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## **Abstract**

Sport entities have always tried to protect their autonomy from interventions. This status has been seriously put into question by the authorities of the European Communities and especially by the Court of the European Communities. One of the most recent cases, where sport authorities were confronted with European competition law, was the one involving players' agents licenses. At present, the reader can find a summary of the famous «Piau Case» (C-171/2005) tackling problems such as whether private organisations like F.I.F.A., whose main statutory purpose is to promote football, have a rule-making power in the issuance of players' agents licenses, taking into consideration that these rules do not have a sport-related purpose; regulate an economic activity that is peripheral to the sporting activity in question, and touch on fundamental freedoms.

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**Key Words:** *football, legal aspects of football players' agents licensing, Piau Case, FIFA, European competition law.*

## Background to the Dispute

The «Fédération Internationale de Football Association» (henceforth FIFA) is an association registered in the Commercial Register in accordance with Swiss law and governed by Swiss law. FIFA was founded on 21 May 1904 and its members are national associations, which are groupings of football clubs classified as amateur or professional and are responsible for organising and supervising football in a country. The players in national associations affiliated to FIFA are either amateur or non-amateur.

Under its statutes, FIFA's objectives are to promote football; foster friendly relations among national associations, confederations, clubs and players, and set up and monitor regulations and methods concerning the rules of the game and the practice of football. FIFA's statutes, regulations and decisions are binding for its members.

The regulations governing the application of the statutes provide that players' agents must possess an agent's license issued by FIFA and authorise the Executive Committee to draw up binding rules for agents. On 20/05/1994 FIFA adopted the Players' Agents Regulations that were amended on 11/12/1995 and enforced on 01/01/1996. The original regulations ordered that the exercise of this occupation was subject to the possession of a license issued by the competent national association and reserved the occupation for natural persons. The procedure prior to obtaining the license provided for an interview to ascertain the candidate's knowledge (in particular of law and sport). The candidate also had to fulfil certain incompatibilities and moral conditions, such as having no criminal record and deposit a bank guarantee of 200 000 Swiss francs. Relations between the agent and the player had to be governed by a contract for a maximum period of two years, with an option to renew. A sanctions mechanism was laid down for agents, players and clubs in the event of infringement of the regulations.

On 23/03/ 1998 Mr Piau lodged a complaint with the Commission in which he challenged the original regulations. He alleged, first of all, that the regulations were contrary to Article (49) et seq. of the (EC) Treaty concerning free competition with regard to services.

On 10/12/2000, following the administrative procedure initiated by the Commission, FIFA adopted new Players' Agents Regulations, which was enforced on 01/03/2001 and were amended again on 3 April 2002. The new FIFA regulations maintain the obligation of players' agents to hold a licence issued by the competent national association for an unlimited period of time in order to exercise the occupation. Also, the occupation is still reserved for natural persons. Also, the candidate, who must satisfy the requirement of having an «impeccable reputation», must take a written examination. The examination consists of a multiple-choice test to verify the candidate's knowledge of law and

sport. Finally, the agent must take out a professional liability insurance policy or, failing that, deposit a bank guarantee to the amount of CHF 100 000. The relations between the agent and the player must be the subject of a written contract for a maximum period of two years, which may be renewed. The contract must stipulate the agent's remuneration, which is calculated on the basis of the player's basic gross salary and, if the parties cannot reach agreement, is fixed at 5% of the salary. A copy of the contract must be sent to the national association, whose register of contracts must be made available to FIFA. Licensed players' agents are required, *inter alia*, to adhere to FIFA's statutes and regulations and to refrain from approaching a player who is under contract with a club.

On 28/09/2001 Mr Piau by a letter to the Commission claimed that the infringements of Article 81(1) EC still remained in the amended regulations and that these restrictions could not be covered by an exemption on the basis of Article 81(3) EC. In addition, Mr Piau stated that the Commission had not examined the rules in question having regard to Article 82 EC. By a decision of 15/04/2002, the Commission rejected Mr Piau's complaint. By an application lodged on 14/06/2002, Mr Piau brought an action before the Court of First Instance.

## **The Arguments**

### **1. The case Against FIFA's Licenses**

The obligation, to comply with the FIFA regulations constitutes an obstacle to «free competition with regard to services» and freedom of establishment and prevents any unlicensed players' agents from gaining market access. The provision contained in the amended regulations relating to remuneration of players' agents amounts to fixing of an imposed price, which restricts competition. The code of professional conduct annexed to the regulations leaves scope for arbitrary action.

The amended regulations cannot enjoy an exemption on the basis of Article 81(3) EC, since the restrictions are neither essential, nor appropriate or proportionate. On the contrary, those regulations eliminate any competition, since FIFA alone is authorised to grant a license. Behind the declared objective of protecting players and raising ethical standards in the occupation of players' agent, FIFA's real intention was to take complete control of the occupation of players' agent in breach of the freedom to carry on a business and the principle of non-discrimination. The argument of the «specific nature of sport», which makes it possible to derogate from Community competition law, cannot be relied on in the present case, since the activity in question is not linked directly to sport.

On the other hand FIFA holds a dominant position on the «football market» and is abusing its dominant position on the related market of services provided by players' agents. FIFA is an association of undertakings and the amended regulations constitute a decision by an association of undertakings. Representing the interests of all buyers, FIFA is acting as a monopsony, a single buyer imposing its conditions on sellers. The abuses of the dominant position are the result of the binding provisions of the regulations. Licensed players' agents also hold, jointly, a collective dominant position which they are abusing through the FIFA rules. The market in the services provided by players' agents is reserved for members of the association of undertakings and unlicensed agents are prohibited from having access.

Finally, by providing access to the occupation of players' agent subject to the possession of a license, the amended regulations are an obstacle to freedom to provide services and freedom to carry on a business. FIFA does not have any legitimacy to lay down rules governing an economic activity.

## **2. The case for FIFA's Licenses**

There was no Community interest to justify continuing with the procedure since the most important restrictions had been removed in the amended regulations. Any persistent effects of the original regulations can be regarded as transitional measures guaranteeing the acquired rights of agents licensed under the old system.

The amended regulations do not include any restrictions prohibited by Article 81(1) EC and satisfy the conditions for an exemption laid down by Article 81(3) EC. The restrictions entailed, which are intended to raise ethical and professional standards, are proportionate. Competition is not eliminated. The very existence of regulations promotes a better operation of the market and therefore contributes to economic progress. The restrictive provisions retained in the amended regulations have a qualitative purpose. The anti-competitive effects that allegedly persist do not result from the rules in question, but from the activity of agents. The «cross-border nature» of the market has no bearing on the likely Community interest of a case.

Article 82 EC, which concerns only economic activities, is not applicable to the present case, which relates to a purely regulatory activity. FIFA cannot be described as an «economic power» or a monopsony and no abuse has been shown to exist on a market related to the «football market». FIFA does not represent the economic interests of clubs and players. Licensed players' agents are a fairly scattered occupation, without any structural links, and do not therefore abuse a collective dominant position.

The amended regulations cannot be classified as a decision by an association of undertakings, since professional clubs, which may be regarded as un-

undertakings, form only a minority of the members of the national associations, which are the members of the international organisation. The regulations adopted by FIFA are not therefore the expression of the will of professional clubs. The amended regulations do not contain any considerable restrictions of competition. Professional liability insurance, whose amount is determined objectively, is an appropriate means to settle disputes. The provisions relating to agents' remuneration are not comparable with a price-fixing mechanism. The standard contract contains conventional stipulations and does not in any way violate privacy. The rules of professional conduct, the sanctions mechanism and the dispute settlement system are not contrary to Article 81 EC. Therefore, the amended regulations could enjoy an exemption under Article 81(3) EC. Those rules are necessary in the absence of organisation of the occupation and of national legislation and because of the global dimension of football. They raise professional and ethical standards for the occupation of players' agent, the increasing number of whom shows that the rules in question are not restrictive.

Article 82 EC is not applicable and therefore FIFA has not abused a dominant position. FIFA is not an association of undertakings since in exercising its regulatory power, which was at issue in this case, does not carry on economic activities. The fact that it exercises a regulatory power over economic actors in a certain market does not mean that it is active on that market or, a fortiori, that it holds a dominant position. Furthermore, the market for the provision of advice, at issue in the present case, is not connected with any market where FIFA is active. Its situation cannot be classified as a monopoly either, since FIFA does not represent either clubs or players in their relations with agents. Similarly, licensed agents do not exercise a collective dominant position which they abuse through the FIFA rules.

## **Agents Licensing before Community Law**

### **1. FIFA as an Association of Undertakings under Competition Law**

Firstly, with regard to *the concept of an association of undertakings*, it is common ground that FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC and the national associations grouping them together are associations of undertakings within the meaning of that provision.

The fact that the national associations are groupings of «amateur» clubs, alongside «professional» clubs, is not capable of calling that assessment into question. In this regard, it should be noted that the mere fact that a sports association or federation unilaterally classifies sportsmen or clubs as «amateur» does not in itself mean that they do not engage in economic activities

within the meaning of Article 2 EC (Joined Cases C 51/96 and C 191/97 *Deliège* (2000) ECR I 2549, paragraph 46).

Furthermore, the national associations, which are required, under FIFA's statutes, to participate in competitions organised by it, must pay back to it a percentage of the gross receipts for each international match. Also, under the same statutes, they are recognised by FIFA, as being holders of exclusive broadcasting and transmission rights for the sporting events in question, and this means they carry on an economic activity (Case T 46/92 *Scottish Football v Commission* (1994) ECR II 1039). They therefore also constitute undertakings within the meaning of Article 81 EC.

Since the national associations constitute associations of undertakings by virtue of the economic activities that they pursue, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 81 EC. That provision applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers (Case 71/74 *Frubo v Commission* (1975) ECR 563, paragraph 30). The legal framework within which decisions are taken by undertakings and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition is concerned (Case 123/83 *BNIC* (1985) ECR 391, paragraph 17).

Secondly, with regard to the concept of a *decision by an association of undertakings*, it is apparent that the purpose of the occupation of players' agent, under the very wording of the amended regulations, was «for a fee, on a regular basis (to introduce) a player to a club with a view to employment or (to introduce) two clubs to one another with a view to concluding a transfer contract». This is therefore an economic activity involving the provision of services, which does not fall within the scope of the specific nature of sport, as defined by the case-law (Case 13/76 *Donà* (1976) ECR 1333, paragraphs 14 and 15, Case C-415/93 *Bosman* (1995) ECR I 4921, paragraph 127, *Deliège*, paragraphs 64 and 69, and Case C 176/96 *Lehtonen and Castors Braine* (2000) ECR I 681, paragraphs 53 to 60).

## **2. FIFA's Legitimacy to Enact Players' Agents Licensing Rules**

On one hand, the Players' Agents Regulations were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred to it by public authorities in connection with a recognised task in the general interest concerning sporting activity (by analogy, Case C 309/99 *Wouters and Others* (2002) ECR I 1577, paragraphs 68 and 69). Those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either (*Bosman*, paragraph 81, and *Deliège*, paragraph 47).

On the other hand, these regulations are binding on national associations that are members of FIFA, and that are required to draw up similar rules subsequently approved by FIFA, and on clubs, players and players' agents. As a result, these regulations are the reflection of FIFA's resolve to coordinate the conduct of its members with regard to the activity of players' agents. They therefore constitute a decision by an association of undertakings within the meaning of Article 81(1) EC (Case 45/85 *Verband der Sachversicherer v Commission* (1987) ECR 405, paragraphs 29 to 32, and *Wouters and Others*, paragraph 71), which must comply with the Community rules on competition, where such a decision has effects in the Community.

With regard to FIFA's legitimacy to enact such rules, which do not have a sport-related objective, 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.

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, that has not been granted 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.

In principle, such regulation that constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of 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 of 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.

### **3. Repeal of the most restrictive provisions contained in the original regulations**

The most important restrictive provisions that were part of the regulations adopted by FIFA on 20 May 1994 were deleted in the regulations adopted on 20 December 2000. During the hearing of the case the provisions of the FIFA regulations were examined under five headings, relating to the examination, insurance, the code of professional conduct, the setting of remuneration for players' agents and the standard contract.

Based on competition law we can consider that the most restrictive provisions of the regulations in question had been repealed. The argument that since agents licensed under the original regulations retained their licenses anti-competitive effects persisted cannot be accepted. It is contrary to the principle of legal certainty to call into question legal positions which are not shown to have been unlawfully acquired (by analogy, Case T 498/93 *Dornonville de la Cour v Commission* (1994) ECR-SC I A 257 and II 813, paragraphs 46 to 49 and 58). Moreover, as the Court has held with regard to transitional measures relating to recognition of diplomas, it is permitted to preserve acquired rights in similar cases (Case C 447/93 *Dreessen* (1994) ECR I 4087, paragraph 10, and Joined Cases C 69/96 to C 79/96 *Garofalo and Others* (1997) ECR I 5603, paragraphs 29 to 33). It is not therefore justified in claiming that the most restrictive provisions of the original regulations were not abolished and that anti-competitive effects persisted because those provisions were retained in the amended regulations.

#### **4. Eligibility of the provisions of the amended regulations for an exemption under Article 81(3) EC**

In the contested decision, it was argued by the Commission that the compulsory nature of the license might be justified and that the amended regulations could be eligible for an exemption under Article 81(3) EC. It explains that the license system, which imposes restrictions that are more qualitative than quantitative, seeks to protect players and clubs and takes into consideration, in particular, the risks incurred by players, who have short careers, in the event of poorly negotiated transfers. It considers that, since there is at present no organisation of the occupation of players' agent and no generalised national rules, the restriction inherent in the license system is proportionate and essential.

The actual principle of the license, which is required by FIFA and is a condition for carrying on the occupation of players' agent, constitutes a barrier to access to that economic activity and therefore necessarily affects competition. It can therefore be accepted only in so far as the conditions set out in Article 81(3) EC are satisfied, with the result that the amended regulations might enjoy an exemption on the basis of this provision if it were established that:

- they contribute to promoting economic progress,
- allow consumers a fair share of the resulting benefit,
- do not impose restrictions which are not indispensable to the attainment of these objectives and
- do not eliminate competition.

Various legal and factual circumstances have been relied upon to justify the adoption of the regulations and the actual principle of the compulsory li-



cense, which lies at the heart of the mechanism in question. It seems that, first of all, within the Community, France alone has adopted rules governing the occupation of sports agents. Furthermore, collectively, players' agents do not, at present, constitute a profession with its own internal organisation. It is not contested either that certain practices on the part of players' agents could, in the past, have harmed players and clubs, financially and professionally. FI-FA explained that, in laying down the rules in question, it was pursuing a dual objective of raising professional and ethical standards for the occupation of players' agent in order to protect players, who have a short career.

Contrary to the claims made by the applicant (Mr. Piau), competition is not eliminated by the license system. That system appears to result in a qualitative selection, appropriate for the attainment of the objective of raising professional standards for the occupation of players' agent, rather than a quantitative restriction on access to that occupation. On the contrary, the quantitative opening up of this occupation is corroborated by statistics communicated by FIFA at the hearing. FIFA stated, without being contradicted, that while it recorded 214 players' agents in 1996, when the original regulations entered into force, it estimated that there were 1.500 at the beginning of 2003 and that 300 candidates had passed the examination at sessions held in March and September of that year. In view of these circumstances and the current conditions governing the exercise of the occupation of players' agent, where there are virtually no national rules and no collective organisation for players' agents, we can conclude that the restrictions stemming from the compulsory nature of the license could enjoy an exemption on the basis of Article 81(3) EC.

The argument that the «specific nature of sport» may not be relied upon to justify a derogation from the rules on competition appears to be irrelevant since the Commissions' decision was not based on such an exception and envisaged the exercise of the occupation of players' agent as an economic activity, without claiming that it should be accepted as falling within the scope of the specific nature of sport.

## **5. Inapplicability of Article 82 EC**

Article 82 EC prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it. That provision deals with the conduct of one or more economic operators abusing a position of economic strength and thus hindering the maintenance of effective competition on the relevant market by allowing that operator to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (Joined Cases C 395/96 P and C 396/96 P *Compagnie maritime belge transports and Others v Commission* (2000) ECR I 1365, paragraph 34).

The expression «one or more undertakings» in Article 82 EC implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity (*Compagnie maritime belge transports and Others v Commission*, paragraph 36).

Three cumulative conditions must be met for a finding of collective dominance:

- Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy.
- The situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market.
- The foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (Case T 342/99 *Airtours v Commission* (2002) ECR II 2585, paragraph 62, and Case T 374/00 *Verband der freien Rohrwerke and Others v Commission* (2003) ECR II-0000, paragraph 121).

In the present case, the market affected by the rules in question is a market for the provision of services where the buyers are players and clubs and the sellers are agents. In this market FIFA can be regarded as acting on behalf of football clubs since it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs. A decision like the FIFA Players' Agents Regulations may, where it is implemented, result in the undertakings operating on the market in question, namely the clubs, being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers (*Compagnie maritime belge transports and Others v Commission*, paragraph 44).

Because the regulations are binding for national associations that are members of FIFA and the clubs forming them, these bodies appear to be linked in the long term as to their conduct by rules that they accept and that other actors (players and players' agents) cannot break on pain of sanctions that may lead to their exclusion from the market, in particular in the case of players' agents. Within the meaning of the case-law cited above (*Compagnie maritime belge transports and Others v Commission*, paragraph 36, Case T 342/99 *Airtours v Commission* (2002) ECR II 2585, paragraph 62, and Case T 374/00 *Verband der freien Rohrwerke and Others v Commission* (2003) ECR II-0000, paragraph 121) such a situation characterises a collective dominant position for clubs on the market for the provision of players' agents' services, since, through the rules to which they adhere, the clubs lay down the conditions under which the services in question are provided.

## Comments

This was not the first time that the Court had to deal with the area of sports (M. Papaloukas, 1996-1997). The Commission as well as the Court have so far dealt with problem areas of sports many times. Cases such as the Bosman case (C-415/1993) (M. Papaloukas, 1997), the Lehtonen case (C-176/1996), the Graf case (C-190/1998), the Scottish football case (T 46/92), the Deutscher handballbund case (C-438/2000), the Meca Medina case (C-519/2006), have had a great impact on sports and sport societies (M. Papaloukas, 1997).

Also this was not the first time that FIFA, in yet another effort to protect the sport entities' autonomy and independence, invoked the argument that the case does not fall within the scope of the specific nature of sport, as defined by the Courts' case-law (D. Panagiotopoulos, 2006), (M. Papaloukas, 2005). In fact FIFA argued that this case is about an economic activity involving the provision of services. Theory has also provided arguments to the fact that not every sports activity can be considered as falling within the scope of EC competition law (M. Papaloukas, 2005). Although these arguments have appeared as early as the famous Bosman Case they have not been accepted by the Court yet, at least not to a large scale (P.J. Sloane, 1980), (Coopers and Lybrand, 1995), (K. Van Miert, 1997), (Conclusions of Advocate General Lenz in the Case C-415/93 point 227).

According to the Courts ruling, as to article 82 EC (M. Papaloukas, p. 77-78.1996), it would seem unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities (M. Papaloukas, 1998), such as the activity of players' agents in the present case, does not hold a collective dominant position on the market for players' agents' services on the ground that is not an actor on that market (M. Papaloukas, 2005). The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players' agents, is irrelevant as regards the application of Article 82 EC, since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members.

With regard to the alleged dominant position, however, the Court ruled that as it follows from the above considerations regarding the amended regulations and the possible exemption under Article 81(3) EC, such an abuse cannot be established. Those regulations did not impose quantitative restrictions on access to the occupation of players' agent that could be detrimental to competition (M. Papaloukas, 2000-2001), but qualitative restrictions that may be jus-

tified in the present circumstances. The abuses of the dominant position that, according to Mr. Piau, stem from the regulations are not therefore established.

Lastly, in the Courts' view the argument that licensed players' agents are abusing their collective dominant position within the meaning of Article 82 EC should also be rejected in the absence of structural links between these agents. The holding of the same license, the use of the same standard contract and the fact that agents' remuneration is determined on the basis of the same criteria do not prove the existence of a dominant position for licensed players' agents, and that the parties concerned adopt an identical approach or that they implicitly divide up the market.

Consequently, according to the Courts' ruling in the present case, although the Commission wrongly considered that FIFA did not hold a dominant position on the market for players' agents' services, the other findings contained in the contested decision, namely that the most restrictive provisions of the regulations had been deleted and that the license system could enjoy an exemption decision under Article 81(3) EC, would accordingly lead to the conclusion that there was no infringement under Article 82 EC and to the rejection of Mr. Piau's arguments in this regard.

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