



FIBA BREAKS THE TABOO ON PLAYER AGENTS' CONFLICTS OF INTEREST AND BANS THEIR ILLEGAL PRACTICES - A MODEL TO FOLLOW

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Sport and its underbelly: the ones we talk about like doping and match-fixing. And those that are kept quiet, such as corruption and conflicts of interest, and which have made their way into the highest spheres of sports power and justice. Among the circles concerned is that of players' agents, who in recent decades have made conflicts of interest their business model in a number of team sports. The illegal remuneration practices of this milieu have led to the worst excesses, recently prompting sports

federations and club associations to take steps to regulate their player transfer market. Among them, the International Basketball Federation (FIBA) is a global pioneer with its new regulations on agents that came into force on 1st January 2022. These regulations explicitly and consistently prohibit the practices of players agents involving conflicts of interest and allow FIBA to break a taboo while putting the economic and legal relations between agents, clubs and players back on the rails of legality.

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AN ILLEGAL BUSINESS MODEL

There is no doubt that agents perform a necessary and important activity for their players and for the transfer market of their respective sport. However, over the last twenty years, agents have become increasingly important and influential in transfer markets. In most cases the relationships they have established over time with clubs have led them to favour their own economic interests and those of the clubs that generally pay them, to the detriment of the interests of the players they are supposed to protect above all.

Indeed, the practices of remuneration of agents by clubs for services they render primarily to their clients, the players, as well as the practices of double or triple representation of agents, have become the norm in certain team sports. However, they are illicit because they constitute conflicts of interest which are prohibited by civil law, sometimes by public law, and by the regulations of sports federations, most of which have turned a blind eye to them for too long.

These illegal practices by agents also affect the clubs that are complicit in them. The vast majority of clubs blindly follow these practices in order to remain competitive in the player transfer market, but they are also the victims of an anti-competitive system that benefits above all the wealthiest clubs, who are most able to buy the best players from the most influential agents, at the rates set by the latter.

Furthermore, by participating in this illegal system, many clubs are playing with fire by concealing from tax and social security authorities the reality of the legal relationships between the parties to the transactions. This is in violation of the law and of their obligations in this respect, and to the detriment of public funds. It is an issue that these authorities are increasingly addressing, as evidenced in the United Kingdom by the new transparency requirements imposed in 2021 by the government department Her Majesty's Revenue and Customs (HMRC) on payments to football intermediaries and agents².

Agent practices involving conflicts of interest and the close links of agents with clubs are also frequently covered by criminal law and constitute the main source of the sometimes systemic criminality undermining certain transfer markets. The football market is the most affected and the most publicised, as it handles astronomical sums of money every year and is in the hands of organised crime, as the International Centre for Sports Studies (CIES) in Neuchâtel pointed out in a 2018 report that has never been made public, but whose summary alone, published in the press in 2019³, is evidence enough of the lawlessness of this environment.

The transfer markets of the other most widespread team sports in Europe, such as basketball, handball, ice hockey, rugby and volleyball, involve much less money and are therefore less exposed to systemic crime. Nevertheless, in these sports too, every time an agent enriches himself at the expense of his player in breach of his contractual obligations towards him, he is likely to commit a criminal offence of criminal mismanagement towards the player. However, given the systematic practices of agents that involve conflicts of interest and undermine certain markets, such an offence is committed just as systematically, without the victims realising it.

Faced with so much excess, illegality and criminal behaviour, some sports federations and club associations have recently taken steps to regulate their transfer market and put an end to the almost

² <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim01152>

³ https://dynamic.faz.net/download/2019/Geheimpapier.pdf?_qa=2.171919011.268470747.1561524996-1262706935.1559629719: summary published 26.06.2019 by the Frankfurter Allgemeine Zeitung (FAZ) as part of its article «DFB, DFL und die Milliarden der Berater».

systematic sacrifice of human and sporting values, advocated by the Olympic movement, on the altar of a «money at all costs» system that ultimately benefits only agents and a minority of clubs. In order to do this, these sports organisations have had no choice but to prohibit in their regulations agent practices involving conflicts of interest, because of a lack of trust. Agents have shown in recent years that they are simply unable to self-regulate their commercial practices in terms of player transfers and to respect their obligations towards the players.

FIBA is the first international federation to have analysed these conflicts of interest in detail from the point of view of the agent's activity as a whole - an activity that includes not only placement services but also management services in most cases - in the context of the drafting of its new regulations on agents⁴, which came into force on 1st January 2022. Such an analysis has enabled it to clearly differentiate between lawful practices and those that should be prohibited as constituting unlawful conflicts of interest. FIBA has now formalised these prohibitions in the new regulations.

FIBA TACKLES AGENT PRACTICES INVOLVING CONFLICTS OF INTEREST

In the world of sport, the activity of the players' agent generally consists of advising his players and managing and defending their interests during their career or part of it. The agent acts as an intermediary when negotiating the employment contracts of his players with clubs. Although the agent's activity is generally perceived in a global way, it is crucial to distinguish between his placement activity and his management activity, as the rights and obligations arising from it for the agent, his players and the clubs are not the same.

Indeed, if the agent is merely an intermediary - he only negotiates and concludes employment contracts with clubs, and nothing else - he may, in certain circumstances, ignore a pre-existing conflict of interest and engage in negotiations as if this conflict of interest did not exist. However, if the agent is also a manager, he is bound to his players in the long term because of his management services in their favour and he cannot therefore derogate from his legal obligation to always safeguard the interests of his players, which stems from this management relationship. He is therefore prohibited from placing himself in a situation of conflict of interest which is likely to be detrimental to the interests of his players, nor can he ignore such a conflict of interest.

Such an obligation to protect the interests of the principal (player) by his representative (agent) is provided for not only by Swiss agency law (Articles 394 and seq. of the Swiss Code of Obligations⁵) - a Swiss law which the sports federations based in Switzerland must take into consideration and enforce in the implementation of their sporting and non-sporting regulations - but also by most other legal orders at international level. And the violation of this duty of protection, to the detriment of the principal's interests, can generally be the subject of a civil action for the recovery of the commission that the agent would have unduly received as a result of his conflict of interest⁶ and of a disciplinary complaint to the competent sports federation⁷. As mentioned above, it is also very often likely to constitute a criminal offence of criminal mismanagement⁸.

⁴ The regulations on agents can be found in Chapter 9 (Art. 293 to 325) of Book 3 of the FIBA Internal Regulations - www.fiba.basketball/internal-regulations/book3/players-and-officials.pdf

⁵ www.fedlex.admin.ch/eli/cc/27/317_321_377/en#part_2/tit_13

⁶ See in particular the award Nr. 2015/A/3962 issued on 07.12.2016 by the Court of Arbitration for Sport (CAS), which refers in particular to Art. 415 of the Swiss Code of Obligations, which provides for the forfeiture of the agent's right to his fee and to any reimbursement of expenses when he acts in the interest of a third party in disregard of his obligations to his client.

⁷ Concerning FIBA, it has set out in Art. 322 to 324 of its agents' regulations the sanctions that are applicable to agents, players and clubs in the event of a breach of these regulations.

⁸ In Swiss law, the offence of criminal mismanagement is contained in Art. 158 of the Swiss Criminal Code - www.fedlex.admin.ch/eli/cc/54/757_781_799/en#art_158

Therefore, as explained in more detail on the website www.check-your-agent.football, which is a fairly comprehensive source of information on the issue of conflicts of interest of agents⁹, agents automatically put themselves in an illegal conflict of interest position when:

- ✗ They get paid their commissions by the clubs for their management activity on behalf of their players, and/or;
- ✗ They get more money from the clubs, without the knowledge of their players, than they would get if they were paid by the latter for the activity carried out on their behalf, and/or;
- ✗ They get money from clubs through double or triple representation practices, and/or;
- ✗ They legally bind themselves to their players' clubs in one way or another (e.g. in football, to negotiate transfer agreements concerning their players) and get paid for it.

However, it is all these practices of remuneration and collusion between agents and clubs, which still constitute the illicit business model of agents in the transfer market of certain team sports, that FIBA now explicitly prohibits in Article 298 of its new regulations on agents. This stipulates that **an agent is no longer allowed to:**

- ⊘ **Represent or advise more than one side in the same transaction** (letter a). This is a self-evident prohibition, since any relationship of multiple representation of an agent automatically gives rise to an unlawful conflict of interest.
- ⊘ **Accept payment for his or her services by anyone other than his or her client** (letter b). In 99% of cases, the agent's actual client is the player. A player who, in order to safeguard his interests, particularly financial interests, and to ensure that the agent also safeguards them, must remunerate his agent himself, both for the placement and management services that the agent renders on his behalf. Moreover, the fact that the player holds the purse strings enables him to ensure the quality of the services provided on his behalf.
- ⊘ **Represent or advise a club in any transaction if the agent is under contract with any player registered with that club** (letter c). This rule also embodies the prohibition of multiple representation by an agent vis-à-vis a club and all its players.
- ⊘ **Directly or indirectly use a third party to circumvent the above restrictions. The only exception is that a player may agree with a third party in writing that such third party makes payment to the agent on his behalf** (letter d). If this third party is the player's club, it will only be able to deduct the remuneration to be paid to the agent from the player's salary, as the club is not allowed to pay anything to the agent from its own funds, precisely to avoid a conflict of interest. It will then be a simple payment arrangement agreed between the player and the third party, the agent not being involved in this arrangement. In practice, however, it is difficult to see what interest a club has in doing this and taking on unnecessary tasks and responsibilities when it can let the player pay the commission of his agent himself.

By banning these illicit practices of agents, FIBA is the first international federation to break the taboo of their conflicts of interest and to put them back where they belong, alongside their clients, the players. FIBA is thus putting the economic and legal relations between agents, clubs and

⁹ Although the website www.check-your-agent.football is dedicated to the issue of conflicts of interest of agents in football, its content is generic and applies to all sports.

players back on the rails of legality, in a new legal framework that makes players responsible for paying their agents themselves. Players who will have to distinguish between the placement services from those of management that are carried out in their favour by their agent, because their mode of remuneration is not the same¹⁰.

FIBA DIFFERENTIATES BETWEEN PLACEMENT AND MANAGEMENT SERVICES

FIBA has also formalised in its new regulations the distinction between placement services and management services of the agent in favour of the player (or a club, even if this case seems to be rather rare in the basketball world). It stipulates in Article 316 of these regulations that the agent has in particular the following rights to:

- ✓ Represent any player or club requesting him or her to negotiate and/or conclude a contract on his/her behalf, always subject to the prohibition of conflicts of interest (letter c.).
- ✓ Manage the affairs of any player or club requesting him or her to do so, subject always to the prohibition of conflicts of interest (letter d.).

FIBA then provides numerous examples of management and placement services in Articles 1.2.1 and 1.2.2 of the master agreement between an agent and a player (or a club) which it has adopted in Annex 1 of its new regulations and which agents should use wherever possible, as provided for in Article 319 of the regulations.

FIBA then also underlines the difference between management services and placement services in the way they are remunerated, by providing in its master agreement, first, for a fixed monthly remuneration for management services, which is to be paid by the player to the agent at the end of each month (Article 3.1); then, for a remuneration fixed as a percentage of the net salary received by the player from the club, with a maximum limit of 10%, for the placement services (Article 3.2).

With regard to the remuneration of management services, it is in the interest of the player and the agent to include in their contract that the amount of this remuneration may be periodically revised upwards or downwards according to the services actually rendered by the agent to his player, with respect to the latter's needs in terms of management, which may evolve over time in terms of both their nature and their volume.

With regard to the remuneration of placement services and by way of example, it may be noted that Swiss public law¹¹ protects the job seeker (in this case the player) by limiting the commission he must pay his agent to a maximum of 5% of the gross annual salary he receives from the club during the first year of the contract only. In particular, the legislator considered that the effort made by the agent to help negotiate and conclude an employment contract of one or more years with the club was not really different, so that it limited this remuneration to the player's first annual salary. Furthermore, according to the same Swiss law, only the player's basic salary should be taken into account for the calculation of the agent's commission, and not other benefits in money (bonuses) or in kind (flat, car, etc.) that the player receives from the club.

¹⁰ The website www.check-your-agent.football devotes a whole chapter to the remuneration of the agent by the player.

¹¹ Art. 3 para. 1 of the Ordinance on fees, commissions and securities foreseen by the Employment Service Act - www.fedlex.admin.ch/eli/cc/1991/425_425_425/fr#art_3 (in French)

These new provisions of FIBA on the conflicts of interest of agents and on the way they are remunerated will change the practices of the basketball transfer market. They will have a definite impact on the activity of many agents who can no longer claim to continue to base their business model on practices that are illegal. This regularisation of practices by FIBA does not affect their freedom of trade or competition law, as some of them might claim, and they will therefore have to adapt their business model to these new rules.

Thus, and in particular, in order to guarantee the payment of the services they provide to their players in the future, agents will have to ensure that their contractual relations with them are properly secured. To this end, agents will have to take into account the fact that FIBA has abolished the exclusivity clause that previously prevented players from signing up with more than one agent at a time, and the fact that its regulations (Article 320) now provide that the player may terminate his contract with his agent at any time by giving 30 days' notice. These changes are justified as they are in line with many national laws on personnel placement and service contracts, which in most cases take precedence over FIBA regulations and in some cases provide for stricter regimes, e.g. immediate termination of the contract without the need for a notice period.

FIBA LEADS THE WAY

FIBA's new regulations on agents thus point the way forward for all international and national sports federations that experience in their respective transfer markets the same (systemic) practices of player agents involving conflicts of interest. While FIBA is the first international federation to take the step, the major American professional leagues of basketball (NBA), ice hockey (NHL), American football (NFL) and baseball (MLB) have long since adopted the player-pays system vis-à-vis his agent.

In ice hockey, agents are not regulated at international level by the International Ice Hockey Federation (IIHF). On the other hand, many European federations or national leagues have regularised agent remuneration practices over the past five years by moving from the club-pays system to the player-pays system.

In handball, the Forum Club Handball, which is the association of Europe's largest men's and women's clubs, recently announced that it would adopt the player-pays system from the summer of 2022, an initiative that it hopes to see globalised with the support of the International Handball Federation (IHF).

In rugby, English Premiership clubs, also affected by the new transparency obligations imposed by HMRC following the abuses seen in football, took the lead in autumn 2021 by indicating that they no longer wish to pay agents themselves for the services the latter provide to their players. Although a dispute is ongoing between clubs and agents, the application of the law can only prove the clubs right.

These examples show that there is now a clear trend and need for sports federations and clubs to abolish certain practices from the past - in this case illegal practices of remuneration of agents

involving equally illegal conflicts of interest - in order to re-establish the law and good practices in their respective transfer markets, and to preserve their image. A regularisation process in which the preservation of athletes' interests is - at last - somewhat put back into focus. Now that FIBA has broken a taboo, other federations, international or national, can follow suit without having to reinvent the wheel; its new regulations on agents - which are still perfectible here and there and which will certainly be refined with time - being an excellent model to follow.

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