The International Sports Law Journal (2024) 24:188–203
https://doi.org/10.1007/s40318-024-00279-4

ARTICLE

Will the football agents' service fee cap survive the current legal attacks?

Regulation of football agents between the poles of autonomy of sports organisations and EU antitrust law

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Accepted: 13 August 2024 / Published online: 3 September 2024

Abstract
The Fédération Internationale de Football Association (FIFA) has set a service fee cap for football agents in its new FIFA Football Agent Regulations (FFAR). The respective regulations came into force on 1 October 2023. The article examines the question—in the negative—of whether this service fee cap is compatible with EU antitrust law. Following an overview of the relevant case law of various German state courts and the Court of Arbitration for Sport (CAS), the legal issues associated with the initial problem are analysed in detail.

Keywords FIFA Football Agent Regulations (FFAR) · Service fee cap · Football agent · Antitrust law · Meca-Medina-test

1 Introduction

The old FIFA Football Agent Regulations of 2015 (FFAR 2015)[1] have been replaced by new provisions (FFAR 2022).[2] The latter came already partially into force on 1 January 2023, the remaining regulations should be implemented by the national football federations by 1 October 2023. Immediately after the FFAR 2022 became known, football players' agents began to legally attack the new regulations—especially the planned service fee cap for so-called football agents within the meaning of Art. 15 FFAR 2022 has been repeatedly challenged in court. The following article comments on the question whether the planned remuneration cap will survive these attacks based on antitrust considerations. In this context, the legal evaluation is limited to the relevant case law of German state courts, European courts and the Court of Arbitration for Sport. In contrast, decisions of other national state courts and sports arbitration tribunals[3] are not included because the development in Germany has progressed the fastest and furthest.

[1] Cf. for an antitrust assessment Heermann 2022a, chap. XIII paras 548–591.

[2] Retrievable at https://digitalhub.fifa.com/m/1e7b741fa0fae779/original/FIFA-Football-Agent-Regulations.pdf.

[3] Similar cases in respect to FFAR are taking place in other countries, e.g. Spain (Commercial Court no. 3 of Madrid, Injunction, 6 November 2023, no. 321/2023—0001) and England (file:///C:/Users/bt230016/Downloads/caa-v-fa-and-fifa-301123-rev-121223-publication-version-1.pdf).

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2 Case law on the FIFA Football Agent Regulations

The proceedings between football agents on the one side and Deutscher Fußball Bund (DFB; German Football Federation) on the other side before the Frankfurt Regional Court, the Frankfurt Higher Regional Court and the German Federal Court of Justice concern the FFAR 2015. Thus, they are only indirectly related to the initial legal question of this article. However, the relevant legal assessments of the respective decisions will be elaborated to the extent to which they (may) have an impact on the admissibility of the controversial service fee cap for football agents under cartel law. In contrast, the antitrust assessments in the proceedings before the Mainz Regional Court, the Dortmund Regional Court and the Court of Arbitration for Sport on the FFAR 2022 in general and on the admissibility of service fee caps for football agents in particular will be discussed in more detail.

2.1 Frankfurt Regional Court on the FFAR 2015

The Frankfurt Regional Court[4] stated that various rules of the FFAR 2015—which do not need to be explained in more detail here—would have the effect of restricting competition pursuant to Art. 101 (1) TFEU. These provisions could not be justified under the so-called *Meca-Medina* test, which will be discussed in more detail in a subsequent section,[5] because this test was not applicable in the specific case. Yet the court concluded that at least some of the provisions at issue could be justified under Art. 101 (3) TFEU.

2.2 Frankfurt Higher Regional Court on the FFAR 2015

In the following judicial instance, the Frankfurt Higher Regional Court,[6] stated that some of the rules of the FFAR 2015 at issue would restrict competition pursuant to Art. 101 (1) TFEU. The court left open whether these were restrictions of competition by object or effect. In contrast to the lower court, the Frankfurt Higher Regional Court considered the *Meca-Medina* test to be applicable and accepted a justification of individual disputed provisions on this basis. The court did not address the possibility of a justification under Art. 101 (3) TFEU.

2.3 German Federal Court of Justice on the FFAR 2015

The plaintiff football agents and the defendant DFB appealed to the German Federal Court of Justice.[7] The latter subsequently referred the following questions to the European Court of Justice (ECJ) for a preliminary ruling under Art. 267 TFEU:[8]

1. Do the principles developed by the ECJ in the judgments in *'Wouters'* (19 February 2002—C-309/99) and *'Meca Medina'* (18 July 2006—C-519/04 P), according to which, when applying the rule prohibiting cartels,

- account must be taken of the overall context in which the decision in question was taken or produces its effects and, more specifically, of its objectives,
- and according to which it has then to be considered whether the decision's consequential effects restrictive of competition are inherent in the pursuit of those objectives,
- and whether they are proportionate to those objectives ('the *Meca-Medina* test'),

apply to the regulations of a sports association, which are addressed to members of the association and regulate the use of services of undertakings outside the association on a market upstream of the association's activities?

2. If question 1 ****is answered in the affirmative: in that case, must the Meca Medina test be applied to all the provisions of those regulations, or does its application depend on substantive criteria, such as the proximity or remoteness of the individual rule to the sporting activity of the association?"

The ECJ's opinion on the questions referred by the German Federal Court of Justice, will have far-reaching effects on how European antitrust law is to be applied to restrictive statutes of sports associations. In particular, the Court will clarify under which conditions the *Meca-Medina* test can be used to justify statutes of sports federations which—as is very often the case—have a restrictive effect on competition not only on the members subject to federations' statutes, but also on third parties, i.e. non-members, legally independent of the federation.

[4] Frankfurt Regional Court (Landgericht Frankfurt, LG Frankfurt) 24 October 2019, 2-03 O 517/18, https://openjur.de/u/2261681.html=Beck-Rechtsprechung (BeckRS) 2019, p. 40640.

[5] 3.4.

[6] Frankfurt Higher Regional Court (Oberlandesgericht Frankfurt, OLG Frankfurt), 30 November 2021, 11 U 172/19 (Kart) = Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechung (GRUR-RS) 2021, p. 37096.

[7] German Federal Court of Justice (Bundesgerichtshof, BGH), 13 June 2023, KZR 71/21, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=3&nr=134028&pos=24&anz=1047&Blank=1.pdf.

[8] C-428/23 – *ROGON and Others*. For details cf. request for a preliminary ruling from the Landgericht Mainz (Germany) lodged on 31 March 2023 – FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA), https://curia.europa.eu/juris/showPdf.jsf?text=&docid=276790&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1668790.

2.4 Mainz Regional Court on the FFAR 2022

After football agents filed a lawsuit against the FFAR 2022 before the Mainz Regional Court,[9] the court suspended the proceedings and referred a couple of questions to the ECJ[10] for a preliminary ruling under Art. 267 TFEU. Among other questions the Mainz Regional Court also stated the following: The ECJ had not yet clearly expressed its opinion as to whether the standard of review of the *Meca-Medina* test was limited from the outset only to regulations of a purely sporting nature which directly affect the sporting aspects of competition (such as, for example, the doping regulations at issue in the *Meca-Medina and Majcen* case) or whether it was also applicable to other regulations issued by a sports federation.

2.5 Dortmund Regional Court on the FFAR 2022

2.5.1 Judgment of 24 May 2023—8 O 1/23 (Kart)

Before the Dortmund Regional Court[11], three football agents had filed an application for an interim injunction, in particular with regard to the provisions of the FFAR 2022 on the planned service fee cap. The court granted the injunctive relief in its entirety and justified this with the risk of a first offence. Individual provisions of the FFAR, in particular the service fee cap for football agents, a "hardcore cartel in the form of a price or purchasing cartel", would violate Art. 101 TFEU as well as the corresponding norms of German cartel law.[12] The defendants, the German Football Federation (DFB) and FIFA, were thus prohibited from applying, enforcing or imposing enforcement of the disputed provisions of the FFAR 2022. FIFA has already appealed the decision. On 13 March 2024, the Düsseldorf Higher Regional Court[13] dismissed the football associations' appeal against the judgement of the Dortmund Regional Court.

2.5.2 Court Orders of 9 August 2023 (DFB) and of 17 August 2023 (FIFA) —8 O 1/23 (Kart)

In circulars with identical contents dated 28 and 29 June 2023, the German Football Federation (DFB) and the German Football League (DFL) informed their members about the legal consequences to be drawn from the ruling of the Dortmund Regional Court of 24 May 2023 in the following manner (emphasis in italics by the author):[14]

> "In view of the fact that the ruling in the preliminary injunction can be enforced and is enforceable immediately, the provisions of the new FFAR that are the subject of the proceedings before the Dortmund Regional Court will not be transferred by the DFB into its own association law, applied, enforced or enforced by the DFB through third parties for the time being. However, *these restrictions only apply to agreements concluded under German law by football agents with players, coaches and/or clubs based in Germany*."

In particular, in the legal assessment of the German Football Federation in its circular letter, which is highlighted in italics, the Dortmund Regional Court convincingly recognised a breach of the federation's obligation to cease and desist to apply, enforce or enforce through third parties the disputed provisions of the FFAR 2022.

Although football federations have legal advisors with rich legal experience in, *inter alia*, antitrust law, all parties involved seem to have lost sight of the so-called effects doctrine, an ironclad principle of antitrust law, when implementing the ruling of the Dortmund Regional Court of 24 May 2023. According to this principle, a cartel law regime (such as Art. 101, 102 TFEU or the German cartel law) can apply to all restrictive practices that have an appreciable effect on the market concerned. Thus, it is only the affected market location of the requested players' agent service that matters, but not—contrary to what the German Football Federation in particular seems to have assumed—the question to which national law a contract is subject. Otherwise, especially with regard to the latter point, the door would be open to simple and crude circumventions of the obligation to cease and desist (in particular by subjecting the

[9] Mainz Regional Court (Landgericht Mainz, LG Mainz), 30 March 2023, 9 O 129/21, https://curia.europa.eu/juris/showPdf.jsf?text=&docid=274366&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=18440910 = Wirtschaft und Wettbewerb (WuW) 6/2023, pp. 351–357.

[10] C-209/23 – *RRC Sports*. For details cf. request for a preliminary ruling from the Landgericht Mainz (Germany) lodged on 31 March 2023 – FT and RRC Sports GmbH v Fédération Internationale de Football Association (FIFA), https://curia.europa.eu/juris/document/document.jsf?text=&docid=275084&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1668618.

[11] Dortmund Regional Court (Landgericht Dortmund, LG Dortmund), 24 May 2023, 8 O 1/23 (Kart), https://www.justiz.nrw/nrwe/lgs/dortmund/lg_dortmund/j2023/8_O_1_23_Kart_Urteil_20230524.html.

[12] §§ 1, 33 (1) Gesetz gegen Wettbewerbsbeschränkungen (GWB).

[13] Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf, OLG Düsseldorf), 13 March 2024, VI-U (Kart) 2/23, https://www.justiz.nrw/nrwe/olgs/duesseldorf/j2024/U_Kart_2_23_Urteil_20240313.html.

[14] Dortmund Regional Court (Landgericht Dortmund, LG Dortmund), 9 August 2023, 8 O 1/23 (Kart), Wirtschaft und Wettbewerb (WuW) 2023, pp. 571–573 – *DFB* with a comment by Heermann (2023b), p. 548.

contract to non-German law), which would undermine the meaning and purpose of antitrust law.

Also with regard to FIFA, the Dortmund Regional Court[15] stated that the federation had breached its obligation to cease and desist to apply, enforce or enforce through third parties the disputed provisions of the FFAR 2022. In the court's view, in the case of an act that created a continuing state of disturbance, the injunction prohibiting the act was, in the absence of indications to the contrary, to be interpreted as a rule to the effect that, in addition to the injunction to cease and desist from such acts, it also required the performance of possible and reasonable acts to remedy the state of disturbance. FIFA had breached this obligation:

- by requiring football agents to submit a declaration of submission without any restrictions,
- by not informing football agents who were already licensed or registered for examination and who were required to submit a declaration of submission that this declaration was not currently valid, and
- by ultimately creating and maintaining a state of disturbance.

The court's legal comments on the antitrust effects doctrine correspond to those in the court order regarding the German Football Federation.

The ECJ has not yet expressly recognised the antitrust effects doctrine, but it has endorsed it in substance by developing a "qualified effects test" in this respect.[16] This test pursues the objective of preventing such acts and conduct which, while not adopted within the EU, have anticompetitive effects liable to have an impact on the EU market.

2.5.3 FIFA's announcement of 8 September 2023 and FIFA Circular no. 1873 of 30 December 2023

In the meantime, in an announcement of 8 September 2023, FIFA expressly took a legal position on the decision of the LG Dortmund of 24 May 2023 (but not on the court orders of 9/17 August 2023).[17] The relevant passages are quoted below:

"[…]

- The FFAR will, with retroactive effect as from 24 May 2023, be suspended in their entirety for all transactions with a link to the German market.
- A link to the German market will be deemed to exist as soon as any party to a transfer (agent, club, player or coach) has a link to Germany. The suspension of the FFAR will then apply to all parties to the relevant transaction, regardless of their domicile.
- All plaintiffs in the procedure before the District Court of Dortmund will, with retroactive effect as from 24 May 2023, no longer be bound by any provisions of the FFAR, on a worldwide basis, regardless of the place of their business activities.

Finally, while FIFA fully respects the Injunction, it is worth noting that the Injunction is inconsistent with previous judicial decisions in other European countries, the recent CAS award and even previous decisions [Sic!] in Germany, including from appeals courts. […] "

Given this legal situation, football agents who wished to avoid and circumvent the service fee cap pursuant to Art. 15 FFAR 2022 could only be strongly recommended to involve a football agent with a "link to Germany" in a player transfer. Without conclusively assessing FIFA's legal evaluations, two comments may be made:

- It cannot be completely ruled out that other decisions than the ones mentioned here on the FFAR 2022 in general and on the service fee cap for football agents in particular have been issued by German state civil courts in the first two judicial instances, which have reached a different legal opinion than the Dortmund Regional Court. However, the author is not aware of any such decisions to date (status: 6 June 2024).
- At least at the beginning FIFA obviously tried to limit the legal effects of the judgment of the Dortmund Regional Court as far as possible in order to be able to apply and enforce the FFAR 2022 worldwide—apart from the relatively narrow exceptions outlined before. In the light of the antitrust effects doctrine, it is still doubtful, whether FIFA hereby fulfilled its obligation to cease and desist to apply, enforce or enforced through third parties the disputed provisions of the FFAR 2022.

[15] Dortmund Regional Court (Landgericht Dortmund, LG Dortmund), 17 August 2023 (FIFA), 8 O 1/23 (Kart), Wirtschaft und Wettbewerb (WuW) 10/2023, pp. 571–573 – *FIFA* with a comment by Heermann 2023b, p. 548.

[16] Cf. for instance ECJ, 6 September 2017, C-413/14 P; ECLI:EU:C:2017:632, paras 40–47 – *Intel*.

[17] FIFA, 8 September 2023, Information on the preliminary injunction granted by the Landgericht Dortmund in the procedure 8 O 1/23 (Kart), https://www.fifa.com/legal/football-regulatory/agents/news/information-on-the-preliminary-injunction-granted-by-the-landgericht. Accessed 6 June 2024.

Most recently, on 30 December 2023, FIFA in its Circular no. 1783[18] temporarily suspended the FFAR 2022 rules affected by the above-mentioned Dortmund Regional Court decision,[19] until the European Court of Justice renders a final decision in the pending procedures concerning the FFAR.[20]

On 24 July 2023, the CAS[21] ruled on the arbitration action filed by the Professional Football Agents Association against FIFA that the FFAR 2022 did not violate European antitrust law and European fundamental freedoms, in particular—but not only—with regard to the service fee cap for football agents pursuant to Art. 15 FFAR 2022.

How is it that the CAS—unlike various German state courts[22]—considers the entire FFAR 2022 to be compatible with Art. 101, 102 TFEU? Because the CAS has not yet found a violation of Art. 101 and/or 102 TFEU in any arbitration proceedings in which the statutes of sports federations have been challenged under antitrust law. And because the CAS has—unfortunately, not for the first time[23]—applied and interpreted European antitrust law in a doubtful manner in favour of a sports federation, as will now be shown:

First, can FIFA actually regulate the freedom of professional practice of third parties who are legally independent of the federation? This is a complex and difficult question.[24] However, the CAS has observed in para 175 "that FIFA enjoys both so-called 'technical' and 'democratic' legitimacy to regulate football agent services a priori". So, is it really as simple as that? The question of whether in those constellations the legislative competence of sports federations can actually be justified in such a surprisingly simple way will be returned to in a subsequent section.[25]

Second, the CAS does not consider the price fixing by the demand side (in the present case: FIFA), a rather obvious hardcore cartel, to be a restriction of competition *by object*,[26] because football agents could compete with each other below the maximum limit (para 238). If this approach were deliberated to its logical conclusion, there would be no price cartels, which—at least according to the general legal opinion—generally are considered restrictions of competition by object and not only by effect.[27] Or are price cartels, after all, fantasies of quixotic and freaky antitrust lawyers? Nevertheless, the CAS assumed that there was a restriction of competition by effect (paras 243–257).

Third, the CAS sets the course in favour of FIFA in paras 221–226, in that the panel grants FIFA "a certain margin of appreciation" —obviously not judicially reviewable –, which is supposed to concern in particular the examination of the prerequisites of the *Meca-Medina* test and leads to improper standards of proof. This approach is intolerable in this form. The panel thus evades its task of examining the actually relatively strict requirements of the *Meca-Medina* test based on objective standards. This aspect will be returned to in a subsequent section.[28] Furthermore, the CAS accepts uncritically all allegedly legitimate objectives—more on this below[29]—put forward by FIFA (paras 284–286). And so, as a result of the improper application of the *Meca-Medina* test, the CAS reaches its ultimately unconvincing conclusion that all restrictive rules of the FFAR 2022 are compatible with Art. 101 and 102 TFEU.

3 Legal problems

3.1 Art. 15 FFAR 2022: fixing of a service fee cap

In simplified terms, Art. 15 FFAR 2022 provides that the maximum payable fee for the provision of football agents' services must amount to 3–10% of the football player's remuneration or 10% of the transfer compensation, depending on the football agent's client and the player's annual

[18] https://digitalhub.fifa.com/m/76b4cdc63e42e03f/original/1873_FIFA-Football-Agent-Regulations-update-on-implementation.pdf.

[19] Cf. 2.5.

[20] Cf. 2.3.

[21] CAS, 24 July 2023, 2023/O/9370 – *Professional Football Agents Association v. FIFA*, https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_9370.pdf. Accessed 6 June 2024.

[22] 2.1–2.5.

[23] On an analysis of the arbitral awards until February 2022 cf. Heermann 2022a, chapter IV, paras 284–310.

[24] Heermann 2022a, chapter XIII, paras 559–568.

[25] 3.2.

[26] Most recently, the ECJ has repeatedly categorised horizontal cartels leading to price fixing as a restriction of competition by object: ECJ, 21 December 2023 – C-124/21 P, ECLI:EU:C:2023:1012, para. 103 – *International Skating Union v. Commission* and ECJ, 21 December 2023 – C-333/21, ECLI:EU:C:2023:1011, para. 163 – *European Superleague Company v. FIFA and UEFA*.

[27] The Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01) does not explicitly categorise price cartels as hardcore cartels, but in para 13 price cartels are explicitly excluded from the scope of the Notice. The Expedia decision of the ECJ, 13 December 2012, C-226/11, ECLI:EU:C:2012:795, paras 35–38, had made it necessary to revise the de minimis notice, which was then carried out in 2014. In the decision, the ECJ had previously stated in general terms that an agreement that has an anti-competitive purpose constitutes an appreciable restriction of competition by its nature and irrespective of its effects. Accordingly, price cartels are generally categorised as restrictions of competition by object.

[28] 3.4.6.2.

[29] 3.4.4.

remuneration. It can be assumed that with this regulation, FIFA wants to restrict the earning opportunities of football agents, who can exceed the million-euro mark several times over, at least in the case of a player transfer in top-level football. How this obvious price cartel on the demand side is to be assessed under antitrust law will be analysed in the following.[30]

3.2 Regulatory competence of the sports associations in relation to external parties

The various legal approaches to this complex problem have already been analysed in detail at other places.[31] In 2005 in the *Piau* case, which concerned the compatibility of an earlier version of the FFAR (in force since 1 January 1996) with EU fundamental freedoms and EU antitrust law, the then Court of First Instance (CFI)[32] —in the meantime succeeded by the General Court—raised the equally exciting and interesting, but ultimately unanswered question of the regulatory competence of FIFA in relation to football agents who are usually not members of the federation (emphasis in italics by author):

> "76. With regard to FIFA's legitimacy, contested by the applicant, to enact such rules, 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.
> 77. The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by *a private-law body, like FIFA, which has not been delegated any such power by a public authority*, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.
> 78. In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, *the rule-making power exercised by FIFA, in the almost complete absence of national rules*, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision must be assessed, while considerations relating to the legal basis that allows FIFA to carry on regulatory activity, however important they may be, are not the subject of judicial review in this case."

In proceedings concerning the FFAR 2015, the Frankfurt Regional Court[33] also raised this legal question, only to assume, without a convincing answer, that the German Football Federation (DFB) and FIFA were competent to impose such rules. Yet some doctrine has come to the conclusion that the football federations do not have any regulatory competence in this respect and therefore the entire FFAR had to be considered invalid.[34]

Why should football federations stand idly by and watch the ever-increasing sums of money being gobbled up by football agents who are not all professionally qualified, after the European legislator and many national legislators have failed to act on suggestions to intervene? Instead, who could judge the problems that have arisen better than the football federations and the football clubs as their members? It is hardly to be expected that conceivable voluntary commitments by an association of players' agents, for example, would be equally effective. So, from a legal perspective, what should prevent football federations from issuing private regulations based on private autonomy, even if these also directly address football agents who are not members of the federation?[35] Of course, the prerequisite remains that it is not a purely subjective professional licensing regulation for the independent profession of football agents. The objection persists that football agents are ultimately *de facto* forced to submit to the FFAR in order not to jeopardise their professional practice and the legal validity of a player transfer or conclusion of a contract. But this goes hand in hand with only a very limited scope of assessment and discretion left to the respective football federations, as well as with comparatively strict (antitrust) legal control of statutes restricting competition and measures taken by the federation based on them. Therefore, sports federations cannot be denied, at least within certain (antitrust) legal limits,[36] the competence to draw up regulations in their statutes that are intended to regulate the activities of football agents as third parties and non-members of the federation.[37]

[30] For a detailed analysis cf. recently Heermann 2023a, pp. 524–531.

[31] Heermann 2022a, chapter XIII, paras 559–568; Heermann 2023a, pp. 525 et seq., paras 8–14.

[32] CFI, 26 January 2005, T-193/02, ECLI:EU:T:2005:22, paras 76–78 – *Piau*.

[33] Frankfurt Regional Court (Landgericht Frankfurt, LG Frankfurt) 24 October 2019, 2-03 O 517/18, https://openjur.de/u/2261681.html = Beck-Rechtsprechung (BeckRS) 2019, p. 40640.

[34] Breuer 2013, 696 et seq.

[35] The autonomy of associations within the meaning of Art. 11 (1) ECHR and Art. 12 (1) CFR only extends to the relationship between the sports federation and its members.

[36] 3.4.

[37] With a similar result Weatherill 2023, p. 312.

3.3 Restriction of competition pursuant to Art. 101 (1) TFEU

It should actually be beyond question that a horizontal agreement leading to price fixing, like the service fee cap for football agents pursuant to Art. 14, 15 FFAR 2022, constitutes a price cartel on the demand side, which as a hardcore cartel has to be considered a restriction of competition by object.[38] Yet the decision-making practice of the CAS shows that quite obvious restrictions of competition caused by sports federations, which admittedly did not originate from statutory salary or service fee limitations, but from other regulations or measures, were repeatedly not recognised and/or acknowledged by different panels. This applies, for example, to the prohibition of so-called third-party ownerships, the violation of the break-even rule of the UEFA regulations on club financing and financial fair play, and sanctions for doping violations.[39]

Most recently, Weatherill, who advised FIFA in the proceedings before the CAS,[40] also tried to undermine the restriction of competition resulting from the service fee cap for football agents with the following reasoning:[41]

> "Horizontal price-fixing is one of the most pernicious of all anti-competitive practices, but this is not what is at stake here. A governing body which regulates agents' fees would not be co-ordinating its practices with undertakings active in the same market, nor would it be promoting its own commercial interests. It would be acting as a private regulator. The appropriate analogy is not with private parties agreeing prices, but rather with intervention by Member States or the EU itself. Inspection of the Court's case law on price controls introduced by Member States which act as restrictions to free movement and of the EU's own legislative practice in controlling prices reveals that EU law leaves room in principle to justify price controls, while also identifying the criteria that will determine whether particular controls, viewed in their proper context, are to be treated as justified."

Admittedly, this is a profound and innovative as well as exciting argumentative approach,[42] which is, however, at best only partially convincing with regard to the service fee cap for football agents for various reasons (even if this may be different for the CAS):

- With the service fee cap, the clubs that are indirectly involved in FIFA's decisions could actually save some economic resources. What would realistically happen to the costs saved by the clubs as a result of the service fee cap? As far as it can be seen, FIFA does not make any binding specifications in this regard. Would the clubs really pursue a legitimate goal, e.g. social and educational objectives or strengthen vertical solidarity?[43] Or would they invest the savings directly back into the squad for additional or more expensive and supposedly better players? In these by no means unlikely circumstances, FIFA and the clubs would not be pursuing any legitimate objectives in terms of the *Meca-Medina*-test.[44]
- Is FIFA's approach really purely regulatory, as Weatherill believes? This legal opinion is questionable,[45] which will be illustrated by an example outside the sports sector: An association of car manufacturers is of the opinion that the profits of car manufacturers are too low due to the highly inflated prices of automotive suppliers. The automobile manufacturers' association therefore decides on a price cap for all parts that the automobile manufacturers have to purchase from the automobile suppliers. Has the automobile manufacturers' association really only acted for regulatory reasons and not for economic reasons? Or is it not a price cartel of a trade association, an association of undertakings pursuant to Art. 101 (1) TFEU, in which the association is also involved as a representative of its members? It would therefore require a special justification as to why a sports federation should be able to evade its antitrust responsibility so easily by invoking

[38] From the case law, see most recently ECJ, 21 December 2023 – C-124/21 P, ECLI:EU:C:2023:1012, para. 103 – *International Skating Union v. Commission* and ECJ, 21 December 2023 – C-333/21, ECLI:EU:C:2023:1011, para. 163 – *European Superleague Company v. FIFA and UEFA*; cf. also Heermann 2022a, chapter XIII, para 383; Podszun 2021, p. 141.

[39] CAS, 9 March 2017, 2016/A/4490, paras 137, 142 – *RFC Seraing/FIFA*; CAS, 3 October 2016, 2016/A/4492, paras 64, 67, 72, 74 f. – *Galatasaray/UEFA*; CAS, 17 December 2020, 2020/O/668, paras 818 et seq. – *World Anti-Doping Agency/Russian Anti-Doping Agency*; cf. Heermann 2022a, chapter IV, paras 282, 302, 307.

[40] CAS, 24 July 2023, 2023/O/9370, para 41 – *Professional Football Agents Association v. FIFA*, https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_9370.pdf. Accessed 6 June 2024.

[41] Weatherill 2023, p. 317.

[42] But Weatherill 2023, p. 318 subsequently points out that this is not a conclusive legal assessment in favour of the service fee cap for football agents: "None of this proves conclusively that direct intervention in the level of fees that are chargeable by agents would survive challenge pursuant to EU law because every case must be examined on its own terms to decide if this form of regulation is lawful in this market."

[43] Cf. Weatherill 2023, p. 314: "Moreover, in so far as the malfunctioning market tends to encourage the seepage of money out of the pockets of clubs and players and into the hands of private parties, agents, it may be feared that the pot used within the game to pursue social and educational functions and to promote vertical solidarity more generally is depleted."

[44] 3.4.4.

[45] Cf. Heermann 2022a, chapter VI, paras 126–138 with a critical appraisal.

its—allegedly—purely regulatory activity. Otherwise, the floodgates would be open to the circumvention of antitrust law ...

- Furthermore, it is doubtful whether the ECJ's legal assessment of *state* price *controls* can actually be applied by analogy to the antitrust assessment of *private* price *cartels* in general and the service fee cap for football agents in particular.
- At first glance, Weatherill's attempt to equate FIFA as a regulatory authority with Member States sounds very convincing. Yet this conceptual approach leaves an argumentative gap that cannot be closed. FIFA does not have the same legitimacy as a national legislature. If one is open to granting FIFA a regulatory competence over third parties that are independent of the federation,[46] then antitrust law must be applied because the limits of the federation's autonomy have been surpassed. Ultimately, FIFA as a regulator is not qualitatively comparable to democratically legitimised national legislators. If associations acting on behalf of the State introduce competition-restricting regulations, antitrust law must be observed. Even in the case of price fixing by a private association established under state law, the ECJ has applied antitrust law restrictively.[47] This must apply all the more to a private sports association that acts without a corresponding state mandate and exceeds the legal limits of the federation's autonomy by regulating professional freedom of football agents, i.e. third parties independent of the federation.

3.4 *Meca-Medina* test

The *Meca-Medina* test has already been analysed in detail in other publications.[48] In the following, the central findings are summarised and applied to the initial problem of the service fee cap for footballs agents.

3.4.1 ECJ in *Meca-Medina* para 42

The *Meca-Medina* test offers a possibility to justify statutes of a sports federation restricting competition under special consideration of the specific characteristics of sport already at the factual level and independently of Art. 101 (3) TFEU. The origin of the test can be found in ECJ's judgment *Meca-Medina* in its famous paragraph 42 (emphasis in italics by the author):[49]

> "Next, the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31). Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC [note: today Art. 101 (1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the *overall context* in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its *objectives*. It has then to be considered whether the consequential effects restrictive of competition are *inherent* in the pursuit of those objectives (*Wouters and Others*, paragraph 97) and are *proportionate* to them."

3.4.2 Reduction of the characteristic "prevention, restriction or distortion of competition" pursuant to Art. 101 (1) TFEU, unwritten justification or ancillary restraints?

The *Meca-Medina* test, also known as the "three-step test" or the "*Wouters* doctrine",[50] can be dogmatically classified as a restriction of the constituent element "restriction of competition" within the meaning of Art. 101 (1) TFEU or as a justification[51] inherent in the norm. Advocate General Rantos[52] has recently derived the *Meca-Medina* test from a so-called "regulatory ancillary restraints [doctrine]".

The last mentioned approach is not convincing[53] as the doctrine of *commercial* ancillary restraints actually concerns completely different factual constellations (e.g. contracts with non-competition clauses). This fact has also been underlined by the European Commission in its so-called Horizontal Guidelines of 1 June 2023 (emphasis in italics by the author):[54]

[46] 3.2.

[47] ECJ, 4 September 2014 – C-184/13, ECLI:EU:C:2014:2147 ECLI:EU:C:2014:2147, paras 49 et seqq. – API.

[48] Cf. in particular Heermann 2022a, chapter VI, paras 164–385 and chapter XIII, paras 559–568; Heermann 2022c, pp. 214–220; cf. also Mürtz 2023, pp. 169–400

[49] ECJ, 18 July 2006, C-519/04 P, ECLI:EU:C:2006:492, para 42 – *Meca-Medina/Majcen v. Commission*.

[50] Ackermann 2022, pp. 123 et seq.; Bien and Becker 2021, p. 568.

[51] It is striking (perhaps even unavoidable?) that German state courts or sports arbitration tribunals mostly use the noun "justification (Rechtfertigung)" or the verb "justify (rechtfertigen)" when applying the *Meca-Medina* test.

[52] AG Rantos, 15 December 2022, C-333/21, ECLI:EU:C:2022:993, paras 87–91 – *European Super League/UEFA and FIFA* and AG Rantos, 15 December 2022, C-124/21, ECLI:EU:C:2022:988, paras 40–42, 131 – *International Skating Union v. Commission*.

[53] Also rejecting this dogmatic view Mürtz 2023, pp. 175–179.

[54] European Commission 2023, para 34.

> "Where undertakings engage in cooperation that does not fall within the Article 101 (1) prohibition because it has neutral or positive effects on competition, a restriction of the commercial autonomy of one or more of the participating undertakings does not fall within that prohibition either provided that that restriction is objectively necessary to implement the cooperation and is proportionate to the objectives of the cooperation (so-called '*ancillary restraints*'). *To determine whether a restriction constitutes an ancillary restraint, it is necessary to examine whether the cooperation would be impossible to carry out in the absence of the restriction in question.* The fact that the cooperation is simply more difficult to implement, or less profitable without the restriction concerned, does not make that restriction 'objectively necessary' and thus ancillary."

The FFAR 2022 in general and the service fee cap pursuant to Art. 15 FFAR 2022 in particular are already objectively unnecessary to implement football operations. A company acquisition agreement without a contractual non-competition clause is indeed not imaginable, but football operations without a service fee cap for football agents are, as the last decades have shown.

But even the so-called "*regulatory* ancillary restraints (doctrine)" favoured by AG Rantos does not provide a convincing dogmatic basis for the *Meca-Medina* test. What exactly does "regulatory" mean? Aren't sports organisations mostly involved in regulatory activities? This approach is ultimately too vague and contourless to be able to justify a privileged treatment of sports associations under antitrust law. Therefore, both the commercial and the regulatory ancillary restraints doctrine should be given up as a dogmatic connecting factor for the *Meca-Medina* test.

As far as evident, the two dogmatic approaches outlined in the beginning, reduction of the scope of restriction of competition within the meaning of Art. 101 (1) TFEU or justification inherent in Art. 101 (1) TFEU, do not lead to divergent results in practical sense, which applies in particular to the distribution of the burden of proof between the parties to the proceedings.[55]

3.4.3 Scope of application of the *Meca-Medina* test

It is obvious that the delimitation of the scope of application for the *Meca-Medina* test is of decisive importance as to whether, in addition to Art. 101 (3) TFEU, a justification of sports federations' statutes restricting competition and/or measures based on them can be considered at all. Most recently, the ECJ has already made important determinations in this respect[56] prior to its still upcoming judgement in the proceedings recently initiated by the German Federal Court of Justice and the Regional Court of Mainz under Art. 267 TFEU.[57] First, however, the current state of opinion in the literature will be outlined.[58]

3.4.3.1 Restrictive approach Some have argued for a very narrow scope of application of the *Meca-Medina* test, using varying explanations. Either view would lead to a situation where restrictive provisions in FFAR could in principle no longer be justified via the *Meca-Medina* test.[59] Instead, only a justification according to Art. 101 (3) TFEU could be considered.[60] In the end, however, this approach would regularly fail because the legal justification—unlike the statutes of sports federations restricting competition—is linked to economic efficiency considerations and therefore—unlike the *Meca*-Medina test—cannot adequately take into account the special nature and characteristics of sport recognised in particular in Art. 165 (1) TFEU.

3.4.3.2 Extensive approach Others advocate a very broad scope of application of the *Meca-Medina* test. According to one view,[61] the scope of application is already open in the case of any "sporting regulation" that restricts competition. This term could be interpreted to mean a rule that must be suitable to directly or indirectly serve sporting purposes, whereby this purpose could also be fulfilled by rules that at first glance had nothing to do with sport or business. This would apply, for example, to the FFAR. Others[62] are in favour of applying the *Meca-Medina* test without restrictions to all statutes of sports federations restricting competition, as long as Art. 101 (1) TFEU is also applicable and there is a restriction of competition. Eventually, there would hardly be a difference in practice between "organisational sporting rules"[63] and "sporting rules".[64]

[55] Heermann 2022a, chapter VI, paras 168 et seq. and paras 334–336.

[56] 3.4.3.4.

[57] 2.3 and 2.4.

[58] 3.4.3.1–3.4.3.3.

[59] Podszun 2021, p. 142; Bien and Becker 2021, pp. 568, 572–576, 580; Ackermann 2022, p. 126; critical and disapproving Heermann 2022b, pp. 308 et seqq.

[60] On this legal aspect, which cannot be dealt with in depth in this article, cf. Heermann 2022a, chapter XIII, paras 584–589; Heermann 2023a, pp. 529 et seq., paras 33–35.

[61] Knauer 2022, pp. 124–126.

[62] Haug 2023, pp. 115–123; Mürtz 2023, pp. 196–226.

[63] Cf. 3.4.3.3.

[64] Mürtz 2023, p. 224.

3.4.3.3 Mediating approach Another approach[65] is linked to paragraph 45 of the ECJ's judgment in the *Meca-Medina* case (emphasis in italics by the author):[66]

> "Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC (note: today Art. 101 TFEU], since they are justified by a *legitimate objective*. Such a limitation is inherent in *the organisation and proper conduct of competitive sport* and its very *purpose* is *to ensure healthy rivalry between athletes*."

It is argued that the *Meca-Medina* test is applicable to such sport-related restrictions of competition that are "inherent in the organisation and proper conduct of competitive sport" and serve "to ensure healthy rivalry between athletes". Following a clear position of the European Commission in the accompanying document to the White Paper on Sport,[67] the *Meca-Medina* test also applies to the regulations concerning football agents. This approach corresponds to the so far prevailing practice of German state courts (except the Frankfurt Regional Court) and even the CAS.[68] Nevertheless, it cannot be overlooked that FIFA, by introducing a service fee cap for football agents, is also pursuing—admittedly not explicitly—economic (albeit perhaps not self-benefitting[69]) objectives. According to the opinion expressed here,[70] this circumstance does not prevent the applicability of the *Meca-Medina* test.

3.4.3.4 ECJ in *International Skating Union v. Commission* and *European Superleague Company v. FIFA and UEFA* The *Meca-Medina* test has so far been applied in decision-making practice on sports antitrust law as an inherent justification developed by the ECJ, in particular in the case of a previously established restriction of competition by object *or* effect pursuant to Art. 101 (1) TFEU. In the opinion of the Court,[71] however, the *Meca-Medina* test should in future only be applicable to restrictions of competition by effect under Art. 101 (1) TFEU. In the case of restrictions of competition by object pursuant to Art. 101 (1) TFEU, only Art. 101 (3) TFEU is to be applied as a legal justification, while application of the *Meca-Medina* test to Art. 102 TFEU is to be ruled out from the outset.

3.4.4 Legitimate objectives[72]

For the following considerations on the *Meca-Medina* test, it is assumed that it can be applied to the restriction of competition resulting from the service fee cap pursuant to Art. 15 (2) FFAR 2022. After all, the CAS—as explained above[73]—considers this to be a mere restriction of competition by effect within the meaning of Art. 101 (1) TFEU, so that the *Meca-Medina* test could be applied in this respect.

3.4.4.1 Irrelevant objectives according to Art. 1 FFAR 2022 In its Art. 1, the FFAR 2022 list a number of objectives to be pursued by the corresponding regulations regarding the activities of football agents. In the following, these objectives will be examined solely concerning the service fee cap pursuant to Art. 14, 15 FFAR 2022 to find out whether they can be considered as legitimate[74] objectives within the meaning of the *Meca-Medina* test. Though only the most obvious objectives listed in Art. 1 FFAR 2022 that can be connected with the disputed service fee cap are taken up. Thus, the following objectives are excluded from the outset:

- "protect the contractual stability between professional players and clubs", Art. 1 (1) lit. a) FFAR 2022;
- "encourage the training of young players", Art. 1 (1) lit. b) FFAR 2022;
- "protect minors", Art. 1 (1) lit. d) FFAR 2022;
- "ensure the regularity of sporting competitions", Art. 1 (1) lit. f) FFAR 2022;
- "Raising and setting minimum professional and ethical standards for the occupation of Football Agent", Art. 1 (2) lit. a) FFAR 2022;

[65] Cf. on this already Heermann 2022a, chapter VI, paras 172–174, chapter XIII, paras 554–556; Heermann 2022b, p. 314; Heermann 2023a, pp. 526 et seq., paras 16–21; Heermann 2022c, pp. 215–217.

[66] ECJ, 18 July 2006, C-519/04 P, ECLI:EU:C:2006:492, para 45 – *Meca-Medina/Majcen v. Commission*.

[67] Commission Staff Working Document – The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport, COM(2007) 391 final, section 3.4. b), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN; cf. on this Heermann (2022a), chapter VI, paras 370 et seq.

[68] 2.

[69] 3.3.

[70] 3.4.4.

[71] ECJ, 21 December 2023 – C-124/21 P, ECLI:EU:C:2023:1012, paras. 109, 113 et seq. – *International Skating Union v. Commission* and ECJ, 21 December 2023 – C-333/21, ECLI:EU:C:2023:1011, paras. 185–187 – *European Superleague Company v. FIFA and UEFA*.

[72] On legitimate objectives in the context of the ***Meca-Medina*** test in general cf. Heermann 2022a, chapter VI paras 175–268, chapter XIII, paras 570–576; Heermann 2023a, pp. 527 et seq., paras 22–28.

[73] 3.3.

[74] The fact that the objectives must be "legitimate" follows from ECJ, 18 July 2006, C-519/04 P, ECLI:EU:C:2006:492, para 45 – *Meca-Medina/Majcen v. Commission*.

- "Limiting conflicts of interest to protect Clients from unethical conduct", Art. 1 (2) lit. c) FFAR 2022;
- "Protecting players who lack experience or information relating to the football transfer system", Art. 1 (2) lit. e) FFAR 2022;
- "Enhancing contractual stability between players, coaches and clubs", Art. 1 (2) lit. f) FFAR 2022.

In the following it will be worked out whether and—if so—under which conditions a causal connection between the remaining objectives within the meaning of Art. 1 FFAR 2022 and the service fee cap for football agents pursuant to Art. 14, 15 FFAR 2022 can exist at all. The follow-up question of whether objectives identified as legitimate in this way are actually pursued in a coherent and stringent manner will be dealt with later.[75]

3.4.4.2 "promote a spirit of solidarity between elite and grassroots football" according to Art. 1 (1) lit. c) FFAR 2022 It is already hardly possible to precisely define the mentioned "spirit of solidarity", even if it is obviously intended to extend to vertical solidarity services between professional and amateur football and thus to a central aspect of the so-called European sports model.[76] Insofar as individual characteristic elements of this model (such as compensatory funding from professional sport to amateur sport) are to be pursued and implemented by statutes of a sports federation, these objectives can in principle be considered as legitimate objectives within the meaning of the *Meca-Medina* test. In any case it is not apparent whether and—if so—in what way the newly introduced service fee cap for football agents could promote this "spirit of solidarity". Certainly, this is intended to considerably reduce the income of football agents. However, it remains completely open, who will benefit from these saved expenses: first of all, the football clubs and rather rarely players. Based on previous experience, it seems reasonable to assume that the expenses saved by the clubs with regard to football agents' service fees will to a considerable extent flow back into the players' squad and not directly into amateur football as solidarity payments.

3.4.4.3 "maintain competitive balance" according to Art. 1 (1) lit. e) FFAR 2022 The aspect of competitive balance, i.e. efforts to achieve the greatest possible economic and, thus, in the medium to long term, also sporting balance between the members of a sports league, has repeatedly been used in recent years as an allegedly legitimate objective to justify various sports federations' statutes that are accompanied by restrictions on competition. This aspect is certainly conceivable as a legitimate objective within the meaning of the *Meca-Medina* test, even if—as far as evident—it has not yet been successfully applied by the cartel authorities or the state courts in this context.[77] In the present case, it can be assumed that, according to FIFA, the service fee cap for football agents should also have a positive effect on the competitive balance in football leagues. But the FFAR 2022 and FIFA do not show in any way how a service fee cap for football agents is supposed to support the striving of the football leagues for a competitive balance—such efforts are accepted here for reasons of simplification. This approach, though, is very dubious. First of all, it must be stated that the gap between "rich" and "poor" clubs within the Bundesliga, for example, but also within the UEFA Champions League, has been widening ever since.[78] It remains unclear, how, under this assumption, the limitation of the service fees for football agents can stop this trend and promote the achievement of an economic and sporting balance within a league.

3.4.4.4 "Ensuring the quality of the service provided by football agents to clients at fair and reasonable service fees that are uniformly applicable" according to Art. 1 (2) lit. b) FFAR 2022 It is not clear how a service fee cap for football agents according to Art. 14, 15 FFAR 2022, which is likely to lead to a considerable loss of income for agents, is supposed to guarantee the quality of the services to be provided by this professional group. For this purpose, is it really necessary—as apparently assumed by FIFA—to have fair and appropriate service fees that can be applied uniformly? What is the benchmark for fair and reasonable service fees? Apparently, the levels of service fees for football agents permitted by Art. 14, 15 FFAR 2022 are considerably lower than the level of remuneration that has been common in practice so far. Since FIFA has not explained the determination of the specific level of the service fee caps in more detail, it can be assumed that fairness and appropriateness are measured by the ideas of FIFA and the people involved in the drafting of the FFAR 2022. These questions can be left open for the time being, as it is already not comprehensible how a reduction of service fees for football agents, in particular, is supposed to ensure the quality of the services they provide.

3.4.4.5 "Improving financial and administrative transparency" according to Art. 1 (2) lit. d) FFAR 2022 Improving financial and administrative transparency in player transfers

[75] 3.4.5.

[76] Cf. in detail Heermann 2022a, chapter XIII, paras 33–61.

[77] On competitive balance as a legitimate objective in league sport Heermann 2022a, chapter VI, paras 213–236 and regarding salary caps for football players chapter XIII, paras 386–390, 399; cf. also Heermann 2022d, pp. 433–435; Mürtz 2023, pp. 271–274.

[78] Heermann 2022a, chapter II, para 11, chapter VI, para 235, chapter XIII, paras 216–224.

in football is certainly a conceivable legitimate objective within the context of the *Meca-Medina* test. However, it is unclear how limiting the service fees of football agents according to Art. 14, 15 FFAR 2022 should and can make a positive contribution to this. After all, this transparency is ensured regardless of the amount of player's salary in individual cases, provided that the football agents and the players and clubs commissioning them comply with their disclosure obligations vis-à-vis the competent football federation.

3.4.4.6 "Preventing abusive, excessive and speculative practices" according to Art. 1 (2) lit. g) FFAR 2022 With this objective, the question remains open which standards are to be used to measure whether certain practices in the area of football players' transfers are abusive, excessive and speculative. With regard to the service fees paid to football agents so far, a presumption for the existence of such practices is rather remote, if the limits of what is legally permissible were not exceeded.

3.4.4.7 Court of Arbitration for Sport on Art. 15 (2) FFAR 2022 The foregoing considerations lead to the conclusion that the objectives listed by FIFA in Art. 1 FFAR 2022, at least with regard to the service fee cap for football agents according to Art. 15 FFAR 2002, can hardly be classified as legitimate objectives in the context of the *Meca-Medina* test. This circumstance does not exclude the possibility that other objectives put forward by FIFA may also be classified as legitimate in this respect. Therefore, a look should be taken at the corresponding statements in the CAS award of 24 July 2023 in the case *Professional Football Agents Association v. FIFA*:[79]

> "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."

[79] CAS, 24 July 2023, 2023/O/9370, paras 284 et seq. – *Professional Football Agents Association v. FIFA*, https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_9370.pdf. Accessed 6 June 2024.

Some of the allegedly legitimate objectives put forward by FIFA—the so-called "subsidiary goals" in particular—have already been identified as rather not legitimate in the sense of the *Meca-Medina* test. The other objectives presented are far too vague (e.g. "to ensure the proper functioning of the transfer system", "to protect the integrity of sport", "limiting conflicts of interest and unethical conduct"). The CAS has amazingly (rather unsurprisingly) not questioned the fact that—at least when viewed objectively—the disputed service fee cap for football agents is not able to make any positive contribution at all to the pursuit of these objectives compared to the *status quo ante*. Thus, the fact that the CAS nevertheless classified all (!) of the objectives presented by FIFA as legitimate with regard to Art. 15 (2) FFAR 2022 not only raises considerable doubts, but also gives rise to the question of whether the panel was actually familiar with the requirements and details of the *Meca-Medina* test and its position in sports antitrust law.

3.4.5 Coherence criterion[80]

Even if the objectives identified above[81] could be classified as legitimate in the sense of the *Meca-Medina* test when viewed in isolation, this circumstance alone is not sufficient to justify the service fee cap for football agents pursuant to Art. 14, 15 FFAR 2022. Moreover, these objectives would have to be pursued in a stringent and coherent manner, i.e. in particular in a consistent and non-discriminatory fashion. The ECJ did not address this aspect in its fundamental *Meca-Medina* judgment of 2006. Yet recent case-law has acknowledged that the mere formulation of generally recognised legitimate objectives does not necessarily guarantee an associated actual pursuit of those objectives, even if the coherence requirement has not always been explicitly addressed.[82]

[80] On the coherence criterion in the context of the ***Meca***-Medina test cf. Heermann 2022a, chapter VI, paras 269–284; Heermann 2022c, pp. 217 et seq.; Heermann 2023a, pp. 528 et seq., paras 29–31.

[81] 3.4.4.

[82] Fundamental for the sports sector with regard to the freedom to provide services cf. EFTA-Court of Justice, 16 November 2018, E.8/17, paras 117 et seq. – *Kristoffersen/NSF*; with explicit reference thereto with regard to legitimate objectives within the meaning of the *Meca-Medina* test German Federal Cartel Office (Bundeskartellamt, BKartA), 25 February 2019, B 2 – 26/17, paras 103–105 – *Rule 40 Bye-Law 3 Olympic Charter* (an English translation can be found at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B2-26-17.pdf?__blob=publicationFile&v=2. Accessed 6 June 2024.); similar, although without explicitly mentioning the coherence criterion European Commission, 8 December 2017, AT.40208, C(2017) 8240 final, paras 224, 230 – *ISU's Eligibility Rules*; EGC, 16 December 2020, T-93/18, ECLI:EU:T:2020:610, paras 94, 97 – *International Skating Union v. Commission*; cf. recently also AG Rantos, 15 December 2022, C-333/21, ECLI:EU:C:2022:993, para 99 – *European Super League v. UEFA and FIFA*.

This criterion is a specifying, quite strict requirement in the context of the *Meca-Medina* test, which—as far as it is known at all—has so far been underestimated by sports federations and largely neglected in the previous academic discussion.[83] Thus—contrary to what quite a few sports federations, but also their legal advisors and even the CAS[84] still seem to believe—it is not sufficient to include more or less detailed lists of objectives in sports federations' statutes which have the potential to restrict competition. After all, how is an identified restriction of competition to be convincingly justified by invoking such objectives if the latter are not (or cannot) be pursued by sports federations at all in practice when applying the relevant regulations? Ultimately, the path and the process that are to be taken to an established objective are at least as important as the objective itself. Thus, objectives set out on paper, which may *prima facie* qualify as legitimate objectives in the context of the *Meca-Medina* test, but which are not pursued in a stringent and coherent manner, are unsuitable for a successful application of the *Meca-Medina* test.[85]

As the preceding considerations on the potentially legitimate objectives within the meaning of the *Meca-Medina* test have shown, there are considerable doubts as to whether the objectives identified by FIFA are (can be) pursued by the service fee cap pursuant to Art. 14, 15 FFAR 2022 in a stringent and coherent manner at all.[86] On the contrary, there is reason to believe that FIFA neglected the coherence requirement when listing the objectives pursuant to Art. 1 FFAR 2022, at least with regard to the considerable reduction of football agents' service fees.

If the requirement of a stringent and coherent pursuit of objectives should evidently not be fulfilled, which currently seems to be the case with regard to service fee cap for football agents pursuant to Articles 14, 15 FFAR 2022, the existence of a *legitimate* objective within the meaning of the *Meca-Medina* test is already inconceivable according to the opinion represented here following the German Federal Cartel Office.[87] However, without leading to different legal results, this aspect can also be taken into account either only at the second stage of the *Meca-Medina* test[88] with regard to the inherence of the measure restricting competition[89] or at the third stage of the examination[90] with regard to its suitability for the pursuit of the objective.[91]

3.4.6 Further conditions for examination

3.4.6.1 Inherence and proportionality If—unlike in the present case of the service fee cap for football agents, a restriction of competition by object—the requirements of the first stage of the *Meca-Medina* test were applicable and to be met, it would have to be examined whether the requirements of the two further stages of the test were fulfilled. At the second level, this requires that the anticompetitive effects on competition are inherent in the pursuit of the identified legitimate objectives.[92] Should this also be the case, the next step would be to examine whether the restrictive effects on competition are proportionate with regard to the legitimate objectives pursued.[93] In practice, a precise distinction is not always made between the individual elements of proportionality, i.e. suitability, necessity and reasonableness.

3.4.6.2 Discretionary competence of sports federations[94] According to a popular opinion, promoted in particular by sports officials and their legal advisors, but also by sports arbitration tribunals, sports federations are entitled to an exclusive, i.e. largely court-proof, prerogative of assessment with regard to the individual characteristics of the *Meca-Medina* test.[95] This would allow sports federations, comparable to a state legislator, albeit without corresponding democratic legitimation, to *de facto* enact statutes

[83] Exceptions are e.g. Mürtz 2023, pp. 332–342; Haug 2023, pp. 132 et. seq.; the coherence criterion is casually mentioned by Houben 2023, pp. 10 et. seq.

[84] 3.4.4.7.

[85] Heermann 2022a, chapter VI, paras 269 et seq.

[86] In contrast, FIFA has taken remarkable care to ensure that the service fee cap set is implemented in practice in a coherent and stringent manner and is not exceeded by prohibiting various conceivable circumvention strategies by the parties involved in a player transfer; cf. e.g. Art. 11 (3+4), 12, 14 (2–5), 15 (2–4), 16 (3) lit. b), d), g) and (4), 18 (2) FFAR 2022.

[87] German Federal Cartel Office (Bundeskartellamt, BKartA), 25 February 2019, B 2 - 26/17, BeckRS 2019, 4347 paras 103–105 – *Rule 40 Bye-Law 3 Olympic Charter*.

[88] 3.4.6.1.

[89] Cf. e.g. Mürtz 2023, pp. 332–342.

[90] 3.4.6.1.

[91] Heermann 2022a, chapter VI, paras 278 et seq. with further references to the alternative dogmatic classifications.

[92] Cf. on the inherence criterion Heermann 2022a, chapter VI, paras 285–287; Mürtz 2023, paras 342–349.

[93] Cf. in detail Heermann 2022a, chapter VI, paras 288–315; Mürtz 2023, pp. 356–397.

[94] Cf. in detail Heermann 2022a, chapter VI, paras 316–333; Heermann 2022c, p. 218 et seq.

[95] CAS, 24 July 2023, 2023/O/9370, paras 221–226 – *Professional Football Agents Association v. FIFA*, https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_9370.pdf. Accessed 6 June 2024; (German) Permanent Court of Arbitration for Clubs and Corporations of the Licensed Leagues, 25 August 2011, Zeitschrift für Sport und Recht (SpuRt) 6/2011, p. 263 regarding the application of the *Meca-Medina* test to the 50+1 rule; see from the literature as representative Schneider and Bischoff 2021, p. 58.; most recently – apparently – Weatherill 2023, p. 323: "[…] but it is important to grasp that EU law typically grants a regulator a margin of appreciation or discretion in making political, economic and social choices which engage complex assessments and evaluations."

that have a restrictive effect on competition for members, but especially also for third parties, i.e. non-members of the federation. As justification, sports federations regularly refer to their (undoubtedly existing) superior expertise in sports-related matters, especially since, in the light of the freedom of association, state courts and, in particular, cartel authorities allegedly could not properly decide on matters of sport.

The proponents of this legal view, first of all, neglect the fact that national and, in particular, supranational law (such as Art. 101 TFEU) set legal limits to the freedom of (sport) association within the meaning of Art. 9 (1) Basic Law for the Federal Republic of Germany (Grundgesetz), Art. 11 (1) ECHR and Art. 12 (1) CFR. Yet a sports federation engaged in business activities falls within the scope of application of antitrust law and cannot then take the interpretation of the relevant rules (with a foreseeable result) into its own hands. Why should sports federations be treated differently from companies in a regular (i.e. non-sports) economic sector in this context?

Of course, in the event that the *Meca-Medina* test is applied, sports federations have a certain discretionary power and a margin of appreciation, in particular, in determining the objectives of their statutes and in assessing their proportionality. However, in case of dispute, the exercise of this discretion has so far automatically been reviewed by cartel authorities and courts on the basis of objective standards.[96] The following then applies:[97] The greater the sporting relevance and the lower the economic impact of a sports federation's regulation and/or its implementation on members, but also on non-members, the greater the scope of discretion to be granted to sports federations and the lower the density of judicial control, which in extreme cases can be zero, is; yet, the lesser sport-related and the stronger the economic impact of a sports federation's regulation and/or its implementation on members and, in particular, on non-members (e.g. the service fee cap for football agents), the narrower the margin of discretion to be granted to sports federations and the more intensive the degree of judicial control should be.

3.4.6.3 Burden of proof For the practical implementation of the *Meca-Medina* test, the allocation of the burden of proof is of considerable importance. The question of the dogmatic classification of the *Meca-Medina* test—either a restriction of the constituent element of a "restriction of competition" within the meaning of Art. 101 (1) TFEU or a justification inherent in the norm—is irrelevant in this respect.[98] Since the *Meca-Medina* test has effects comparable to a legal justification, a sports federation, in analogous application of Art. 2 sent. 2 EU-Regulation 1/2003, basically bears the abstract burden of proof as well as the objective burden of proof for the individual requirements of the *Meca-Medina* test.[99] A significant exception applies to the test level on proportionality, provided that one reaches this requirement at all in the application of the *Meca-Medina* test. Here, a sports federation does not have to prove positively that no other conceivable measure could achieve the desired goals under the same conditions, but with less interference in the freedom of competition.[100] Rather, a kind of secondary burden of proof applies in such constellations. Accordingly, the party restricted in competition must first substantiate allegedly lesser intensive interferences in competition that are supposed to be at least as effective as the disputed regulation or measure with regard to the pursuit of the objective.[101]

3.4.7 Extended *Meca-Medina* test at a glance

The *Meca-Medina* test, including its substantive extensions beyond the requirements listed in ECJ *Meca-Medina* para 42, can be summarised in the overview as follows:

Scope of application: A regulation of a sports association that constitutes a restriction of competition by effect pursuant to Art. 101 (1) TFEU [ECJ *International Skating Union v. Commission*, paras. 109, 113 et seq. and ECJ *European Superleague Company v. FIFA and UEFA*, paras. 185–187] is inherent in the organisation and proper conduct of competitive sport [ECJ *Meca-Medina*, para 45]

1. Overall context, especially legitimate objective(s) [ECJ *Meca-Medina*, para 42]

   → Self-benefitting objectives cannot be legitimate [EGC, 16.12.2020, T-93/18, para 220—*International Skating Union v. Commission*] and cannot be masked by other legitimate objectives.
   → Stringent and coherent pursuit of objective(s) [This aspect can also be assessed at level 2 or level 3 a); not explicitly mentioned in ECJ *Meca-Medina*, but derivable from the case law of the ECJ on fundamental freedoms]

[96] Heermann 2022a, chapter VI, paras 317–324.

[97] Heermann 2022a, chapter VI, paras 325–333.

[98] Heermann 2022a, chapter VI, paras 167–170.

[99] Cf. e.g. Heermann 2022a, chapter VI, paras 334–336; likewise Breuer 2013, p. 665 regarding the *Wouters* test, the further development of which is the *Meca-Medina* test.

[100] In this direction, although not explicitly on European antitrust law ECJ, 18 July 2006, C-519/04 P, ECLI:EU:C:2006:492, para 54 – *Meca-Medina/Majcen v. Commission*; with relation to the freedom to provide services EFTA-Court of Justice, 16 November 2018, E.8/17, paras 123 – *Kristoffersen/NSF*.

[101] Heermann 2022a, chapter VI., para 336; likewise Breuer 2013, p. 760 regarding the *Wouters* tests, the judicial basis of the *Meca-Medina* test.

2.Inherence [ECJ *Meca-Medina*, para 42]
3.Proportionality [ECJ *Meca-Medina*, para 42]
a)Suitability [not explicitly mentioned in ECJ *Meca-Medina*]
b)Necessity [not explicitly mentioned in ECJ *Meca-Medina*]
c)Adequacy [not explicitly mentioned in ECJ *Meca-Medina*]

→ Judicially controllable scope of assessment and discretion of the sports federations [not explicitly mentioned in ECJ *Meca-Medina*]. Otherwise, sports federations could act as judges in own affairs when applying the *Meca-Medina* test. The requirements of Art. 101 (3) TFEU are also subject to judicial review on the basis of objective standards.

4 Conclusion

German state courts have repeatedly dealt with the question of whether individual regulations in the FFAR 2015 or in the FFAR 2022 are objectionable under antitrust law.[102] The Dortmund Regional Court has classified the service fee cap according to Art. 15 FFAR 2022 as a prohibited and unjustifiable demand price cartel.[103] The Regional Court of Mainz has not yet issued a final ruling on this question, but has initiated a preliminary ruling procedure before the ECJ pursuant to Art. 267 TFEU.[104] The Federal Supreme Court of Germany (Bundesgerichtshof) has also initiated such a referral procedure before the ECJ. However, the referral question does not relate to the service fee cap for football agents, but to the scope of application of the so-called *Meca-Medina* test.[105] The CAS, on the other hand, recently found that all provisions of the FFAR 2002, including the service fee cap for football agents pursuant to Art. 15 (2) FFAR 2022, were in line with Art. 101 (1) TFEU.[106]

The following results on the individual aspects of the antitrust assessment of Art. 15 (2) FFAR 2022 are to be noted:

- FIFA has the competence to issue FFAR, even if they affect non-members such as football agents. But these regulations are subject to strict antitrust control.[107]
- The service fee cap for football agents according to Art. 15 (2) FFAR 2022 is a hardcore (demand) cartel and thus at the same time a restriction of competition by object within the meaning of Art. 101 (1) TFEU.[108]
- Only restrictions of competition by effect pursuant to Art. 101 (1) TFEU can be justified if the relatively strict conditions of the *Meca-Medina* test are met. This test cannot be derived from the ancillary restraints doctrine. Instead, the *Meca-Medina* test can be applied either as a reduction of the element of restriction of competition within the meaning of Art. 101 (1) TFEU or as a justification inherent in Art. 101 (1) TFEU. Both approaches do not lead to different results in practical application.[109]
- According to the opinion expressed here, the *Meca-Medina* test is applicable to such sport-related restrictions of competition by effect that are "inherent in the organisation and proper conduct of competitive sport" and serve "to ensure healthy rivalry between athletes".[110]
- Even if one assumes, at least as the CAS does, that the anticompetitive service fee cap for football agents according to Art. 15 (2) TFEU only constitutes a restriction of competition by effect pursuant to Art. 101 (1) TFEU, the rule does not pursue a legitimate objective in the sense of the *Meca-Medina* test, because the disputed rule is not able to make any positive contribution at all to the pursuit of the objectives presented by FIFA compared to the *status quo ante*.[111] The contrary view of the CAS, which considers the entire FFAR 2022 to be in compliance with antitrust law, is not convincing because it is based in particular on an inappropriate application of the *Meca-Medina* test.[112] Thus, the service fee cap for football agents violates Art. 101 (1) TFEU and is therefore void within the scope of application of the TFEU pursuant to Art. 101 (2) TFEU. Furthermore, the CAS neglects another aspect. Anticompetitive rules such as Art. 15 (2) FFAR 2022 must, according to the prevailing opinion, pursue the alleged legitimate objectives in a coherent and stringent manner,[113] which is not the case with regard to the service fee cap for football agents.
- The *Meca-Medina* test includes further conditions of application which, for the purposes of the antitrust assessment of Art. 15 (2) TFEU, though, are no longer relevant:
- At the second level of the *Meca-Medina* test is to be examined whether the anticompetitive effects on competition are inherent in the pursuit of the identified legiti-

[102] 2.1–2.5.2.
[103] 2.5.
[104] 2.4.
[105] 2.3.
[106] 3.
[107] 4.2.
[108] 4.3.
[109] 4.4.2.
[110] 4.4.3.
[111] 4.4.4.1–4.4.4.6.
[112] 4.4.4.7.
[113] 4.4.5.

mate objectives. Should this also be the case, the next step would be to examine whether the restrictive effects on competition are proportionate with regard to the legitimate objectives pursued.[114]

- If the *Meca-Medina* test is applied, sports federations have a certain discretionary power and a margin of appreciation, in particular in determining the objectives of their statutes and in assessing their proportionality. Nevertheless, the exercise of this discretion can be reviewed by cartel authorities and courts in cases of dispute on the basis of objective standards.[115]
- A sports federation, in analogous application of Art. 2 sent. 2 EU-Regulation 1/2003, generally bears the burden of proof for the individual requirements of the *Meca-Medina* test.[116]

Author contributions I myself—made substantial contributions to the conception or design of the work; or the acquisition, analysis, or interpretation of data; or the creation of new software used in the work; —drafted the work or revised it critically for important intellectual content; —approved the version to be published; and—agree to be accountable for all aspects of the work in ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved.

Funding Open Access funding enabled and organized by Projekt DEAL.

Data availability No datasets were generated or analysed during the current study.

Declarations

Conflict of interest The authors declare no competing interests.

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[114] 4.4.6.1

[115] 4.4.6.2.

[116] 4..4.6.3.