 15 FFAR), as well as (ii) disparities in those ceilings (Article 15(2) FFAR), and (iii) restrictions on freedom of representation (Article 12(8)-(9) FFAR).

462. FIFA advances that the FFAR do not amount to an abuse of a dominant position under Article 7 of the Cartel Act, and reiterates its reasoning put forward under Article 102 TFEU above.

463. The Panel agrees with FIFA that Article 7 of the Cartel Act aligns closely with Article 102 TFEU. This parallel is also recognised by the case law of the Swiss Federal Supreme Court, which states that "*the interpretation and practice of art. 102 TFEU can also be taken into account without further ado for the interpretation and practice of art. 7 Cartel Act* [...]." (BGE 146 II 217, cons. 4.3).

464. Accordingly, the Panel finds that PROFAA has failed to prove that Articles 12(8)-(9) and 15(2) FFAR infringe Articles 4(2) and 7 of the Cartel Act, and in any event that they would not be justified, based on the reasoning set out above (*see* Sections 3.5.5, 3.6.2 and 3.7.2 *supra*).

7.1. Interim Conclusion

465. In light of the above, the Panel finds that PROFAA has failed to prove that Articles 12(8)-(9) and 15(2) FFAR infringe Articles 4(1), 4(2) and 7 of the Cartel Act. In any event, the Panel notes that such violation (*quod non)* would be justified.

7.2. Personality Rights

466. Article 28 Swiss Civil Code (CC) provides:

> *(1) Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.*
>
> *(2) An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law.*

467. PROFAA contends that Articles 12 and 15 of the FFAR infringe the personality rights of agents, specifically their right to development and economic fulfilment in professional sport, laid down Article 28 CC.

468. FIFA disputes this claim.

469. The Panel notes that, according to the Swiss Supreme Court case law, measures implemented by sports associations may only be considered a violation of the right to development and economic fulfilment in exceptional circumstances, if such violation is manifest and serious (BGE 138 III 322, cons. 4.3.1, 4.3.2 and 4.3.5).

470. While the Panel recognises that Articles 12 and 15 FFAR could potentially restrict agents' freedom of action and be perceived as impeding their right to development and economic fulfilment, the Panel emphasises that PROFAA has not adequately substantiated a manifest and serious violation of these rights.

471. In any event, the Panel underlines that such an infringement would likely be justified under Article 28(2) CC, insofar as the contested FFAR provisions pursue a series of legitimate objectives and are proportionate thereto (see Sections Sections 3.5.5, 3.6.2 and 3.7.2 *supra*).

472. Accordingly, the Panel dismisses PROFAA's submission.

7.3. Interim Conclusion

473. In light of the above, the Panel cannot conclude, on the basis of PROFAA's submission, that Articles 12 and 15 FFAR violate the football agents' personality rights under Article 28 CC.

8. Whether the FFAR Comply with Italian Law

8.1. The Potential Overlaps Between the FFAR and the FIGC Regolamento Do Not Automatically Make the FFAR as a Whole Incompatible with Italian Law

474. PROFAA submits that "*the international dimension described by article 2.2 of FIFA Football Agent Regulations has inevitably an impact on the scope of application described by article 1.2 of FIGC Football Agent Regulations*", which requires football agents to register in the national registry, thus requiring football agents, in the case of an international transfer, to comply with both the FFAR and the FIGC Regolamento.

475. FIFA argues that the football agents' compliance with the FFAR does not necessarily conflict with Italian national law, particularly the national requirement to be registered as an agent.

476. FIFA's arguments are well founded.

477. This potential double regulatory burden does not entail, by itself, that the FFAR as a whole is incompatible with Italian national law.

478. Pursuant to Article 24(1) FFAR, FIFA can recognise national licensing systems if they establish (i) eligibility requirements for all applicants and licensees and (ii) impose an exam. Conversely, as FIFA rightly notes, Italy is at a preliminary stage of the legislative process to adopt a new legal framework governing sports agents, and there is nothing to suggest that Italy will not be recognising licenses issued to agents under the FFAR in the future. In fact, Italy had previously recognised the licenses issued by FIFA before the adoption of the "Regulations on Working with Intermediaries" in 2015 as equivalent and therefore registered them in the national registry (Article 12 of the Decree of 24 February 2020). The Panel also observes that both Article 17(1) CONI Regolamento and Article 1(1) FIGC Regolamento opt to follow the rules established by international sports federations in general and by FIFA in particular.

479. The Panel underlines, that in any event, Article 3(3) FFAR allows national member associations to deviate from the provisions of the FFAR where they conflict with stricter mandatory provisions applicable in the territory of the member association.

480. Accordingly, the Panel dismisses PROFAA's submission.

8.2. Articles 12(8)-(9) FFAR Are Compatible with the Conflict of Interest Rules under the FIGC Regolamento

481. PROFAA argues that the FFAR conflict rules are incompatible with the conflict rules of the FIGC Regolamento.

482. FIFA disputes this.

483. Article 21(5) FIGC Regolamento allows an agent to engage in dual or triple representation, if the agent informs the clients of the existence of the conflict of interest and these give their prior written consent.

484. Article 12(8) FFAR prohibits multiple representation, except in the case where an agent represents the player and the engaging entity, if both clients give their prior explicit written consent.

485. However, as FIFA rightly indicates, the differences in the conflict rules under the FIGC Regolamento and the FFAR still allow agents to comply with both set of rules. The Italian provisions allow agents to engage in dual or triple representation, but do not oblige agents to do so. Therefore, respecting the prohibition of multiple representation under the FFAR does not entail non-compliance with Italian national rules.

486. Accordingly, the Panel dismisses PROFAA's submission.

8.3. Article 15(2) FFAR Is Compatible with the Freedom to Set Fees under Italian Law

487. PROFAA argues that, under Italian law and case law, "*the fees shall be hierarchically i) agreed by the parties, ii) determined by tariffs and customs, and iii) determined by the judge, who decide based on the parameters established by the corresponding Ministry, in accordance with article 9.2 of the Italian Decreto Legge n.1 of 24 January 2012.*" PROFAA does not substantiate this argument.

488. FIFA indicates that PROFAA's "*assertion seems flatly contradicted by the indication by the Legislator that there can be rules in relation to the "parameters" for agents fees (Article 8, Legislative Decree No.37/2021).*"

489. FIFA's argument is justified.

490. Article 21(8) FIGC Regolamento provides that the fees due to football agents are set by the parties, or as a percentage of the value of the transaction or the gross salary of the football player. Notably, Article 21(7)(a) CONI Regolamento allows national sport federations, such as FIGC, to set a cap on a percentage basis and thus comply with the FFAR. And in any event, as FIFA rightly indicates, the introduction of a service fee cap by Article 15(2) FFAR still allows the parties to negotiate below the cap, and therefore do not undermine the freedom of agents to set their fees recognised under Italian law.

491. Accordingly, the Panel dismisses PROFAA's submission.

8.4. Interim Conclusion

492. In light of the above, the Panel cannot conclude, on the basis of PROFAA's submission, that Articles 12(8)-(9) and 15(2) FFAR, nor the FFAR in general, are incompatible with Italian law.

9. Whether the FFAR Comply with French Law

9.1. The Potential Overlaps Between the FFAR and the French Regulations Do Not Automatically Make the FFAR as a Whole Incompatible with French Law

493. Equal to the arguments put forward under Italian law, PROFAA argues that the French Regulations and the FFAR both impose the obligation for agents to be registered. According to PROFAA, this overlap "*inevitably* [has] *an impact on the scope of application*" of the French Regulations in the case of international transfers, where both the French Regulations and the FFAR would be applicable.

494. FIFA disputes this.

495. Article L222-7 Code du Sport foresees that sports agents must be licensed by the relevant delegated federation. Article 3(1) Règlement des agents sportifs of the Fédération Francaise de Football ("FFF Règlement") imposes an obligation on agents to hold a licence issued by the FFF.

496. This potential double regulatory burden does not entail, by itself, that the FFAR as a whole is incompatible with French national law.

497. Pursuant to Article 24(1) FFAR, FIFA can recognise national licensing systems if they establish (i) eligibility requirements for all applicants and licensees and (ii) impose an exam. According to FIFA, the FFF has already applied to FIFA to recognise their national licensing system. Even if FIFA decides not to recognise the French national license, which would create a double licensing burden on the agents, again this would not automatically entail that the FFAR as a whole is incompatible with the FFF Règlement.

498. The Panel underlines, that in any event, Article 3(3) FFAR allows national member associations to deviate from the provisions of the FFAR where they conflict with stricter mandatory provisions applicable in the territory of the member association.

499. Accordingly, the Panel dismisses PROFAA's submission.

9.2. Articles 12(8)-(9) FFAR Are Compatible with the Conflict of Interest Rules under the FFF Règlement

500. PROFAA argues that the FFAR conflict rules are incompatible with the conflict rules under the FFF Règlement.

501. FIFA disputes this.

502. Article 6(2)(1) FFF Règlement allows agents to act only on behalf of one of the parties to a contract, thus prohibiting multiple representation in all cases. Article L222-17 Code du Sport foresees the same prohibition.

503. In any event, Article 3(3) FFAR allows member associations to introduce stricter measures than those provided for in Articles 11-21 FFAR, which includes the general prohibition of multiple representation set out in Article 12(8) FFAR. Insofar as Article 12(8) FFAR does not impose an obligation on agents to engage in dual representation, French law can take a stricter approach and prohibit dual representation in all cases while complying with the FFAR.

504. Accordingly, the Panel dismisses PROFAA's submission.

9.3. Article 15(2) FFAR Is Compatible with the Service Fee Cap Set Out in French Law

505. PROFAA argues that the service fee cap introduced by Article 15 FFAR is incompatible with the service fee cap imposed by French law.

506. FIFA disputes this.

507. Article L222-17 Code du Sport imposes a cap of 10%, but allows national sports federations to impose stricter caps. Therefore, when transposing the FFAR, the FFF can use this power and introduce stricter service fee caps that are in line with Article 15(2) FFAR. In any event, the Article L222-17 Code du Sport only governs service fee caps imposed by national sports federations, which therefore do not cover international sports federations such as FIFA.

508. Accordingly, the Panel dismisses PROFAA's submission.

9.4. Interim Conclusion

509. In light of the above, the Panel cannot conclude, on the basis of PROFAA's submission, that Articles 12(8)-(9) and 15 FFAR, nor the FFAR in general, are incompatible with French law.

10. Whether the FFAR Comply with the MLS-MLSPA CBA

510. PROFAA argues that the FFAR, without specifying any provisions thereof, violate the CBA between the MLS the MLSPA because (i) "*agent regulations do not fall under "management rights" because such changes are changes to "player-benefits", which are prohibited*", (ii) "*agent regulations are already addressed in the MLS-MLSPA CBA therefore any alterations by federation regulations are prohibited*", and (iii) "*the MLSPA has not explicitly waived the right to collectively bargain agent regulations*".

511. However, as FIFA rightly indicates, the MLS-MLSPA CBA does not address the rules and regulations which apply to football agents. Article 1(1) of the MLS-MLSPA CBA merely provides that although the MLSPA is the exclusive bargaining representative of

the players, it is permissible for players to use a player-agent to bargain with the MLS to achieve better terms than those established in the CBA. Article 18(3) of the MLS-MLSPA CBA provides that, if the MLSPA were to develop and implement an agent certification programme, only certified agents may be used. However, no such programme has been developed yet. As a result, it is clear that the use of licensed football agents is compatible with the MLS-MLSPA CBA, and that the latter foresees that agents may be regulated by the MLPSA. But otherwise, the CBA does not regulate the activity of football agents. For the same reasons, Article 15(2) FFAR, which relates to the conditions of agent services, does not fall within the concepts of "*management rights*" or "*player benefits*" set out in Article 5 of the MLS-MLSPA CBA.

512. As PROFAA states, the MLSPA may exercise its exclusive authority to develop regulations that apply to football agents. But there is no reason to anticipate, at this stage, that those regulations would fail to reflect the FFAR or would otherwise be incompatible with it.

513. Accordingly, PROFAA's submission is manifestly unfounded.

10.1. Interim Conclusion

514. In light of the above, the Panel cannot conclude, on the basis of PROFAA's submission, that the FFAR in general are incompatible with the MLS-MLSPA CBA.

IX. COSTS

515. Article R64.4 of the Code provides as follows:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*
>
> - *the CAS Court Office fee,*
> - *the administrative costs of the CAS calculated in accordance with the CAS scale,*
> - *the costs and fees of the arbitrators,*
> - *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
> - *a contribution towards the expenses of the CAS, and*
> - *the costs of witnesses, experts and interpreters.*
>
> *The final account of the arbitration costs may either be included in the award or communicated separately to the parties. It shall contain a detailed breakdown of each arbitrator's costs and fees and of the administrative costs and shall be notified to the parties within a reasonable period of time. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."*

516. Article R64.5 of the Code provides as follows:

> *"In the arbitral award, the Panel shall determine which party shall bear the*

arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

517. The Claimant requested the Panel to fix a sum of 20,000 CHF to be paid by the Respondent for the legal fees and costs incurred, as well as to pay the whole CAS administration costs and the Arbitrators fees.

518. The Respondent requested the Panel to order the Claimant to bear the full costs of these proceedings and to make a contribution to FIFA's legal costs.

519. Pursuant to the terms of the Letter, as amended, in which the Parties agreed that each party remain solely liable for its respective legal costs, the Panel rules that each party shall bear its respective legal costs.

520. The Letter does not cover the issue of the costs of these proceedings, but the Panel finds that the spirit of the Letter and of these proceedings is that each party bear equally the arbitration costs of these proceedings, as determined by the CAS Court Office and notified in a separate communication.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The claims filed by PROFAA in these proceedings are dismissed in their entirety.

2. The costs of the present arbitration, which shall be determined and separately communicated to the parties by the CAS Court Office, shall be borne equally by PROFAA and FIFA.

3. PROFAA and FIFA shall bear their own legal fees and other expenses incurred in connection with these proceedings.

Done in Lausanne, Switzerland on 24 July 2023

THE COURT OF ARBITRATION FOR SPORT

Romano F. **Subiotto KC**
President of the Panel

Olivier **Carrard**
Arbitrator

Luigi **Fumagalli**
Arbitrator