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ARTICLE

VAT chargeability of football intermediaries' commissions in EU Law, in the light of the EU–UK Trade and Cooperation Agreement

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Abstract
This article discusses the Value-Added Tax (VAT) discipline relating to the representation services offered by football intermediaries in the contractual negotiation of the employment contract between the player and the club(s). The analysis is carried out taking into consideration the relevant legislative provisions of European Union (EU) law as well as the case law of the European Court of Justice (ECJ) and the findings of the EU VAT Committee. The VAT discipline of representation services provided by football intermediaries is first analyzed in light of the EU legislative acts regulating the different legal figures of intermediation contracts and the effects on the EU internal market. Then, the legal nature of the "intermediation commission"—as the VAT chargeable event—and the "place of supply of the intermediation service"—as the place of taxation—as qualified by EU tax law, are studied. Finally, the EU–UK Trade and Cooperation Agreement (TCA) provisions regarding VAT chargeability of intermediation services are analyzed. The article concludes arguing that, at the moment, it does not seem that the TCA has specifically reformed the regulation of the VAT chargeability of the intermediation commission received by football agents for their representation services in negotiating an employment contract between the player and the club(s).

Keywords Football · Intermediation · VAT · Chargeability · Commission · EU–UK TCA

1 Introduction

The present study is dedicated to the analysis of the VAT chargeability of the services provided by a football intermediary in favor of a player and/or a club—by virtue of a representation contract stipulated between those parties, according to EU law and in the light of the EU–UK Trade and Cooperation Agreement.[1]

Football intermediaries—also named "football agents"—offer various and differentiated services to their clients; these services include representation in the context of contractual negotiations, financial advice, player development,

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[1] FIFA (2015) Regulations on Working with Intermediaries. Art. 4.5: "*The representation contract that the intermediary concludes with a player and/ or a club (cf. article 5 below) must be deposited with the association when the registration of the intermediary takes place*". Art. 5: "*1. For the sake of clarity, clubs and players shall specify in the relevant representation contract the nature of the legal relationship they have with their intermediaries, for example, whether the intermediary's activities constitute a service, a consultancy within the scope of article 1 paragraph 1 of these regulations, a job placement or any other legal relationship. 2. The main points of the legal relationship entered into between a player and/or club and an intermediary shall be recorded in writing prior to the intermediary commencing his activities. The representation contract must contain the following minimum details: the names of the parties, the scope of services, the duration of the legal relationship, the remuneration due to the intermediary, the general terms of payment, the date of conclusion, the termination provisions and the signatures of the parties. If the player is a minor, the player's legal guardian(s) shall also sign the representation contract in compliance with the national law of the country in which the player is domiciled*".

social media management, negotiation of sponsorship agreements, and more.[2]

In this context, the main service provided by football intermediaries is the intermediation activity in the negotiation of the employment contract between the athlete and the club(s).

This activity may be provided by the intermediary by virtue of an intermediation contract—also named "representation contract"—consisting in a contract of mandate, which can be a mandate without effective representation or a mandate with effective representation. In this last case, the football intermediary acts in the name and on behalf of the represented person.

According to the general principles of conferral and subsidiarity pursuant to Art. 5(2) and (3) Treaty on European Union (TEU), the European Union (EU) shall act only within the limits of the competences conferred upon it by the Member States (MS). In the areas not included in its exclusive competences, the EU shall act only if and to the extent, the objectives of the proposed action cannot be sufficiently achieved by the MS, but can be better achieved at EU level.

Taxation policies are neither included in the exclusive competences, disciplined by Art. 3 Treaty on the Functioning of the European Union (TFEU), nor in the competences to support, coordinate or supplement the action of the EU, according to Art. 6 TFEU.

Although taxation policies are not explicitly considered in the list of the shared competences of the EU and the MS, provided for by Art. 4(2) TFEU, Art. 4(1) TEU itself states that: "*the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6*".

Art. 113 TFEU constitutes the general legal basis for the provisions of EU law directed to the harmonization of indirect taxation legislation. Under this provision, the competence to impose direct and indirect forms of taxation on services, as well as on goods, is a competence of the MS, shared with the EU by virtue of Art. 4(1) TFEU

That premised, the notions of "chargeable event" and "place of taxation" must first be considered, considering their relevance in EU and international tax law.

The "chargeable event" is the event that gives rise to the right to charge taxes on it. The chargeable event takes place—and thus the value-added tax (VAT)[3] becomes due—when the goods or the services are supplied or provided.[4]

The "place of taxation" coincides with the State where the provision of services (or the supply of goods) concerned is taxed. The place of taxation depends upon both the nature of the service and the legal nature of the customer. The main criteria to identify the place of taxation are the "genuine link" that has to exist between the State and the provider of the service (or the supplier of goods) and the "justification of the tax claim" based on the specificity of the economic event.[5]

Second, it must be highlighted that, as far as football intermediaries' commissions are concerned, the FIFA regulatory norms do not deal, in general and for tax purposes with the legal nature of the "intermediation commission", qualified as "chargeable event", and the "place of supply of the intermediation service", qualified as "place of taxation".[6]

As stated, those elements are of the utmost importance for the identification of the chargeability of the value-added tax (VAT) on the intermediation commission received by the football intermediary.

The services provided by football intermediaries[7] may be relevant under different disciplines and areas of law, including: private law[8]; public law[9]; international sports law[10]; European Union (EU) law.[11]

[2] Onesti and Cattaneo 2020.

[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax, in OJEU 11.12.2006 L 347/1, (the VAT Directive). Art. 1(2): "*The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT calculated on the price of the goods or services at the rate applicable to such goods or service, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components. The common system of VAT shall be applied up to And including the retail trade stage*".

[4] Art. 63 VAT Directive: "*The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied*". On the subject: Lasok QC KPE 2020.

[5] Mann F A 1984. Mann F A 1990, pp. 13-20, quoted in Schön W 2015, p. 280.

[6] FIFA (2015) Regulations on Working with Intermediaries. Also: FIFA (2020a, b, c, d) Legal Handbook September 2020. Most notably: FIFA (2020a, b, c, d) Regulations on the Status and Transfer of Players and FIFA (2020a, b, c, d) Match Agents Regulations. The FIFA Regulations on Working with Intermediaries is a non-binding act, establishing a general set of standards and its efficacy depends on the national federations to whom the application of the regulation itself is delegated. As a consequence, the regulation of the activity of sports agents varies at a national level. On the other hand, the FIFA Regulations on the Status and Transfer of Players "[…] *lay down global and binding rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different association*" (Art. 1); the FIFA, *Match Agents Regulations* also contains binding provisions.

[7] On the subject: Cattaneo A, Parrish R 2020, pp. 127-135.

[8] Efficacy of regulations adopted by sports Federations, legal persons of private law.

[9] National norms governing the access to sports intermediation, as a regulated economic activity.

[10] Norms adopted by international organizations predetermining the commission, calculated on the basis of the salary received by the athlete and rules governing the conflict of interest and the protection of underage players in transfer agreements.

[11] Among others, competition law norms regarding the activities of football intermediaries and clubs and tax norms, pertaining to the regulation of payment of the intermediation commission.

In this context, the scope of the present study will be limited to the analysis of the VAT subjection of the commission paid to the football intermediary for the intermediation activity carried out in the transfer procedures between clubs of professional footballers.

This aspect will be analyzed as disciplined in EU law and in light of the EU–UK Trade and Cooperation Agreement (TCA)[12] and the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (WA or Withdrawal Agreement).[13]

The above considering the relevance of intermediation services provided by football intermediaries established in the EU in favor of clubs established in the UK and *vice versa*.

Thus, the study will conclude that, at least at the present moment, it does not seem that the TCA and the WA impacted significantly the legal regime of VAT subjection of the commission received by the football intermediary in the transfer procedures of professional footballers. While, in any case, a better regulation of the sector of football intermediation might be necessary in light of safeguarding football competitions as a whole.

2 The taxation of the intermediation commissions received by football agents in EU primary law

The intermediation activity of football agents is disciplined by private law regulations, issued at the supranational level (FIFA) and, in accordance, at the national level, by the competent football Federations.[14]

The market for intermediation services related to the transfer of professional football players reflects the international transfer market of professional footballers, the majority of which takes place in Europe or involve UEFA affiliated clubs. The EU internal market is, by far, the territory of greatest relevance for transactions involving intermediaries.[15] Football intermediation is therefore an activity subject to different regulatory and tax regimes, having, by its own nature, an international and European character.

To this end, the intermediation contract must first be considered and, subsequently, the legal nature of the commission and the conditions of its VAT chargeability must also be analyzed.

Excluding the Customs Union, which falls within the exclusive competences of the Institutions, the EU has competence to act alongside MSs on fiscal matters, to avoid significant divergences between national tax disciplines, which might hinder the competition and the European internal market[16].

At the level of primary legislation, articles 110–112 TFEU deal with the principle of non-discrimination on grounds of nationality in the fiscal context[17].

On the other hand, art. 113 TFEU bestows upon the Council—deciding at unanimity and after consulting the European Parliament and the Economic and Social Committee—the power to adopt "[...] *provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation, to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*". Value-Added Tax is comprised within the "other forms of indirect taxation".[18]

[12] *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, in OJEU L 149/10, 30.04.2021.

[13] *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)*, in OJEU CI 384/1, 12.11.2019.

[14] In Europe, *inter alia*: Federazione Italiana Giuoco Calcio (FIGC) (2020) Regolamento Agenti Sportivi; Federazione Italiana Giuoco Calcio (FIGC) (2020) Regolamento disciplinare Agenti Sportivi; The Football Association (FA) (2020) The FA Handbook 2020/2021—working with Intermediaries Regulations; The Football Association (FA) (2020) The FA Regulations on Working with Intermediaries - August 2020 – Guidance Notes, August 2020; Real Federación Española de Fútbol (RFEF) (2015) Reglamento de Intermediarios de la RFEF, 25 March 2015 (2015); Real Federación Española de Fútbol (RFEF) (2020) Reglamento General, Junio 2020, art. 41; Federação Portuguesa de Futebol (FPF) (2015) Regulamento de Intermediários, 01 April 2015; Fédération française de football (FFF) (2020) Règlement des agents sportifs 2020-2021.

[15] According to FIFA (2020a, b, c, d), Intermediaries in International Transfers 2020 are part of the EU seven out of the ten States whose national football association, in percentage, engage most in international transfers of players with intermediaries representing the engaging club; the remaining three are England, Japan, and Wales. Furthermore, are part of the EU six out of ten States whose national football association, in percentage, engages most in with intermediaries representing the releasing club (the other four are: Serbia, Colombia, Ghana, and England). Finally, the total amount spent by UEFA affiliated clubs on intermediary commissions in 2020 is 473.5, more than 30 times over the amount spent by CONMEBOL affiliated clubs, the second highest gross spending value.

[16] Art. 3 TFEU.

[17] The principle of non-discrimination on grounds of nationality in EU law is defined by Art. 18 TFEU: "*Within the scope of application of the Treaties, and without prejudice to any special provision contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination*".

[18] With regards to tax harmonization, art. 116 TFEU has also to be taken into account, considering that this primary law provision does not specifically limit its own scope and—in considering the differences between the national norms of MS that distort competition in the internal market, a distortion that needs to be eliminated—could potentially consider also tax legislation; Englisch J 2020, pp. 59-60.

In this regard, the unanimity criterion evidently demonstrates the will of the Member States to safeguard their fiscal sovereignty, considering that when it was decided to confer the right to the EU to collect an indirect tax, such as the custom duty, MS did so explicitly[19].

While establishing a legislative competence, art. 113 TFEU also defines precise limits concerning both the legislative procedure applicable (procedural limits), and the scope of the legislation approved (substantive limits). Therefore, this provision cannot be used as a general legal basis, sufficient for any and all legislative intervention in the field of indirect taxation, such as, for example, to differentiate the VAT rates at the national level.[20]

Similarly, also in the sports sector, the legislative competence of the EU is limited. According to arts. 6 and 165 TFEU, in the sports sector, the EU has only a competence to support, coordinate, and supplement the actions of the Member States.

This supporting competence allows the EU to complement the activity of the Member States, to: promote the development of the European dimension of sport; pursue fairness and openness in sports competitions; promote cooperation between bodies responsible for sports, while considering the specific nature of sport and its structures based on voluntary activity. In any event, harmonization of national legislations (laws and regulations) is excluded.[21]

Art. 165 TFEU reaffirms, on one hand, the autonomy of sports Federations and, on the other hand, the general application of EU law even to the sports sector.

In conclusion, Art. 165 TFEU prohibits legislative harmonization in the sports sector and its formulation has been deemed as "*cautiously narrow*" and "*calculatedly vague*":[22]

- "*cautiously narrow*", because the EU has a subordinate role, having only the possibility to contribute to the promotion of European sport with supporting actions and, therefore, the EU cannot act as a sports regulator;
- "*calculatedly vague*", because the meaning of the notions of "specific nature of sport" and "European dimension in sport" is willingly left unclear.[23]

Thus, the market of intermediation service in the transfer of football players is not regulated at EU level. Neither the market is regulated at the level of international organizations of sports governance, considering that the FIFA Regulations on Working with Intermediaries is a soft law act, having the legal nature of recommendation, non-binding for the national federations.[24]

In light of this complex context, it could be inferred that a market for intermediation services, differentiated at the national level as it is, could have direct effects on the player transfer market and, potentially, on the fairness of sports competition. This could constitute an obstacle to the pursuit of the objectives established by the Treaties and a threat to the integrity of the internal market.

However, the protection of the functioning of EU internal market and the adoption of measures for its establishment and functioning are exclusive competences of the EU, in accordance with articles 26 and 114 TFEU.

In particular, Art. 114 TFEU states that, for the establishment and functioning of the internal market, the European Parliament and the Council are empowered to adopt measures relating to the approximation of national laws.

At the same time, Art. 114 (2) TFEU excludes that the Council and the European Parliament can promulgate acts of approximation of national legislation in the sectors of taxation, free movement of persons, and rights and interests of workers.

Therefore, it could be inferred that it is not possible to exclude in advance that an intervention of the EU according to Art. 113 or Art. 114 (1) TFEU in the sector of intermediation services could have an effect on the specific activities of football intermediaries and, eventually, influencing the scope of application of Art. 165 TFEU or of Art. 114 (2).

As a consequence, both fiscal and sports legislation can be considered subject to a limited degree of intervention by the EU.

In the course of this contribution it will then be necessary to illustrate the relevant measures concerning the taxation of the intermediation commissions, adopted at the EU level, as well as their application in light of the TCA agreement.

[19] Regarding fiscal neutrality in the EU, harmonization of indirect taxation and of direct taxation: Wasserfallen F 2014; Boria P 2014; Wattel P J et al. 2018.

[20] de la Feria R and Schofield M 2017, p. 93.

[21] European Commission (2016) Mapping and Analysis of the Specificity of Sport, June 2016; Siekmann R 2012; Union of European Football Associations (UEFA) UEFA's position on Article 165 of the Lisbon Treaty.

[22] Weatherill S 2017, in particular Chapter 3.5, p. 64–67.

[23] *Ibidem*.

[24] In this regard, it has to be noted that the rules adopted by the competent sports federations "[...] *can be tested for anti-competitive effects, albeit that they might be permissible by virtue of the Wouters doctrine*", in Whish R and Bailey D (2015), p. 142. The statement above means that competition norms would not be violated if the sporting rule could "*reasonably be considered to be necessary*" for the proper proceeding of the sporting competition, in ECJ, *Wouters* and others, 19 February 2002, C-309/99, ECLI:EU:C:2002:98, 107. On the subject: ECJ, *Meca-Medina and Majcen v Commission*, 18 July 2006, C-519/04, ECLI:EU:C:2006:492.

3 The "intermediation contract"

The locution "sports agents" identifies a specific form of intermediary.[25]

Art. 5 FIFA *Regulations on Working with Intermediaries* states that: "[…] *the clubs and players shall specify, in the relevant representation contract, the nature of the legal relationship they have with their intermediaries* [...]" and clarifies the general guidelines concerning the payment of the intermediation activity "[…] *while taking into account the relevant national regulations and any mandatory provision of national and international law* […]".[26]

Therefore, the contracts involving football professional players and/or clubs, stipulated with sports agents for carrying out an intermediation activity in negotiating an employment contract, are intermediation contracts.[27]

EU law does not provide a definition of "intermediation contract", but identifies specific forms of intermediation contracts according to the matter concerned, from "online intermediation services"[28], to "credit intermediary"[29], and to "trader" and "organizer"[30].

In this regard, it must be highlighted that all the contracts mentioned in the previous paragraph pertain to subjects attributable to the general category of "consumer law", a sector where the contractual power between the "client" and the "intermediary" is, by its own nature, unbalanced in favor of the latter.[31]

Thus, EU law lacks an express and univocal definition of "intermediation contract".

In this context, it has to be underlined the lack of specific regulation on the subject at EU primary and secondary law

[25] FIFA (2015) Regulations on Working with Intermediaries define an intermediary as follows: "*a natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract or represents clubs in negotiations with a view to concluding a transfer agreement*", p.1. KEA, CDES, EOSE (2009) Study on sports agents in the European Union—a study commissioned by the European Commission (Directorate-General for Education and Culture), November 2009 defines sports agents as follows (p. 3): "*Sports agents act, first and foremost, as intermediaries between sportspersons and sport clubs/organizers of sport events with a view to employing or hiring an athlete or sportsperson. They bring together the parties interested in concluding an agreement concerning the practice of a sport as a remunerated activity. Finding a job placement for a sportsperson is the central and specific role of sports agents. Sports agents may however engage in a broader range of activities, including the conclusion of different kinds of contracts on behalf of the sportsperson (image rights contracts, sponsoring contracts, advertising contracts, etc.) or managing the assets of the sportsperson. Sports agents have thus become essential partners of sportspersons and clubs/organizers of sport events, acting as a go-between and advisor for either side. The sports agent's profession is inherent to the existing system for the employment and transfer of sportspersons, particularly in the case of team sports. Agents facilitate transactions between sport clubs/organizers of sport events and sportspersons. They are an integral part of the market: they enter into the equation of commercial success and of investments capable of leading to convincing results in sport.*"

[26] In this context, it is worth repeating that according to the Preamble of the FIFA Regulations on Working with Intermediaries, the Regulations "[...] *shall serve as minimum standards/requirements that must be implemented by each association at national level, the latter having the possibility of further adding thereto*".

[27] "*A player intermediary's primary role is to represent the player in negotiating an employment contract with a club. Meanwhile, more and more clubs are using intermediaries to find a taker when deciding to move a member of their squad on*", in FIFA (2020a, b, c, d) Intermediaries in International Transfers, p. 1.

[28] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, in OJEU 11.07.2019 L 186/57, art. 2 (2): " *'online intermediation services' means services which meet all of the following requirements: (a) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council; (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers*".

[29] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, in OJEU 28.02.2014 L 60/34, art. 4 (5): "'*Credit intermediary' means a natural or legal person who is not acting as a creditor or notary and not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary, and who, in the course of his trade, business or profession, for remuneration, which may take a pecuniary form or any other agreed form of financial consideration*".

[30] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, in OJEU 11.12.2015 L 326/1, art. 3 (7) and (8): "'*trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organizer, retailer, trader facilitating a linked travel arrangement or as a travel service provider; (8) 'organiser' means a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader, or the trader who transmits the traveller's data to another trader in accordance with point (b)(v) of point 2*[definition of packages, with the provision of ulterior services purchased from separate traders]". Regarding the specific VAT regime of travel agents and arts. 63 and 65 of the VAT Directive: ECJ, *Skarpa Travel*, 19 December 2018, C-422/17, ECLI:2 EU:C:2018:1029. Regarding the taxable base of the commission received by a travel agent: ECJ, *Ibero Tours*, 16 January 2014, C-300/12, ECLI:EU:C:2014:8.

[31] On the subject: Ammannati L 2019.

level. As a matter of fact, with respect to the general principle of mutual recognition[32], EU competences and autonomy of the sports system, the absence of a definition of "sports intermediation contract" has to be considered.

In this light, the activity of the intermediary "sports agents" could receive a normative definition at the EU level similar to the intervened clarifications of the legal nature of the intermediaries "travel agent" and other forms of intermediaries.

As a consequence, according to the VAT Directive, the prominent elements of the intermediation contract—which is VAT chargeable—are: the "action" undertaken by a subject "in the name" and "on behalf" of another subject[33]. Such a contract coincides with the mandate with representation.

In any case, the intermediation contract may contain provisions other than the action in the name and on behalf of the represented person, such as: "[…] *(1) the collection of a payment for its own behalf or on behalf of a third person; (2) a supply under a condition precedent (i.e., a condition that will happen or not in the future and that it is not certain at the time of the conclusion of the contract) allow to determine when a supply takes place i.e. at the condition the condition is realized i.e. at the time of the remittance of a 'voucher' to the supplier of goods and services, but not before* […]"[34].

If the intermediation contract is not stipulated "in the name" of another subject, it will be an intermediation contract, or a mandate, without representation, as identified by Articles 28 and 44 VAT Directive[35].

4 ECJ, VAT Committee, and EU secondary law provisions applicable to the taxation of the intermediation commission

In the general normative and fiscal context outlined in the previous part, the normative elements of VAT chargeability of football intermediaries' services have been mostly delineated by the sentences of the European Court of Justice (ECJ), as well as by the decisions of the VAT Committee[36].

In the case *Baumgarten Sports & More*[37] the Court, dealing with the issue of VAT chargeability, considered a case where the payment of the commission in favor of the intermediary was provided in installments, every 6 months. Each payment was subject to the condition that the player was respecting the employment contract with the acquiring club for its entire duration.

As observed above, according to Art. 63VAT Directive: "*The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied*".

[32] The principle of mutual recognition in EU law is a general principle, applicable to the entirety of EU law, including provision of services, first developed on the basis of the free movement of goods in the EU, Arts. 34-36 TFEU, by the ECJ in the so-called *Cassis de Dijon* case. According to the principle of mutual recognition, the sale of products lawfully sold in a MS may not be prohibited in the other States, considering that each State recognizes the effectivity and the validity of the relevant controlling procedures, carried out by the MS of production, or first commercialization of the product. Limitations to the principle of mutual recognition may be justified only in cases of: public interest; financial supervision; public health; protection of consumers; fairness of commercial transactions: "[…] *there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the member States, alcoholic beverages should not be introduced into any other member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules*", ECJ, Rewe-Zentral AG (Cassis de Dijon), 20 February 1979, C-12/78, ECLI:EU:C:1979:42, n. 14.

[33] VAT Directive, art. 44: "*The place of supply of services by an intermediary acting in the name and on behalf of another person, other than those referred to in Articles 50 and 54 and in Article 56(1), shall be the place where the underlying transaction is supplied in accordance with this Directive. However, where the customer of the services supplied by the intermediary is identified for VAT purposes in a Member State other than that within the territory of which that transaction is carried out, the place of the supply of services by the intermediary shall be deemed to be within the territory of the Member State which issued the customer with the VAT identification number under which the service was rendered to him*"; art. 50: "*The place of the supply of services by an intermediary, acting in the name and on behalf of another person, where the intermediary takes part in the intra-Community transport of goods, shall be the place of departure of the transport. However, where the customer of the services supplied by the intermediary is identified for VAT purposes in a Member State other than that of the departure of the transport, the place of the supply of services by the intermediary shall be deemed to be within the territory of the Member State which issued the customer with the VAT identification number under which the service was rendered to him*".

[34] Amand C 2017. On the subject: VAT Committee (2020) Working Paper n. 993, New Legislation Matters Concerning the Implementation of Recently Adopted EU Vat Provisions.

[35] VAT Directive, art. 28: "*Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself*". On the subject of the mandate without representation and VAT chargeability of the commissions: ECJ, *ITH Comercial Timişoara*, 12 November 2020, C-734/19, ECLI:EU:C:2020:919.

[36] The VAT Committee has been established pursuant Art. 29 Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnovers taxes—common system of value-added tax: uniform basis of assessment, n. 77/388/EEC, in OJEC n. L. 145/1 of 13.06.1977. The Directive has been recast by the VAT Directive and the VAT Committee is now discipline by art. 398 VAT Directive. The VAT Committee is an advisory Group, consisting of representatives of the Member States and the European Commission. The Committee is consulted on issues pertaining the application of EU provisions on VAT in the cases indicated in the VAT Directive, upon request of a MS or at its own initiative.

[37] ECJ, *Baumgarten sports & more*, 29 November 2018, C-548/17, ECLI:EU:C:2018:970.

Therefore, the collectability of the VAT should arise simultaneously to the chargeable event.

The subsequent art. 64 (1) states: "*Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14 (2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate*".

Therefore, each payment—in favor of the intermediary, in the matter at hand—constitutes a chargeable event and, thus, the VAT can be collected only when the payments are performed, meaning when each chargeable event arises.

In conclusion, the Court argued that, for VAT purposes, the chargeable event should not be identified with the stipulation of the transfer contract of the athlete, but with the expiry of the periods to which the payments made by the club refer[38] and which depend on the conditions of the transfer contract.

These conditions are: the continued possession, by the footballer, of the license issued by the competent national authority and the continued effectiveness of the employment contract stipulated between the athlete and the acquiring club. Thus, for every condition that is realized an installment is paid and a chargeable event comes into being, upon which the VAT is collected.

Alongside the Case law of the ECJ, the VAT Committee, carrying out its mandate to promote the uniform application of the VAT Directive[39], has specifically dealt with the VAT chargeability of the intermediation activities as well as with chargeability of fees received for the transfer of professional footballers.

The VAT Committee is consulted on issues pertaining the application of the VAT Directive and deals with relevant questions presented by MS and the European Commission (EC). In carrying out this interpretative activity, the VAT Committee issues specific guidelines on different aspects regarding the application of the VAT Directive[40].

The VAT Committee guidelines, although merely interpretative and non-mandatory, bear specific relevance, in consideration of the qualified nature of the source. In Academia, an increase in the level and range of competences of the VAT Committee has been proposed.[41]

In this context, the VAT Committee has taken into specific consideration the VAT chargeability of fees in the context of transfer of professional footballers; in particular, from the latest version of the Guidelines Resulting from Meetings of the VAT Committee up until 5 March 2021, the following elements must be considered.

At the 34th Meeting all the delegations considered that: "[...] *the fee paid when a footballer was transferred from one club to another was the consideration for a supply of services* [...] *and should be subject to tax. However, sums paid as compensation for breach of contract and to penalise the failure to fulfil an obligation by one of the parties did not fall within the scope of VAT as they were not a consideration for services supplied*". Furthermore, most delegations "[...] *considered that such a fee should be taxed at the place where the purchaser was established* [...]".[42]

At the 52nd Meeting, a large majority of delegations confirmed that "*transfer fees are to be taxed according to Article 9(2)(e) at the place where the customer has established his business or has a fixed establishment to which the service is supplied*".[43]

These are the only stances where the VAT Committee specifically dealt with the taxation of the fees paid when a footballer is transferred from one club to another. In light of the indicated considerations of the VAT Committee, the following elements have to be highlighted.

[38] *Ibidem*, n. 31.

[39] VAT Directive, art. 398.

[40] Art. 44 VAT Directive (as modified by Council Directive 2008/08/EC of 12 February 2008 *amending Directive 2006/112/EC as regards the place of supply of services*, in OJEU L 44/11 20.02.2008) states: "*The place of supply of services to a taxable person acting as such shall be the place where that person has established his business* [...]"; art. 45: "*The place of supply of services to a non-taxable person shall be the place where the supplier has established his business* [...]"; art. 46: "*The place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive*". In this regard, it must be highlighted that articles 53 and 54 VAT Directive (inserted in the section dedicated, *inter alia*, to the supply of sporting services) specify

Footnote 40 (continued)

that the place of supply of sporting services is the place where the events (supplied to taxable persons) and the activities (supplied to non-taxable persons) take place.

[41] Gruson J and Merkx M 2021.

[42] VAT Committee (2021) Guidelines Resulting from Meetings of the VAT Committee - up until 5 March 2021, p. 63. This specific caveat is indicated in the Guidelines: "*ATTENTION: Please bear in mind that guidelines issued by the VAT Committee are merely views of a consultative committee. They do not constitute an official interpretation of EU law and do not necessarily have the agreement of the European Commission. They do not bind the European Commission or the Member States who are free not to follow them. Reproduction of this document is subject to mentioning this Caveat.*"

[43] *Ibidem*, p. 81. The same caveat *ut supra* indicated applies: "*ATTENTION: Please bear in mind that guidelines issued by the VAT Committee are merely views of a consultative committee. They do not constitute an official interpretation of EU law and do not necessarily have the agreement of the European Commission. They do not bind the European Commission or the Member States who are free not to follow them. Reproduction of this document is subject to mentioning this Caveat.*"

According to FIFA Intermediaries in international transfers 2020 "*transfer fees refer exclusively to club-to-club compensation and are not to be confused with intermediary commissions*".[44]

Consequently, a discrepancy in the definition of "fee" in the subject at hand appears to emerge. To contribute to the solution of said discrepancy, in the present study, it is proposed that the conclusions of the VAT Committee, although devoid of binding force, could be read according to the general methods of legal interpretation: textual, contextual, and teleological.[45]

In this light, it could be argued that the VAT Committee, on the one hand, does not specify the constitutive elements of the locution "*fee paid when a footballer is transferred*". On the other hand, the VAT Committee willingly clarifies the difference between the fee itself and the sum paid as compensation for breach of the contract in the 34th Meeting, as above.

In addition, the VAT Committee appears to consider as synonyms the "*fee paid when a footballer is transferred*" and the "*transfer fees*", which are to be taxed at the place of establishment of the recipient of the service, in 52nd Meeting, as above.

Therefore, according to the three criteria mentioned above, it could be inferred that the VAT Committee does not specify, willingly, the difference between the "intermediation commission", the "*fee paid when a footballer is transferred*" and the "*transfer fee*".

As a consequence, it appears to be coherent with the wording of the VAT Committee to consider the following: if the intermediation commission is set in the transfer contract, as a part of the major amount constituting the "*fee paid when a footballer is transferred*", then the intermediation commission has to be subject to VAT.

Beyond the scope of the representation activity of football intermediaries, the VAT Committee has taken into consideration, in general terms, the VAT chargeability of the intermediation commission received by intermediaries, providing their services in different fields.

More specifically, the VAT Committee has clarified various aspects of the taxation of the intermediation commission in general, with reference to intermediation in supply of: lodging services[46], immovable property contracts[47], electronic services[48], tickets to events[49], bank and investment services[50], digital services[51], insurance services[52], and to travel agents[53].

Thus, according to the VAT Directive, the ECJ jurisprudence, and the interpretative guidelines of the VAT Committee, it could be concluded that the intermediation commissions received by the intermediary for the representation of parties in the negotiation of the transfer of a football player are VAT chargeable, being a remuneration for an intermediation service provided.

Therefore, the general rules provided by the VAT Directive on the supply of services apply.

In general, the place of supply of an intra-EU service provided by a VAT—taxable person—"relevant business person"—registered in the EU depends on the legal nature of the recipient of the service.

If the latter is a taxable person (football club), the VAT will be charged—output VAT—in its place of establishment, according to the reverse charge rule[54]. In this case, the recipient of the service will reclaim its VAT—input VAT—in its own State.

Instead, if the recipient of the service is not a taxable person (the football player is an employee and thus cannot be qualified as a "taxable person")[55] the VAT on the service—output VAT—will be charged in the State where the service provider is established[56]; as a consequence, the following can be observed.

[44] P. 4.

[45] Regarding the methods of legal interpretation in EU law, Lenaerts K and Gutierrez-Fons J A 2013-2014.

[46] 88th Meeting of 30 September 2009; 93rd Meeting of July 2011.

[47] 93rd Meeting of July 2011.

[48] 93rd Meeting of July 2011.

[49] 97th Meeting of 7 September 2012.

[50] 13th Meeting of 15-16 December 1981; 104th Meeting of 4-5 June 2015; 108th Meeting of 27-28 March 2017; 110th Meeting of 13 April 2018.

[51] 107th Meeting of 8 July 2016.

[52] 31st Meeting of 27-28 January 1992.

[53] 3rd Meeting of 28 June 1978; 16th Meeting of 30 November-1 December 1983; 17th Meeting of 4-5 July 1984; 20th Meeting of 4-5 June 1986;25th Meeting of 10-11 April 1989; 101st Meeting of 20 October 2014.

[54] "*The term "reverse charge" conveys that the recipient of the goods or services has to self-account the VAT due in a given transaction*", in Calisto Pato A and Marques M 2014, p. 205.

[55] Art. 9 (1) VAT Directive: "*'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity* [...]". Art. 10 VAT Directive: "*The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability*".

[56] VAT Directive, arts. 44, 45. On the subject, it has been observed that: "*The general position for supplies of services to customers, and from suppliers, outside EU VAT area is identical because of the worldwide scope of the definition of a 'relevant business person'. However, the supply of certain services to a non-relevant business person, outside the EU VAT area, will always be treated as made where the customer belongs, and so outside the scope of VAT. Such supplies include (for example), transfers of intellectual property, advertising and the services of consultants, lawyers and accountants (unless the services relate to land)*", in Jeremy Cape, Max Schofield, *VAT and Brexit: The Past, Present and Future*, *EC Tax Review*, 2018 - 6, 290-302, 292.

If the intermediation commission is received by the agent for a service provided in favor of the acquiring club (or both the club and the player, it can be argued), the VAT is to be charged in the MS where the service is provided. This coincides with the place where the acquiring club (being a taxable person) is established *ex* art. 44 (2) VAT Directive; regardless of the place of residence (or establishment) of the agent[57].

If the agent provides a service exclusively in favor of the athlete by virtue of a contract of mandate with representation ("*in the name and on behalf*"), then, *ex* art. 44 (1) VAT Directive, the VAT is to be charged in the MS where the underlying transaction is provided. The latter could coincide, or not, with the place of establishment of the agent, or of the acquiring club.

If the agent provides a service exclusively in favor of the athlete by virtue of a contract of mandate without representation, then the general rules apply and, *ex* art. 45 VAT Directive, the VAT is to be charged in the MS where is the place of residence (or establishment) of the agent.

A different type of conclusion is to be drawn if the sum due as commission is inserted in the employment contract and paid from the club to the athlete, whom, subsequently, pays it to the agent, with all the relevant consequences as for VAT chargeability.

In this case, it could be argued that this specific provision of the employment contract is formulated exclusively for purposes of tax evasion. As a consequence, if the internal legislation of the competent State so provides, the national tax authority might be entitled to give a different legal qualification to the concerned provisions of the contract and thus consider the intermediation as VAT chargeable, according to rules indicated above.[58]

Finally, if a club, established in an MS, creates in a different MS a stable organized subsidiary, then the general criteria provided by arts. 49–55 TFEU for the right of establishment apply.

Therefore, if the subsidiary club carries out transfer operations, the eventual intermediation commission will be charged according to the relevant provisions of the VAT Directive. If the agent acts in favor of the club (or both the club and the athlete), the VAT on the commission will be charged in the MS where the subsidiary is established.

All the above, as long as the subsidiary operates as an effective economic entity and not a mere artificial construct whose objective is to elude the fiscal norms of the MS of the controlling club.

In this last instance, it could be argued that if the sole purpose of the controlled club is to allow the controlling club to elude or evade the tax laws of the MS where the controlling club is the established, then this MS could charge the VAT on the operations carried out by the controlled club in another State[59].

The same conclusion could be drawn in the case of an extra-EU subsidiary held through another subsidiary which one or more transactions with no economic substance which, despite formal compliance with tax rules, essentially achieve undue tax advantages constitute abuse of the right.

These operations cannot be opposed to the financial administration, which denies the advantages by determining the taxes on the basis of the rules and principles evaded and taking into account the amount paid by the taxpayer as a result of these operations economically inactive by an EU-based controlling company.

In this case, if the controlling club were to perform an intra-group operation—VAT taxable—in favor of the active controlled subsidiary but exclusively with the inactive controlling subsidiary, the latter would be considered, in any event, as anon-economic activity.

Consequently, the EU-based controlling club, for VAT deduction on intermediation costs purposes, would have to demonstrate that the sustained costs do not relate (even partially) to the shares of the economically inactive intermediate controlling company that it owns.[60]

In light of the Case Law, among others, *Halifax, Cadbury Schweppes*, *Part Service* and *C&D Food Acquisition*[61], it could be argued that the same verification regarding the effective nature of the subsidiary could be drawn not only to football clubs but to any typology of economic activity, including, for the purposes of the present study, to the intermediation agency and its eventual controlled entities or subsidiaries in a different State.

57 On the subject: Council Directive (EU) 2018/2057 of 20.12.2018 *amending Directive 2006/112/EC on the common system of value-added tax as regards the temporary application of a generalized reverse charge mechanism in relation to supplies of goods and services above a certain threshold*, OJEU L 329, 27.12.2018.

58 This specific competence is bestowed upon the national fiscal authority (Agenzia delle Entrate) by Italian Legislation. According to Art. 10bis c. 1 D.L. 212/2000, the transactions without economic substance which, despite formal compliance with tax rules, essentially achieve undue tax advantages constitute an abuse of law. These operations cannot be opposed to the financial administration, which denies the fiscal advantages by determining the taxes on the basis of the rules and principles evaded and taking into account the amount paid by the taxpayer as a result of these operations.

59 ECJ, *Halifax and Others*, 21 February 2006, C-255/02, ECLI:EU:C:2006:121; ECJ, *Cadbury Schweppes and Cadbury Schweppes Overseas*, 12 September 2006, C-196/04, ECLI:EU:C:2006:544;ECJ, *Part Service*, 21 February 2008, C-425/06, ECLI:EU:C:2008:108. Regarding the provision of services made by EU-based subsidiaries to the extra-EU controlling company, VAT chargeability, and VAT recovery: Gamito P 2019.

60 ECJ, *C&D Foods Acquisition*, 08 November 2018, C-502/17, ECLI:EU:C:2018:888. On the subject also: Velthoven M and Zeegers M 2020, p. 243.

61 Above, n. 59.

5 Supply of intermediation services to taxable and non-taxable persons by an intermediary established in the EU

Having identified the general coordinates of the EU fiscal regulation of intermediation activities in the transfer of football players, it emerges a very fragmented system at the national level, where the possibility of conflict of interests between the players, the clubs, and the intermediaries is concrete[62].

As a matter of fact, the agent could be incentivized to enter into negotiations with clubs located in EU Member States that offer a more advantageous tax regime (both for VAT and for other indirect taxes, as well as direct taxes) for the intermediation commission to be received, regardless of what is in the best interest of the parties involved in the transaction.

This eventual conflict of interest has also to be considered in the light of the practices of "dual representation" (or "dual agency") and "switching".[63]

The dual representation contract is the specific mandate contract according to which the agent represents the interests of more than one party in the same negotiation.

Switching is a process—non-legitimate according to both FIFA Regulations and national Federations Regulations—consisting in "[…] *a "dual representation" contract where the Licensed Agent acted for both the Player and the Club although only shown as acting for one. Sometimes an Agent would in truth be acting for the Player under a verbal contract but then later make a written representation agreement with the Club* […]".[64]

In particular, although the specific analysis of the fiscal regime of the "dual representation" intermediation contract falls outside the scope of the present study, the following aspects are to be highlighted[65].

The dual representation contract, although potentially giving rise to conflict of interests, is not considered illegitimate by most EU Countries legal systems, as well as by their respective sports Federation, as long as both parties represented are aware of this double representation.[66]

On the other hand, if the dual representation contract is prohibited by national Federations and in case an agent engages in a dual representation contract without formalizing it, then, on the fiscal perspective, the athlete may have to pay the taxes on the commissions received by the agent.

In such a case, the club may find that the commissions (illegitimately) paid to the agent are to be taxed by the national fiscal Authorities and, obviously, the agent may have to pay the taxes on the commissions received, being a direct revenue.[67]

As a consequence of the practice of *switching*, the club could have set off the commission paid as expenses and reclaimed the VAT paid on the intermediation commission due to a tax form, issued by the club in favor of the player, according to which the latter had received a "benefit in kind" upon which taxes are due.

Neither the athlete nor the club could have done so if the relationship player/agent was legally based on an intermediation contract stipulated between the two, with the express provision on payment of the commission.[68]

6 Overview of the EU–UK Trade and Cooperation Agreement (TCA)

Once the general themes related to the VAT regime of the intermediation commission received by football intermediaries have been analyzed, the focus of the study has to turn on the impact in the subject area of the Withdrawal Agreement (WA) and the EU–UK Trade and Cooperation Agreement (TCA).[69]

The TCA is an international treaty stipulated between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part; thus without the formal participation of the singular Member States of the EU.[70]

As stated above, the TCA establishes the main conditions regarding the recession of the United Kingdom from the European Union and it operates alongside the mentioned

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[62] In general, on the subject: Rosner S R 2004.

[63] KEA, CDES, EOSE, Study on sports agents in the European Union—A study commissioned by the European Commission (Directorate-General for Education and Culture), November 2009, p. 104. According to a 2009 study, including a questionnaire regarding the activities of football intermediaries, the dual representation practice was indicated as a possible source of conflict of interest.

[64] England and Wales Court of Appeal, *McGillv The Sports and Entertainment Media Group*, 2014, 300, 29.

[65] On the subject: Tenore M 2015; Tenore M 2016; De Marco N 2017, p. 160. Van Oostaijen P 2019.

[66] KEA, CDES, EOSE, Study on sports agents in the European Union—A study commissioned by the European Commission (Directorate-General for Education and Culture), November 2009, pp. 104, 113.

[67] *Ibidem*, pp. 113, 204, 243. Also, Baker III T A et al. 2012.

[68] *Ibidem*, p. 30.

[69] On the political debate regarding the *Brexit Agreement*: Matthijs M et al. 2019; Vroom M and de Wit W 2018; Gauci J-P et al. 2017; Tauwhare R 2017.

[70] "*Legally speaking, while the Withdrawal Agreement provides for a mixture of international law and EU law approaches to the UK/EU relationship, the TCA sets out a purely international law framework*", in Peers S 2022, p. 50.

Withdrawal Agreement and the other subject-specific treaties.[71]

The TCA is composed of seven parts: general provisions; trade, transport, fisheries and other arrangements; law enforcement and judicial cooperation in criminal matters; thematic cooperation; participation in Union programs, sound financial management and financial provision; dispute settlement and horizontal provisions; final provisions. Furthermore, there are 49 annexes and three protocols.

Although the parties of the TCA are not exclusively States, the TCA has to be interpreted according to the customary rules of interpretation of public international law, including the ones codified in the Vienna Convention on the Law of Treaties of 23 May 1969 (Art. 4 TCA)[72].

Furthermore, as most international treaties, the TCA contains a termination clause, according to which either party may terminate the treaty, by written notification (Art. 779 TCA).

Art. 771 TCA states that the provisions regarding democracy, rule of law and human rights (Art. 763.1 TCA), fight against climate change (Art. 764.1 TCA), and countering proliferation of weapons of mass destruction (Art. 765.1 TCA) "[...] *constitute essential elements of the partnership established by this Agreement and any supplementing agreement*".

Consequently, Art. 772.1 TCA affirms that either party of the TCA "[...] *may decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part* [...]", if it considers that there has been a serious and substantial failure, by the other party, in the fulfillment of an obligation pertaining to one of the essential element.[73]

Furthermore, according to Art. 692.1 TCA, part III of the treaty (law enforcement and judicial cooperation in criminal matters) may be terminated by written notification at any moment by any party, without prejudice to Art. 779 TCA.[74]

To ensure effectiveness to the various and differentiated norms of the TCA, the creation of a bilateral Partnership Council (Art. 7 TCA) and of numerous specialized bilateral forums (Committees—art. 8 TCA—and Working Groups—Art. 9 TCA) is provided for, in the treaty.

Of particular interest is to note that the sixth part of the TCA is dedicated, as observed, to dispute settlement and horizontal provisions. The thorough analysis of this theme falls outside the scope of the present study; however, it has to be highlighted that the *raison d'être* of the part in comment is to resolve "*disputes between the parties concerning the interpretation and application of the provisions*" of the TCA or of the supplementing agreement (Art. 735.1 TCA), with a few notable exceptions, among which the whole fourth part of the TCA: thematic cooperation, constituted of health security and cyber security.

In particular, is dedicated to dispute settlement the first title of the sixth part of the TCA, which is divided in five chapters: general provisions[75]; procedure (consultations and arbitrations); compliance; common procedural provisions; specific arrangements for unilateral measures.

According to Art. 746.1 TCA, the party found by the arbitration tribunal, possibly established to settle the dispute, to have breached an obligation under the TCA (or under any supplementing agreement), "*shall take the necessary measures to comply immediately with the ruling of the arbitration tribunal in order to bring itself in compliance with the covered provisions*".

Finally, it has to be noted that the TCA does not contain a specific clause regarding sports.

However, the provisions of the TCA that, in general terms, pertain to sporting themes are the following.

Art. 17.2 (f) TCA states that "[...] *goods imported for sports purposes (sports requisites and other articles for use by travellers in sports contests or demonstrations or for training* [...]" can be imported in the territory of a party of the TCA under the regime of temporary admission on the importation of goods.[76]

[71] *Ibidem*, pp. 50, 51. The subject-specific treaties are: the "Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information", in OJ L 149, 30.4.2021, pp. 2540–2548; the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy", in OJ L 150, 30.4.2021, pp. 1–18.

[72] Art. 1 (Scope of the present Convention) of the Vienna Convention on the Law of Treaties of 23 May 1969 states: "*The present Convention applies to treaties between States*". Art. 3 (International agreements not within the scope of the present Convention) states: "*The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties*".

[73] Peers S 2022, p. 53.

[74] *Ibidem*, pp. 55-57.

[75] Art. 736 TCA (Exclusivity) states: "*The Parties undertake not to submit a dispute between them regarding the interpretation or application of provisions of this Agreement or of any supplementing agreement to a mechanism of settlement other than those provided for in this Agreement*".

[76] According to Art. 17.1 TCA: "*For the purposes of this Article, "temporary admission" means the customs procedure under which certain goods, including means of transport, can be brought into a customs territory with conditional relief from the payment of import duties and taxes and without the application of import prohibitions or restrictions of an economic character, on the condition that the goods are imported for a specific purpose and are intended for re-exportation within a specified period without having undergone any change except normal depreciation due to the use made of those goods*."

Annex 3 of the TCA, dedicated to product-specific rules of origin, in listing the various articles to the end of the annex, in section XX, named "miscellaneous manufactured articles", recalls "*toys, games and sports requisites*".

Annex 44 of the TCA (exchange of criminal record information—technical and procedural specifications), chapter 3 (standardized format of transmission of information), indicates the corresponding codes for the criminal offenses to the ends of facilitating the exchange of information between the Member States of the EU and the UK, when transmitting information regarding convictions of nationals of another State. Among the specific categories of criminal offenses, in chapter 3 are considered "violence during sports events" and "prohibition to play certain games/sports".

7 VAT chargeability of intermediation activities in the negotiation of an employment contract in the light of the EU–UK Trade and Cooperation Agreement

That being premised regarding the WA and the TCA, it has to be noted that, notwithstanding the limited competence of the EU on tax and fiscal matter[77], the theme of VAT on services is taken into account both in the WA and in the TCA.[78]

The Withdrawal Agreement takes into consideration the VAT concerning services in the stances of telecommunications and broadcasting services[79], regarding the Cyprus base areas[80] and with reference to Gibraltar.

In particular, Art. 3 of the Protocol on Gibraltar (fiscal matters) attached to the Withdrawal Agreement does not take into consideration the issue of VAT and of VAT chargeability on services (referencing only to excise duties or special taxes in relation to alcohol and tobacco).

Art. 3 Withdrawal Agreement references Gibraltar as part of the UK Territory and EU law applies in Gibraltar according to the 1972 Act of Accession.[81]

However, Gibraltar does not form part of the United Kingdom and thus EU law applies to Gibraltar by virtue of Art. 355 (3) TFEU: "*In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:* [...] *3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible*".

According to Articles 28–30 of the 1972 UK Act of Accession, EU norms concerning, most notably, the Common Agricultural Policy, the Customs Union and the turnover taxes, included the value-added tax, do not apply to Gibraltar.

Therefore, it could be inferred, based also on the absence of references on the subject in the TCA, that a compromise solution has been reached with reference to Gibraltar with the objective of maintaining the previous fiscal regime of Gibraltar, as far as EU law regarding indirect taxation policies, VAT included, is considered.[82]

[77] Regarding the freedom of establishment provided by Art. 49 TFEU and the relevant provisions of the TCA (with a focus on national treatment): Weber D and Steenbergen J 2022, pp. 101, 102.

[78] The Protocol on Ireland/Northern Ireland attached to the WA takes into consideration the VAT (art. 8) with exclusive reference to goods, not services; on the subject: Weatherill S 2020.

[79] - Part III (Separation Provisions)—Title III (Ongoing Value-Added tax and Excise Duty Matters) of the Withdrawal Agreement is composed on three articles, from 51 to 53; the only reference to VAT on services in relation to the VAT Directive and the Implementing Regulation 282/2011 is indicated in art. 51(4) and relates to the VAT returns in the telecommunications and broadcasting services sector. Council Implementing Regulation (EU) n. 282/2011 of 15 March 2011 *laying down implementing measures for Directive 2006/112/EC on the common system of value-added tax* OJEU L 77, 23.3.2011, 1.

[80] - WA - Protocol Relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus–arts. 3-4 dictates that the indicated Territory in substance and with reference to VAT (included on services) is to be considered part of the Union for fiscal reasons, considering that the relevant EU provisions on indirect taxation adopted on the legal basis of art. 113 TFEU apply to and in the Territory *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)*, in OJEU CI 384/1, 12.11.2019. Protocol Relating

Footnote 80 (continued)

to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus—art. 3 "Taxation—*1. The provisions of Union law on turnover taxes, excise duties and other forms of indirect taxation adopted pursuant to Article 113 TFEU shall apply to and in the Sovereign Base Areas. 2. Transactions originating in or intended for the Sovereign Base Areas shall be treated as transactions originating in or intended for the Republic of Cyprus for the purposes of value-added tax (VAT), excise duties, and other forms of indirect taxation. 3. The Republic of Cyprus shall be responsible for the implementation and the enforcement of the provisions of Union law referred to in this Article in the Sovereign Base Areas, including for the collection of duties and taxes payable by civil natural or legal persons residing or established in the Sovereign Base Areas*".

[81] Treaty between the Member States of the European Communities and the Kingdom Of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community of 22 January 1972, in OJEC L 73, 27.3.1972, p. 5–204.

[82] On the subject, it has been observed that: "*Unfortunately, the New Year's Eve Agreement does not expressly include, nor make reference to, the provision of cross-border services, a freedom once enjoyed by Gibraltar to—and from—the EU (including passporting rights for financial services firms), prior to Brexit. Nevertheless, Gibraltar and the UK have agreed on a temporary permissions framework allow-*

As a consequence, it is evident how, for political motivations, the legal regime (and, more specifically, the fiscal regime) governing the provision of cross-border services EU–UK has not received a specific regulation in the WA[83].

Regarding the EU–UK Trade and Cooperation Agreement, the main provisions related to VAT concerning services are the following.

Art. 8 (k): establishment of the Trade Specialized Committee on Administrative Cooperation in VAT and Recovery of Taxes and Duties, "[…] *which addresses matters covered by the Protocol on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties*".

Articles 120 and 122, cooperation between the UK and EU Authorities and the Committee to ensure compliance with VAT legislation, according to the "*Protocol on administrative cooperation and combating fraud in the field of value added tax and on mutual assistance for the recovery of claims relating to taxes and duties*" (P.VAT).

Art. 774, the TCA "[...] *shall neither apply to Gibraltar nor have any effects in that territory*".

P.VAT—art. 3, definitions, "[…]—"*VAT" means value added tax pursuant to Council Directive 2006/112/EC on the common system of value added tax for the Union and means value added tax pursuant to the Value Added Tax Act 1994 for the United Kingdom*".[84]

Summarizing, the following could be argued. No specific provision regarding the application of the VAT on services provided by an intermediary in favor of one or both parties of the underlying contract is considered, neither in the Withdrawal Agreement, nor in the TCA.

As a consequence, the general rules disciplined by the VAT Directive and the other relevant norms shall continue to apply and, thus, legal certainty and consistency is guaranteed by the previously formed jurisprudence, both national and supranational.[85]

However, regarding the TCA and the P.VAT, the following has also been observed.

On one hand, some provisions of the TCA and P.VAT contain "[…] *binding legal obligations that constrain what the UK can do in the relevant sector.* […]"; obligations that "[...] *repeatedly contain commitments by a state to apply certain rules and refrain from passing others. This is quite apart from the regulatory obligations that flow from the level playing field* […]"[86].

On the other hand, the UK has "[...] *the opportunity to reform the VAT law to make meaningful reductions to the business compliance burden* [...]. *The freedom created by Brexit in terms of VAT design should be exploited to achieve compliance burden reductions needed to offset new costs likely to arise in the post-Brexit era*".[87]

The two above indicated statements, apparently imbalanced, could be synthesized as it follows: the taxation norms included in the TCA, although able to influence the UK's taxation policies, will have a more limited impact in the UK compared to EU's MS.

As a matter of fact, some of the taxation provisions of the TCA "[...] *are very similar to those included in recent free trade agreements or other international agreements concluded by the EU. Therefore, it is unlikely that they will*

Footnote 82 (continued)

ing continuing post-Brexit exclusive market access to licensed financial services firms to passport their services to—and from—each of the respective jurisdictions. Although noting that the foregoing is the snapshot of information and seemingly policy objectives, which will be pursued in the forthcoming negotiations between all parties' respective representatives, the foregoing does not appear to suggest that the provision of cross-border services will not be an item featuring on the agenda of the imminent talks. Accordingly, we must remain hopeful and vigilant of the timely updates that are expected to be announced in the forthcoming weeks and months on the nature and substance of the arrangements which will, hopefully for the benefit of all stakeholders, see the application and implementation of the Schengen acquis in Gibraltar", Noguera J 2021, p. N73.

[83] Dougan M 2020. On the subject: Dashwood A 2020.

[84] In this regard: "*The Commission may also, at the invitation of a Member State, attend bilateral negotiations between the UK and a Member State over certain matters. One area in which there may be such negotiations concerns VAT and the mutual assistance for the recovery of claims relating to taxes and duties and social security.30 It seems that the EU is taking steps to limit the capacity of the UK to divide the EU Member States in negotiations after Brexit just as it did before Brexit*", Lyons T 2021. Other relevant provisions of the P.VAT are: - P.VAT – art. 2: rules and procedures for cooperation to exchange information regarding VAT and for the recovery both of VAT due itself and fines related to it;- P.VAT – art. 14: entitled "Simultaneous Controls", it allows the MS of the EU and the UK to single out the subjects (taxable persons) that are deemed to be of

Footnote 84 (continued)

interest and, consequently, propose them for a fiscal control carried out by two or more States (simultaneous control); - P.VAT – arts. 15, 20: States may refuse the disclosure of the data requested by their counterpart if it could lead, inter alia, to divulgation of professional secrets. Among the other norms of the P.VAT the following have to be mentioned: Arts. 25, 26, 28, 31, 33, according to which if the VAT recovery claim and request for precautionary measures of the requesting State is accepted by the requested State, it shall recover the VAT directly, taking into consideration: the situation of the debtor; the absence of serious economic or social difficulties in the requested State; the costs for the requested State, which shall not be disproportionate to the monetary benefit.

[85] "*The UK VAT Act will still be required to be interpreted in accordance with historic Court of Justice judgments delivered on or before 29 March 2019, including such non-UK specific concepts, like 'abuse of rights' (again until the UK decides to legislate otherwise)*", Cape J 2019.

[86] Craig P 2021, p. 140.

[87] Zu Y et al. 2020, p. 377.

have an impact which is different from the impact of other trade agreements concluded by the EU or the UK with third countries [...]"[88].

Finally, according to the general reference made by P.VAT—art. 3, it could be argued that the VAT Directive has to be interpreted in its intrinsic meaning and, thus, the following conclusion could be drawn.

If the intermediation commission is received by the agent, regardless of its place of establishment, for a service provided in favor of the acquiring club, or both the club and the player, the VAT would have to be charged in the State (MS of the EU or the UK) where the service is provided.

This state coincides with the place where the acquiring club (being a taxable person) is effectively established *ex* art. 44 (2) VAT Directive; with the exception of the Sovereign Base Area of Cyprus.[89] In this case, the Courts of the MS where the club is established and thus the ECJ would have jurisdiction if the club was established in an EU MS.

However, if a club were to create a subsidiary with the sole purpose of evading the fiscal provisions of the Country of origin, it could be argued in favor of the jurisdiction of the Courts of the Country of origin of the controlling club and, consequently, the ECJ, according to the jurisprudence *Halifax, Cadbury Schwepps, Part Service* and *C&D Food Acquisition*, as above.

In such case, on one hand, if the intermediary provides a service exclusively in favor of the athlete in force of a contract of mandate with representation ("*in the name and on behalf*"), then, *ex* art. 44 (1) VAT Directive, the VAT is to be charged in the MS where the underlying transaction is provided, which could coincide, or not, with the place of establishment of the agent, or of the acquiring club.

On the other hand, if the intermediary provides a service exclusively in favor of the athlete by virtue of a contract of mandate without representation, then according to art. 45 VAT Directive, the VAT is to be charged in the MS where is the place of residence (or establishment) of the agent.

8 Conclusion

As has been observed in Academia, neither the WA nor the TCA specifically reforms the subject of the VAT chargeability of provision of intermediation services, with reference to the newly established relationship between the EU and the UK.

Therefore, as explicitly stated in the TCA - P.VAT (Art. 3), no successive law (*jus superveniens*) will substitute the VAT sources of law and their application.

Consequently, the VAT Directive will continue to apply with reference to the supply of intermediation services from an EU-based provider (intermediary); with the only difference that UK-established clubs are now to be considered extra-EU. Obviously, this is the case until specific political negotiations will dictate a joint and complete reform of the subject of EU–UK provision of service, or until the relevant UK provisions on indirect taxation and value-added tax will not be modified.

In conclusion, it does not seem that, at least at the moment, *Brexit* has specifically reformed the fiscal regulation of the VAT chargeability of the intermediation commission received by the football agent for its activity in negotiating an employment contract between the player and the club.

As a consequence, the activity of football intermediaries continues to be mostly disciplined at the national level, by the legislation of the different MS and the regulations of the competent national sports federations.

This differentiation entails the most important aspects of the activity of football agents, among which have to be highlighted both the identification of the legal nature of the "sports intermediation contract" and the legal distinction between the emoluments received by the agent.

The "sports intermediation contract" being determined either as an intermediation contract, with or without representation, or as a contract of mixed legal nature; a distinction that affects the consequent identification of the subjects legally required to pay the commissions in favor of the intermediary.

The emoluments received by the agent being differentiated as commissions due for the representation activity in negotiating an employment contract and as emoluments received by the agent as fees due for other services, provided in favor of the represented party by virtue of ulterior ancillary contracts.

The clarification of these aspects is preliminary for the consequential solution of the specific issues regarding VAT.

First, the determination of the VAT rate chargeable on the commission due for a contract of mandate with representation, in case that the underlying transaction ex art. 44 (1) VAT Directive is not precisely qualified.

Second, the identification of the VAT rate chargeable on the eventual ulterior service that the agent provides in favor of the represented party according to an ancillary contract and the subject obliged to pay the VAT on those different services.

Finally, the subsequent identification of the national Authority entitled to VAT collection.

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[88] Pirlot A 2021, p. 14.

[89] Bradley K 2020, p. 405.

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