

The FIFA reform package on football agents: ready for regulation or looking for litigation?

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FIFA reform: proposals for agents

The FIFA Council and the Football Stakeholders Committee unanimously adopted a series of reforms with respect to football player agents in order to “protect the integrity of football and prevent abuses.” FIFA asserts that these reform proposals were the outcome of a long consultation process between relevant stakeholders – including players, clubs, leagues and member associations – as well as the player agents themselves. According to FIFA, the rationale behind these rules is to increase transparency, safeguard player welfare, improve contractual stability and ameliorate professional and ethical standards (see [here](#)).

It is clear that FIFA is of the view that the absence of strict regulations has led to “the law of the jungle currently in place, with conflicts of interests rife and exorbitant “commissions” being earned left and right”. FIFA points out that the incomes of football agents have grown exponentially in the last five years, alleging that “football agents earned US\$ 653.9 million in fees, four times more than in 2015”. As football’s governing body, FIFA considers that it “has the responsibility to address and regulate these matters”.

FIFA’s reform package includes a number of new restrictions, such as: (i) the establishment of a cap on commissions “to avoid excessive and abusive practices”; (ii) restriction of multiple representations to avoid conflicts of interest; (iii) reintroduction of a mandatory licensing system for agents, to increase professional standards; (iv) creation of a FIFA Clearing House to ensure better financial transparency; (v) creation of an effective FIFA dispute resolution system to address disputes between agents, players and clubs; and (vi) increased disclosure of all agent-related work in transfers.

According to FIFA, “all of these proposals from FIFA on agent regulation are sensible, reasonable, rational, proportionate and necessary to protect the interests of players and the wider interests of football” and are “also in line with sentiments repeatedly expressed by institutions such as the European Commission and European Parliament”. FIFA is thus obviously aware of the need to respect EU law when adopting these proposals, given the

restrictive effect they will have on the profession. FIFA is currently turning these proposals into final regulations.¹

A closer look at the reform proposals

A number of these proposals seem straightforward and uncontroversial. More financial and professional transparency, a mandatory licensing system, maintaining high professional standards and avoiding conflicts of interest appear to be in the interest of all involved. It remains to be seen how some of these proposals will be translated into actual regulations, but as a matter of principle the proposed reforms appear to be reasonable and necessary. However, two of the reform proposals merit a brief legal comment. They concern (1) the proposal to establish an effective dispute resolution mechanism to address disputes involving agents and (2) the proposed cap on agents' fees.

An effective dispute resolution system

It will be interesting to see what kind of "effective FIFA dispute resolution system to address disputes between agents, players and clubs" FIFA has in mind. In this respect, it is worth recalling that this is not the first attempt by FIFA to regulate player agents or "intermediaries" as they are sometimes called as well. Before April 2015, FIFA Players Agents Regulations (the "Agents Regulations") were in place to regulate the role of players' agents. These Agents Regulations were replaced in 2015 by the currently applicable FIFA Regulations on Working with Intermediaries (the "Intermediaries Regulations"), which essentially relaxed the relevant regulations. They replaced the licensing system with a registration system at the national level, accompanied by a number of "benchmarks" that were to be used as the basis for national regulation on, for example, compensation of agents. The system FIFA put in place in 2015, however, appears to have led to what is now - in FIFA's own words - "the law of the jungle".

Importantly, with the change from the Agents Regulation to the Intermediaries Regulation in 2015, FIFA also changed the system of settling disputes involving player agents. Before 2015, under the Agents Regulations, the FIFA Players' Status Committee would resolve disputes involving agents. However, as a result of FIFA Circular no. 1468,² FIFA clarified that under the Intermediaries Regulations it will no longer be competent to hear disputes involving intermediaries. This appears to be changing again under the new proposals. FIFA is now seeking to re-assert control over player agents by making these new proposals. As part of this renewed control, FIFA considers that it has to develop a new mechanism to settle disputes arising out of the new regulations that will be adopted.

From the way the proposals are worded, it seems that FIFA considered that the previous mechanism's reliance on the Player Status Committee of FIFA was not as "effective" as it should be, since the new proposal is to "establish an *effective* FIFA dispute resolution system" to address disputes between agents, players and clubs. If it had intended to still rely on the Player Status Committee, it would probably just have said so. It thus appears that FIFA intends to come up with a new dispute resolution system that needs to be "effective". One possible solution would be to create an independent arbitration tribunal within FIFA but independent from FIFA, similar to the Basketball Arbitration Tribunal ("BAT"), which operates independently from the international basketball association (FIBA). The BAT has had great success in addressing contractual disputes in an objective and effective manner. An interesting feature of the BAT is its power to decide disputes "ex aequo et bono" after it has first determined the contractual position. If FIFA were to follow the example of FIBA, it would be relinquishing some control in favor of greater efficiency. Such a BAT-like arbitration tribunal

¹ See FIFA, "Reform proposal concerning football agents' regulations", 22 January 2020, available [here](#).

² Available here: <https://resources.fifa.com/image/upload/1468-amendments-to-the-regulations-on-the-status-and-transfer-of-playe-2510650.pdf?cloudid=zro9p178udvmsgy3nzy7>

would not be a genuinely “internal” dispute resolution system, but it would likely be a more “effective” one given that such an arbitration tribunal would be a genuine court of arbitration under Swiss law, the awards of which could be enforced under the New York Convention. It is not clear whether FIFA is seriously considering such an independent dispute resolution option but it seems worth reflecting on its potential.

A proposed fee cap for agents

Another interesting but potentially very controversial aspect of the proposal is the fee cap imposed on player agents. In particular, regarding the agents’ fees, the proposal would be to impose the following mandatory caps: (i) agent acting for selling club – 10% of transfer fee; (ii) agent acting for buying club – 3% of player’s salary; and (iii) agent acting for the player – 3% of player’s salary. Under the single permissible scenario of dual representation (i.e., agent acting for both player and buying club), the cap on commissions will be set at 6% of the player’s salary – i.e., 3% from each party.³

In response to this proposed fee cap, the Association of Football Agents noted that “we cannot accept any regulations that provide for capping of our fees or restrict our freedom to act for any party in a transaction” and described the regulations as “unlawful and anti-competitive.”⁴

The case law of the European Court of Justice has elaborated, in the past, on the role of sports associations in setting out certain rules regarding the organization of the sport or the provision of services even ancillary to sport such as the provision of football agents’ services and their compatibility with relevant EU competition law concepts under Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”). In so doing, the European Court has confirmed the applicability of EU law to the regulations of sports associations.

In order to assess whether measures by associations such as FIFA are potentially in violation of Article 101(1) TFEU,⁵ it must be established that (i) the FIFA rules at issue constitute a decision by an association of undertakings; (ii) that such rules may affect trade between EU Member States; and (iii) that those rules have as their object or effect the prevention, restriction or distortion of competition within the EU internal market. FIFA has already been considered by the EU courts to qualify as “an association of undertakings”⁶ and its regulations can be considered “decisions”.⁷

In terms of the kind of regulations by sports associations that would be justified, the European Court of Justice clarified that regulations closely related to the organization of fair and competitive sporting events such as, for example, doping-related regulations, may be permissible. For example, it clarified that, even if certain anti-doping rules are to be conceived as a decision of an association of undertakings limiting the appellants’ freedom of action, and thus subject to EU competition law, they still do not necessarily constitute a restriction of competition incompatible with the EU internal market within the meaning of Article 101 TFEU. This is so because they are justified by a legitimate objective.⁸ Notably, such a limitation is endemic to the organization and proper conduct of competitive sports and its rationale is to

³ See FIFA, “FIFA and football stakeholders recommend cap on agents’ commissions and limit on loans”, 25 September 2019, available [here](#).

⁴ See *New York Times*, “Agent Group Solicits Donations to Sue FIFA over Transfer Limitations”, 27 September 2019, available [here](#).

⁵ Article 101(1) TFEU reads: “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*”.

⁶ Case T-193/02 *Piau v Commission* [2005] ECR II-0209, para. 69.

⁷ *Ibid.*, paras 73 and 75. Cf. Case C-309/99 *Wouters and Others* [2002] ECR I-1577 para. 64; Case C 96-82 *IAZ v Commission* [1983] ECR 3369 paras 20-21.

⁸ See Case C-519/04 P, *MecaMedina v Commission* [2006] ECR I-6991, para. 45.

ensure healthy rivalry between athletes.⁹ In *Piau*, a landmark case on player agents regulations, the rules on agents were justified as they sought “to raise the professional and ethical standards for the occupation of players’ agents in order to protect players, who have a short career”.¹⁰

The second angle to look at under EU competition law concerns the possible abuse of a dominant position under Article 102 TFEU.¹¹ For Article 102 to be violated, (i) FIFA needs to be considered as an undertaking holding a dominant position on the internal market, (ii) the rules in question need to affect trade between EU Member States, and (iii) an abuse of FIFA’s alleged dominant position needs to be established.¹²

With respect to Article 102 TFEU, the EU Court of First Instance (now the General Court) noted in *Piau* that FIFA, which is an organization governing hundreds of international football associations, holds a dominant position in the market of services of players’ agents.¹³ However, it considered that the FIFA regulations did not impose quantitative restrictions on access to the occupation of players’ agents which harm competition, but only qualitative restrictions which may be justified. Therefore, the Court considered that these regulations do not constitute an abuse of FIFA’s dominant position in that market.¹⁴

The question is whether the same conclusions would still hold with respect to the new FIFA proposal. In *Meca-Medina*, the European Court of Justice ruled that the examination of the consistency of certain sports-related regulations with EU competition law will be case-specific.¹⁵ Based on the standard test developed in the *Wouters* case, the analysis of the justification of the above-described fee cap will take into consideration the overall context and the “legitimacy” of the objectives of the regulations. Whether the restrictive effects of the fee caps are inherent in the pursuit of these objectives and proportionate to them will be examined also. Given that FIFA is regulating the provision of services ancillary to sport, it is already sailing close to the wind, given the *Piau* judgement. Moreover, the aim of protecting players and raising standards may be legitimate, but it is less clear whether an agents’ fee cap is inherently necessary to the pursuit of that aim and whether the specific restrictions are proportionate to that aim.

In sum, there is little doubt that EU competition law is applicable to FIFA’s revised regulation on agents’ fees, as it will have an impact on the conditions of trade in the European internal market. The fact that FIFA proposes to put in place mandatory caps on intermediaries’ fees begs the question to what extent such rules are consistent with Articles 101 and 102 TFEU. Whether this question will be tested through litigation before the courts will probably depend to a large extent on whether the players’ agents will be involved in the final stage of the consultations to shape the regulations. But, based on the statement of the Association of Football Agents, it is doubtful that litigation can be avoided if the fee caps remain part of FIFAs new rules on players’ agents.

⁹ *Ibid.*, paras 45-49.

¹⁰ Case T-193/02 *Piau v Commission* [2005] ECR II-0209, para. 102.

¹¹ Article 102 TFEU reads: “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”.

¹² See, *inter alia*, Case 322/81, *Michelin* [1983] ECR 3461; Case 85/76, *Hoffmann* [1979] ECR 461.

¹³ See Case T-193/02 *Piau v Commission* [2005] ECR II-0209, paras 114-116. In a similar vein, in *Pechstein* the German Federal Court of Justice (Bundesgerichtshof) held that sports associations are market dominant if they are organized in a monopolistic pyramid structure of a single national sport association per sport and state on the relevant market and, therefore, should comply with Article 102 TFEU. For the Decision of the German Federal Court of Justice in Civil Matters (*BGHZ*) in *Pechstein/International Skating Union*, see [here](#).

¹⁴ *Ibid.*, para. 117.

¹⁵ See Case C-519/04 P, *MecaMedina v Commission* [2006] ECR I-6991, para. 42.