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FIFA's Football Agents Regulation Violates Competition Law

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Sport itself is all about the competition on the pitch. However, sports federations' actions and regulations have come increasingly into the focus of competition watchdogs and courts worldwide. A well-known example is the dispute over the establishment of the European Super League. As the recently announced merger between golf associations PGA and L.I.V. demonstrates, competition law's relevance is not limited to football. In Germany, however, competition law and football share a long common history. Witness to this shared history is, inter alia, the so-called 50+1 rule, which stipulates that if a professional football division is outsourced into a capital company, a non-profit parent club has to retain a majority (i.e., 50+1% of the voting rights) in that capital company. The German Bundeskartellamt has examined the 50+1 rule at length in recent years and currently assumes that it escapes the prohibition provisions under competition law because it, inter alia, served the purpose of furthering certain aspects of the sporting competition. Most recently, the Bundeskartellamt sent a draft decision meaning to declare commitments the parties made in the proceeding binding and its President declared that "*restricting participation in league matches to not-for-profit membership clubs continues to constitute a restraint of competition that has to be legitimised by a sport policy*".

In one of the latest developments, the Dortmund Regional Court has issued a preliminary injunction against FIFA and the German football association, the DFB (LG Dortmund, 24.5.2023, 8 O 1/23 (Kart)). The Court ruled that certain rules in the new FIFA Football Agent Regulation (FFAR) may not be applied and enforced because they were in violation of EU competition law, specifically Article 101 TFEU. In the court's view, the FFAR's rules constitute decisions by associations of undertakings, which restrict competition by their object. FIFA published the new FFAR after working on it for four years. Agents' associations criticised FFAR already during its drafting process. After the FFAR had been adopted on 16th December 2022, three football agents filed a complaint for injunction before the Dortmund Regional Court.

The Court's decision has far-reaching consequences: it prohibited FIFA and DFB from applying or enforcing the sections of the FFAR that violate competition law, under the threat of a fine being imposed of up to 250,000 euros for each violation.

Background

The complaint in Dortmund is one of several proceedings conducted around the legality of FIFA

regulations by football agents. Other German courts, such as the Mainz and Frankfurt Regional Courts, the Frankfurt Higher Regional Court and the German Federal Supreme Court have also examined current and previous football agents' regulations under EU competition law.

The proceedings before the Frankfurt Regional Court and Higher Regional Court (the Frankfurt proceedings) concerned the abovementioned rules for football agents adopted in 2015. In the Frankfurt proceedings, the Courts prohibited DFB from applying or enforcing sections of these rules that, inter alia, obliged agents to subject themselves to certain regulations such as the FIFA statutes, the FIFA disciplinary code, the FIFA ethics code and the DFB Legal and Procedural Regulations. The Frankfurt proceedings are noteworthy because they dealt with the scope of the Meca-Medina test.

According to the ECJ's Meca-Medina test, the "*mere fact that a rule is purely sporting in nature*" does not justify an exemption from competition law (C-519/04 P). The ECJ relies on a three-pronged test for the purposes of applying Article 101(1) TFEU by reviewing: i) the regulation's legitimate objective; ii) whether the restriction of competition is inherent to pursuing the objective and; iii) the principle of proportionality (para 42). In a similar vein, on its ISU decision, the EU General Court, however, stated that a practice escaped the prohibition laid down in Article 101(1) TFEU if it satisfied two conditions: the rules should be inherent in the pursuit of legitimate objectives and proportionate to those objectives (T-93/18, para 60).

The Frankfurt Regional Court and the Frankfurt Higher Regional Court specifically address the question of what constitutes a rule that is "*necessary to ensure the proper conduct of competitive sport*" in the meaning of Meca-Medina. According to the Frankfurt Regional Court, the football agents' regulation is not a "*sporting set of rules*" to which the Meca-Medina test applies (LG Frankfurt, 2-03 O517/18, para 112). This is because the provision of players' agents' services constitutes an economic activity. The fact that the area of sport is "*reflexively*" touched upon in the rules is not sufficient to counterbalance their anti-competitive nature, according to the Frankfurt Regional Court. As a result, sports-related objectives do not justify a restriction of competition on a market upstream of the sporting competition via the application of the Meca-Medina test in this case.

The Frankfurt Higher Regional Court, however, expanded the concept of a "*sporting set of rules*" to "*sports organisational rules*", which have a direct economic impact on market participants in an upstream market (OLG Frankfurt, 11 U 172/19 (Kart), para 106). Therefore, not only the rules that directly relate to the sporting competition itself but also the rules in the surroundings of a sporting competition that relate to upstream markets could, in principle, escape the prohibition provisions under competition law. This extensive interpretation of the Meca-Medina test has been criticized as undermining competition law and stretching out the autonomy of sports associations. The case ended up at the German Federal Supreme Court, which referred to the Court of Justice (BGH, KZR 71/21).

The German Federal Supreme Court questions related, inter alia, to the necessity of an assessment on whether settling that regulation is a "*sporting set of rules*" is a prerequisite for applying the Meca-Medina test. According to the German Federal Supreme Court, the ECJ's case law is unclear regarding the application of the Meca-Medina test on restrictions of competition on markets upstream to the sporting competition (BGH, KZR 71/21, paras 27 et seq.). Specifically, the German Federal Supreme Court asked whether the Meca-Medina test was to be applied to all regulations of a set of rules, or whether its application depends on their content, such as the

proximity or distance of the individual regulation to the sporting activity of the association. If the Meca-Medina test applied to all regulations of a set of rules, it would have to be examined for each rule individually, whether it is inherent to pursuing a legitimate object and follows the principle of proportionality.

Therefore, the application of the Meca-Medina test is highly controversial in this context. This is underlined by other recent developments on the EU level, i.e., by AG Rantos' opinion in Superleague. AG Rantos outlined the analytical framework for so-called regulatory ancillary restraints including ancillary restraints related to sports escape the prohibition under Article 101(1) TFEU. In his opinion, the aforementioned assessment on whether a regulation is a "*sporting set of rules*" as a prerequisite for applying the Meca-Medina test does not exist. Whether an ancillary restraint is directly connected to sports and the underlying public interest is rather a part of applying the Meca-Medina test and the assessment should be focused on whether it is inherent and proportionate to the objectives pursued (para 91). Consequently, AG Rantos applies the Meca-Medina test on the rules relating to the organisation of a sporting competition (paras 95 et seq.). According to AG Rantos, from an organisational perspective, it appears to be legitimate for a body to be designated as responsible for ensuring compliance with the appropriate rules to ensure the adequate organisation of a sporting discipline. As far as the application of the Meca-Medina test to economic activity in the surrounding of a sporting competition is concerned, AG Rantos and the OLG Frankfurt seem to agree. However, it remains to be seen whether the ECJ will also agree.

While the proceedings before the Frankfurt Regional Court, the Frankfurt Higher Regional Court and the German Federal Supreme Court concerned the aforementioned regulations, the proceedings before the Dortmund and Mainz Regional Courts concern the new regulations (the FFAR).

Football agents had filed a complaint against the new FFAR before the Mainz Regional Court. The Mainz Regional Court suspended the proceedings and referred a set of questions to the ECJ on whether the FFAR violates EU competition law.

According to the Mainz Regional Court, the ECJ had yet not clearly stated whether applying the Meca-Medina test is, *a priori*, limited to regulations of a purely sporting nature. The Dortmund Regional Court also intensively examined the application of the Meca-Medina test. In a preliminary injunction, the Dortmund Regional Court prohibited applying or enforcing the FFAR. To understand the decision's substance, it is, however, necessary to have a look at the FFAR.

Taking a step back – What's the FFAR about?

The extensive new regulation introduced by FIFA responds to FIFA officials' belief that the de-regulation of the industry in 2015 was a "*mistake*". The FFAR's ultimate objective is to set up professional as well as ethical standards for football agents' services worldwide and establish a "*fairer and more transparent football transfer system*". The different sections included, inter alia, read as follows:

- The fixing of a service fee cap. Article 15 FFAR establishes that the maximum payable fee for the provision of football agent services must amount to 3%-10% of the Individual's (typically a football player's) remuneration or 10% of the transfer compensation, depending on the football agent's client and the player's annual remuneration;
- General principles for service fees. Article 14 No. 13 FFAR enshrines that all service fee

payments shall be made through FIFA's own payment institution acting as an intermediary ("FIFA Clearing House") in accordance with FIFA Clearing House Regulations;

- Regulations on representation. Article 12 No. 8 FFAR provides that a football agent may only perform services for one party in a transaction. The FFAR only allows dual representation in narrowly defined exceptions.
- General provisions. Article 4 No. 1 FFAR requires a natural person to submit a complete licence application, comply with eligibility requirements, successfully pass an exam and pay an annual fee to FIFA to become a football agent. Pursuant to Article 4 No. 2 FFAR, applicants have to agree to abide by several FIFA regulations and statutes.

The Court's ruling

The Dortmund Regional Court essentially addresses three key issues. **First**, the examination of whether the FFAR's provisions prevent, restrict or distort competition by object or effect. **Second**, it decided on whether the rules set out in the FFAR were immune to competition law according to the so-called Meca-Medina test (para 27). In this regard, it also dealt with the question of whether FFAR only regulates so-called "*inner affairs*" and might, therefore, fall outside the scope of competition law due to FIFA's autonomy as an association. **Third**, the Dortmund Regional Court balances the pro- and anticompetitive effects of the FFAR's provisions under Article 101(3) TFEU.

According to the Dortmund Regional Court, the service fee cap as well as its mandatory processing via FIFA Clearing House Regulations, the restriction of multiple representation and the mandatory licensing of football agents aim to restrict competition (LG Dortmund, 8 O 1/23 (Kart), paras 82 et seq.).

On one side, the service cap fee imposed uniform behaviour upon football agents' clients regarding the maximum fees to be agreed on in the market. Football agents could no longer freely negotiate their fees. Likewise, the mandated use of FIFA's Clearing House aimed at restricting competition as it enabled FIFA to monitor compliance with the service fee cap. The Dortmund Regional Court identified the service fee cap as price-fixing, which is, by its very nature, injurious to the proper functioning of normal competition (para 112). The Dortmund Regional Court refers to the ECJ's judgments in Dole Food and Budapest Bank, in which the ECJ stated that where an agreement is classified as a restriction of competition by object, there is no need to demonstrate, in addition, the effects of that agreement (*Dole Food*, C-286/13 P, para 114 and *Budapest Bank*, C-228/18, para 39). For its classification of the service cap fee as a "*by object*" restraint of competition, the Dortmund Regional Court took account of the rule's content and its economic and legal context. Specifically, it took account of the market coverage of 100% and the association's intention, as it stated that there existed no demand for the provision of football agents' services that would not be subject to the FFAR's service cap fee and that FIFA had declared its intention to limit the fee level. This approach is in line with the ECJ's case law (*Cartes Bancaires*, C-228/18, paras 50-55).

On the other side, FIFA's ban on multiple representation aimed at restricting the independence of football agents as market participants as well as other market participants' freedom of choice between multiple suppliers. If an agent acting on behalf of one of the parties involved in a transfer (player or club receiving the player), the remaining parties involved in the transfer cannot receive this particular agent's services. According to the Dortmund Regional Court, this restriction was intended by the rule. Therefore, the Dortmund Regional Court classified the ban on multiple

representation as a "*by object*" restriction of competition as well (para 133).

Last but not least, in the Court's own words, the licensing obligation constituted a barrier to entry. Football agents who refuse to obtain a license would be denied any access to the market for the provision of football agents' services. The Dortmund Regional Court emphasized that agents who do not obtain a licence and declare to be subject to certain FIFA and DFB regulations were unable to access the relevant markets. This provision also constituted a "*by object*" restriction of competition.

Generally, the Dortmund Regional Court emphasizes the restriction of the market participants' individual economic freedom, a traditionally ordoliberal approach. As the FFAR's provisions were designed to restrict competition in the market for the provision of football agents' services, i.e., representing football players and organizing football players' transfers, they constitute infringements "*by object*", according to the Dortmund Regional Court. As by object restrictions of competition are injurious to normal competition by their very nature, generally a bright line rule is applied.

Although the Dortmund Regional Court explained the revealed degree of harm deriving from the application of the FFAR entailed that it should be characterised as a by object restriction (in a similar vein to *Cartes Bancaires*, para 69), there remain doubts about their characterisation due to the restrictive nature of the "*by object*" concept. In Cartes Bancaires, SIA Maxima Latvija, and Visma Enterprise, the ECJ stressed the narrow interpretation of the *by object* category and, inter alia, provided horizontal price-fixing as an example (*Cartes Bancaires*, paras 51 and 58; *SIA Maxima Latvija*, C-345/14, para 18; *Visma Enterprise*, C-306/20, para 60).

Recently, in its Super Bock judgment, the ECJ underlined that pro-competitive effects are not to be considered exclusively under Article 101(3) TFEU but must be part of the assessment of the economic and legal context of an agreement under Article 101(1) TFEU (para 36) (see comment on the ruling here). According to the ECJ, pro-competitive effects may give rise to reasonable doubt as to whether an agreement constitutes a by object restriction of competition. Based on this narrow interpretation and the ECJ's favouring of a context- and substance-based approach in applying Article 101 TFEU, a more in-depth examination of the effects might have been preferable, at least with regard to the ban on multiple representation and the licensing obligation.

After stating that some of the FFAR's provisions restricted competition, the Dortmund Regional Court assesses whether they escape the scope of Article 101(1) TFEU due to public policy considerations. In this regard, the Dortmund Regional Court considered applying the three-pronged Meca-Medina test. However, according to the Court's findings, the FFAR does not constitute a sports regulation (LG Dortmund, 8 O 1/23 (Kart), paras 124 et seq.). The Dortmund Regional Court states that the FFAR was not inseparably connected with the proper functioning of the sporting competition. Therefore, the Meca-Medina test, which was designed specifically for sports regulations, could not be applied. The court's arguments are compelling: only regulation that directly affects what happens on the pitch should be exempted from competition law. If competition "*off the pitch*" is restricted, competition law generally ought to intervene. This is in line with the Frankfurt Regional Court's approach regarding the abovementioned regulation. Because both the German Federal Supreme Court (with regard to the preceding rules) and the Mainz Regional Court (with regard to the FFAR) have referred to the ECJ, a clarification on whether the Meca-Medina test applies to "*sports organisational rules*" is expected to be admitted soon.

For the sake of completeness, the Dortmund Regional Court emphasized that the abovementioned FFAR's provisions do not pursue a legitimate objective pursuant to the Meca-Medina test nor were the restrictions of competition inherently connected with the pursued objective. The Dortmund Regional Court argued that the FFAR does not directly affect the sporting competition (paras 128 et seq.). Articles 4, 12, 14, and 15 FFAR would therefore not pursue the objectives put forward by FIFA (i.e., to maintain the balance of the sporting competition). Moreover, the FFAR's provisions also violated the principle of proportionality according to the Dortmund Regional Court (paras 139 et seq.). The court underlines that the FFAR's provisions apply uniformly to all kinds of football agents and transfers. The provisions would also apply to the type of football agents who had not contributed to the alleged misdevelopment, i.e. the alleged "*excessive behaviour*" which led FIFA to adopt the new FFAR. Vice versa, restricting those football agents' autonomy does not directly address this problem, regardless of whether it constitutes a legitimate object.

After establishing that parts of the FFAR were restricting competition and do not escape the prohibition under Article 101(1) TFEU due to public policy considerations, the Dortmund Regional Court assessed whether it could be exempted under Article 101 (3) TFEU. This is in line with the case law according to which even restrictions of competition by object may, in principle, benefit from Article 101(3) TFEU (in this sense, e.g. *Visma Enterprise*, para. 90; *Pierre Fabre*, C-439/09, paras 57 and 59; *GlaxoSmithKline*, T-168/01, para 233).

As the ECJ stated in Super Bock, the concepts of "*restriction by object*" and "*hardcore restrictions*" are not conceptually interchangeable and do not necessarily overlap (*Super Bock*, C-211/22, para 41). Therefore, it is, in principle, possible for the FFAR, except for the price-fixing, to benefit from a block exemption. However, given that there were no applicable block exemptions for football agents, the Dortmund Regional Court carefully examined whether the criteria contained in Article 101(3) TFEU for an individual exemption were satisfied (paras 146 et seq.). In the court's view, however, it was not apparent "*at the outset*" that the FFAR's provisions were achieving any relevant efficiencies. Potential advantages for the clubs had to be disregarded, as these clubs were part of the association of undertakings that had passed the FFAR. This is consistent with settled case law, according to which the improvement within the meaning of Article 101(3) TFEU cannot be identified with all the advantages which the parties obtain from the agreement (*Mastercard*, C-382/12 P, para 234; *Visma Enterprise*, para 85).

Furthermore, ensuring the "*integrity of sport*", as FIFA put it, was not a pro-competitive consideration pursuant to Article 101(3) TFEU, according to the Dortmund Regional Court. As the court correctly stated, fostering such general interests is the legislator's responsibility. Competition authorities and courts may only take general interests into account if they can be considered an "*improvement in the production or distribution of goods or the promotion of technical or economic progress*", in a narrow reading of Article 101(3) TFEU.

What's next?

First and foremost, the Dortmund Regional Court's decision demonstrates how competition law can effectively protect market participants in the sports sector. However, there is no sign of a "Dortmund Effect" that would, *de facto*, externalise the ruling outside of the jurisdiction. FIFA has already appealed the decision. Düsseldorf's Higher Regional Court, acting as the next instance, will decide on that matter in the upcoming months. The Dortmund Regional Court's decision is an

interim injunction. Provisional legal protection is, in principle, granted where normal legal action, the so-called principle proceeding, would not guarantee effective protection because of its duration or the urgency of the matter.

The appeal in Düsseldorf is also part of provisional legal protection, and the appeal before the Düsseldorf Higher Regional Court cannot be suspended in light of the ECJ's upcoming preliminary ruling. However, the principle proceeding is very likely to be suspended with regard to the Mainz District Court's referral to the ECJ on whether the FFAR's provisions violate Articles 101 and/or 102 TFEU which gives the ECJ the opportunity to further specify its Meca-Medina doctrine.

From a procedural point of view, the Mainz Regional Court's referral to the ECJ influenced the Dortmund Regional Court's preliminary injunction. The Dortmund Regional Court held that the interim prohibition to apply and enforce the FFAR was necessary insofar as the principal proceeding would have to be suspended due to the ongoing referral by the Mainz Regional Court. Depending on the ECJ's preliminary ruling, the Dortmund Regional Court might come to a different ruling in the upcoming principle proceeding. However, it may take some time for the ECJ to respond to the Mainz Regional Court's preliminary ruling request. In 2022, the average time taken to process requests for a preliminary ruling was 17.3 months. Thus, if the Düsseldorf Higher Regional Court should agree with the Dortmund Regional Court's view in the appeal, the FFAR cannot be applied or enforced in Germany for a long-term period.

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