

## **Football agents: From de-regulation to re-regulation and beyond**

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## **11, Football Agents: From De-Regulation to Re-Regulation and Beyond**

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*High profile disputes involving football agents, tend to see the public light very often. Notwithstanding the fact that the increase in the use of social media, makes the prevalence of headlines, involving agents, almost inevitable, it is also arguable that the enormous commodification of the game, creates the basis for such headlines. The reader may question the necessity, for the discipline of sports law, to look deeper into this area of regulation. The cynic would pose the question what is so special about football agents that would deserve a special enquiry? Although this is not an opening statement, some facts may allow the readers (cynics or not) to elicit the significant problems in the regulation of football agents.*

*The enormous amounts of money that relate to the transfers of professional football players, create an attractive environment of employment where any individual (without skills and/or relevant qualifications) can enter and make a profit. The evidence surrounding the activities of football agents clearly indicates that unskilled and untrained agents may cause severe legal problems for their clients and/or other agents, particularly on issues of contract law and/or employment law.*

*The relative ease by which individuals can enter and perform the profession of a football agent. The previous deregulation of such profession created ethical and legal problems. An open profession, for example, without regulation and with an attractive and quick remuneration, attracts all sorts. Some of these problems exist to the present day.*

*The lack of appropriate sanctions, where regulatory violations occur, contributes significantly to the perpetual existence of the issue, and it usually tends to damage the image of sport. This last point has enormous significance for the justification of the argument that the legitimacy of self-regulation and governance is severely dented.*

*The above underlined problems, with the regulation of football agents, may create the basis upon the present work. More significantly, they may assist the reader in appreciating the significance of this area of regulation, not only for the discipline of sports law, but for society too.*

### **I. From Regulation to De-Regulation**

Although the representation of football players by agents may be traced back to the early years of the introduction of football as a regulated sport, it was not until 1994 when FIFA decided to create the Players' Agents Regulations, to regulate the activities of such individuals. In their first format, such regulations created strict licensing criteria and placed a burden on clubs and players to engage only agents that possessed a valid licence. Pre-requisites for the issuance of the licence included a 'clean' criminal record and a bank guarantee of 200k Swiss Francs (in the form of a deposit).

In 1999, the European Commission was called upon to investigate complaints (brought forward by football agents) based on allegations of restrictions to the market, discrimination on citizenship and lack of remedies on decisions re-entered by disciplinary bodies. The complaints were brought forward by Multiplayers International Denmark and by the French football agent Laurent Piau. The EC issued a statement of objections, following an investigation into the allegations. The Commission stated that the prohibition against unlicensed agents and the exclusion of legal persons from representing players, may fall foul of competition law. FIFA decided to respond to such objections and, with the introduction of the 2001 Players' Agent Regulations, removed some of the restrictions. It retained, however, the regulations that concerned the ability of natural persons only to hold a licence, and it also created an amendment which authorised national associations to issue licences to agents registered with them. At the same time, FIFA re-enforced (into its regulatory framework) the requirement of 'impeccable reputation' to be applied to those who wished to obtain a licence, and it further introduced an examination which tested the applicant's knowledge on the law that related to football.

Although the French agent *Piau* continued to challenge the validity/legality of these regulations, the General Court confirmed that FIFA Regulations do not violate EU competition law. In doing so, the Court took the opportunity to state that FIFA may impose qualitative restrictions on agents, an argument which meets with the author's agreement and, upon which, much of the present work is based. In addition, and on a point, which is of immense importance to the present work, the Court refused to assess the legal basis of FIFA's ability to regulate agents, but it took the opportunity to state that FIFA displays no abuse of a dominant position (on this point), particularly where there is an absence of state control, in the form of external regulation.

The above may help the reader appreciate that there have been many attempts by FIFA, over the years, to regulate the activity of football agents. The decision to regulate such activity may also form a determinative, persuasive, and comprehensive indicator towards the argument that such is the importance of this activity, as well as its size and impact on the relevant market that comprehensive regulation must be in place. Four major revisions have taken place in the last few years (2006, 2008, 2015 and 2022), testament to the complexity and the speed by which such market moves. FIFA has not been laconic in its production of the relevant regulations, but the previous revision (2015), identified an enormous degree of de-regulation, and, subsequently, created enormous problems that led FIFA towards creation and application of, yet, another set of regulations. These are now in force (the '2022 set' which came into force in January 2023) and it appears that we have moved back to re-regulation.

## **II. De-Regulation is not working - Calls for a change**

The introduction of the 2015 Regulations on football agents created a comprehensive form of deregulation. Notwithstanding the fact that FIFA introduced a freedom for legal persons to conduct players' transfers, the biggest change concerned the abolition of the licensing system. ~~Article 11.2 of FIFA's Regulations Working with~~

**Intermediaries** (Article 11.2 of FIFA's Regulations Working with Intermediaries). According to this notable change, national football federations were no longer required to have a licensing system and the only requirement related to a registration system, where national federations were only required to put in place a registration system through which 'intermediaries' are registered for every individual transaction they are involved in, whether it is with a club or with a player.

Considering the above, it is submitted that this de-regulation attempt by FIFA has exasperated the problem. Our research data (Ioannidis 2019), identified, five years ago, the routes of the problem and produced certain calls for change. Consequently, a comprehensive argument can be made that the lack of barriers to individuals who are unskilled, untrained and lack knowledge of the relevant regulations, are all elements that have a tendency of making the problem more serious. Such elements could potentially damage not only the image of sport, but they may create irreparable situations of negligence involving football players and/or clubs. In addition to this argument, the introduction, by FIFA, of relevant regulations that allow commercial entities to enter into agency transactions, now creates a wider and increasing field of tax avoidance schemes and poses a threat to the financial stability of several stakeholders in the sport. In this light, the respectful submission is that there was no reasonable or compelling justification for this deregulation, as in essence, such deregulation damages the image of sport.

Further, another element of the 2015 Regulations, which created a procedural limitation, related to the ability (or lack of) of litigants to use available appellate proceedings. One of the most important aspects of the procedural and substantive advantages the discipline of sports law may entertain in this area of practice, centres on the choice of arbitration litigants may have and the choice of the appropriate dispute resolution forum. The 2015 regulations limited the ability of litigants to apply for relief to CAS (at least at national level), although such limitation may now be remedied with the introduction of FIFA's new Football Tribunal.

Still, there is ample evidence to suggest that the plethora of disputes, the lack of resources and personnel and other political reasons in the decision making of national federations, would not allow national federations to apply and execute such regulations in an effective and efficient manner. In such situation, litigants would find themselves short of a remedial avenue, as FIFA had created a jurisdictional limitation, at national level, where parties would have no possible avenues for appeals to the Court of Arbitration for Sport (CAS). This lacuna clearly illustrated such jurisdictional issues litigants would face, particularly where they were unhappy with a decision at national level. Unless there was a specific agreement at national level, which allowed for an appeal to CAS (and usually there was not), and/or FIFA had decided to intervene and reached a decision (in which case litigants would appeal it to CAS), CAS applications would be restricted because of the described jurisdictional limitations.

Following the above problems, it was suggested that FIFA included specific criteria for the creation of qualification criteria for football agents (Ioannidis 2019). A return of

the licensing system has been adopted (in the 2022 set of regulations). This remains short of the introduction of qualifying criteria as a pre-requisite for the granting of licenses. In addition, it was suggested to FIFA (Ioannidis 2019), that the first stage in the licensing system includes the necessary academic and vocational training for professionals who wish to practise as football agents. FIFA's re-introduction of an examination system notwithstanding, this remains short of mandating that agents possess the appropriate vocational training, via continuous training and practice.

An outstanding issue with self-regulation, is that there is little domestic legal oversight where national federations fail to take appropriate action against individual agents for breach of rules. It is submitted that the state is an important player in the investigative stage of disciplinary proceedings against agents, especially where there is the inadequate or non-existent application of sanctions against unscrupulous agents. Lack of execution and application of rules undermines the effective and purposeful application of such rules.

### **III. Re-regulation, the 2022 revision and legal challenges**

It became obvious to FIFA that de-regulation has not worked, so with the new set of regulations that came into force in January 2023, FIFA decided to introduce a stricter environment, to ensure that all members are protected. It is not the purpose of the present work to fully discuss this new set of regulations. However, it is worth mentioning that several aspects of the new rules have been challenged before several national jurisdictions. It is our intention to look closely at the English jurisdiction and to critically examine the recent decision in the matter of an arbitration under *Rule K of The Football Association rules in CAA Base Limited, Key Sports Management Ltd (t/a Wasserman), Stellar Football Limited, Arete Management Limited v The Football Association Limited and Federation International de Football Association (FIFA)*.

The case concerns the challenge brought forward by a team of football agents, against *the FIFA regulations on football agents (FFAR)*, that came into force in January 2023. Although said regulations were also challenged in other national jurisdictions (i.e. Germany and the Court of Arbitration for Sport (CAS 2023/O/9370)), the present analysis solely and purely deals with the challenge in the English jurisdiction. At the time of writing, a decision is awaited from the ECJ in relation to a joint reference made by the German High Court (*Bundesgerichtshof*) seeking clarification of the application of the Meca Medina principles and compatibility of the FFAR with Article 101 (1) TFEU. Interim measures (an injunction) prevent the FFAR from being implemented by the German Football Association pending the ECJ's ruling.

The claimants in this matter were agents operating in the UK and abroad representing football players, pursuant to the regulatory frameworks of FIFA and the FA. The Respondents were the national (England) and international football governing bodies respectively. It is worth stating at the outset that all parties in these proceedings respected and followed the general premise that all disputes between football stakeholders should be submitted to arbitration, and recourse to national courts must

be avoided. Hence, the Claimants challenged the FIFA football agents' regulations (2023 ed) before the FA's Rule K Arbitration Tribunal. The FA, as first respondent, is obliged to implement and apply FIFA's regulatory framework. FIFA's regulatory framework, therefore, applies nationally and internationally, and, as a result, national and international transactions are influenced by the way such framework is interpreted and applied.

Although national member associations have certain latitude in creating and implementing their own regulations, such regulations can only be applied in the general spirit of the FIFA regulations. Also of note is that the tri-partite relationship, between a national association, members of the association and the international federation, does not only have its roots in the law of association, but predominantly finds application in the law of contract, which heavily influences the creation, application, and interpretation of such regulatory framework. Lastly, it is also of note that European and national competition law, as well as employment law, may influence the application of FIFA's regulatory framework.

Having considered the above, the claimants' challenge may be summarised as follows:

- The agents' objection to the FFAR provisions which cap their fees (the so called 'Fee Cap');
- The agents' objection to the FFAR provisions which require payment to be made over the life of the player's contract (the 'Pro Rata Payment Rules');
- The agents' objection to the FFAR provisions which prohibit payment of agents' fees on behalf of the player (the 'Client Pays Rules'); and
- The agents' objection to the FFAR provisions which prohibit dual or multiple representation (the 'Dual Representation' or the 'Multiple Representation' rule).

The Fee Cap was one of the most contentious issues, but one that proved to be the most straightforward in the subsequent analysis. FIFA was aware that the proposition of this rule was going to create enormous legal complications and likely to be challenged. In fact, the Tribunal expressly stated at para 222 of its Decision that: '...(2) from the outset FIFA knew that EU competition law might present a problem if a fee cap were to be introduced; and (3) in order to deal with the legal problem, FIFA recognised that it would have to find a legal justification to support it.'

Notwithstanding the above reference from the Tribunal, the author had warned in 2018, that it was likely the creation of a mandatory rule on a fee-cap would be challenged in the courts. The author presented his objections to the introduction of a mandatory rule on a fee-cap in October 2018 at the International Sports Law Conference in The Hague. The author further published such objections in 2019, in research which explained how and why FIFA's regulatory framework on agents needs to be revised. In this publication (Ioannidis 2019), the author explained:

*'Another notable recommendation (as opposed to a mandatory provision) relates to the remuneration of agents, which states that agents should not receive more than 3% of the player's basic gross income for the duration of the contract (3% of the transfer fee when the agent has been engaged on behalf of the club). In practice, it is hardly ever the case that an agent would claim a 3% fee in relation to a transaction. (From the author's experience, fees may range from 5% to 18%.) In addition, it is the author's opinion that if such a recommendation were to receive a mandatory nature, it would highly likely be challenged before courts and it is almost certain that it would fall foul of Articles 101 and 102 on distortion of competition and abuse of a dominant market position. [Emphasis added].'*

Consequently, the Tribunal concluded (at para 200) that sport governing bodies are seeking to regulate prices, as opposed to sporting activity, and this takes place in a purely economic context. As a result, the Proposed Rules cannot fall within the established principle of *Wouters/Meca-Medina*. The Tribunal, therefore, appeared to agree (at para 286) that imposing a mandatory fee-cap on football agents' payments, may violate European Union law and national competition law, as is the case with Great Britain.

Regarding the Pro Rata Payment Rule, the Tribunal stated at para 252 of its Decision that: "The purpose of the Pro Rata Payment Rules is said to be directed at agents encouraging their clients to leave clubs before the end of the contractual period." On this point, the Tribunal again concluded that there was insufficient evidence before it to demonstrate that agents 'encourage players' to terminate their contracts and/or agents usually attempt to 'engineer transfers.'

As the Tribunal stated at paras 257-258 of its Decision:

*'In the view of the Tribunal, this is not an adequate or proportional response to the perceived threat of agents engineering transfers. An early move to another club may be in the player's interests, and there may therefore be no question of "encouraging a player" or "engineering of transfers."*

*There may, as the Governing Bodies say, be cases in which agents have a financial incentive to destabilise a player's contract where it is not in the player's interest to move from a club, but there is no evidence before the Tribunal that abuse of this kind is so common that it is necessary to make agents' fees contingent on the subsistence of the player's contract.'*

Further, the Tribunal had to consider the challenge against the Dual Representation Rule and the Client Pays Rule. The Dual Representation rule is another important rule in FIFA's regulatory framework and was enacted with a view to restricting and eliminating possible conflicts of interest arising from players' transfers. It is a simple, yet effective rule, but, regrettably, it is not always followed by football agents. The rule (in the previous 2015 set of regulations and in the new 2022 version of the regulations), makes it clear that dual representation is only permitted if the agent has obtained prior written consent of all parties in the transaction. This is a mandatory

provision, and FIFA instructs national federations to implement this rule into their regulatory frameworks.

The Tribunal, concluded in its Decision (at para 259), that the Dual Representation Rule (and the Client Pays Rule) are not restrictive of competition:

*'As to whether these two Rules can be considered to be reasonably necessary to tackle the market failures and abuses identified by FIFA, the Tribunal can be brief. This is because the Tribunal finds that neither rule is in any event restrictive of competition by object or effect. The Tribunal's assessment is that the Dual Representation Rules and the Client Pays Rule can be regarded as reasonably necessary for, respectively, the avoidance of conflicts of interest and the promotion of transparency.'*

#### **IV. Conclusion**

It has been suggested, in this work, that there is an increasing need for cooperation between self-regulation and external regulation. Such is the importance of football for society that all consequences flowing from inadequate and ineffective regulation have the potential of damaging the image of sport and, therefore, instruct for a public, rather than a private response. To this effect, it is also important to conclude that those governing the regulation of agents must arrive at a specific path and decide to follow it without diversions. When one of my students recently asked me where self-regulation is going with this area of football law, I could not find a better answer than the one identified in one of Christopher Columbus' writings (written on his attempts to discover America): 'When I was travelling to America, I didn't know where I was going; when I arrived in America I didn't know where I were; when I left America, I didn't know where I had been.'

It follows that the only solution to this increasing anathema for self-regulation is a clear direction. The author is of the view that unscrupulous agents have no place in the sport of football, and they must be eliminated. The current regulatory framework must be applied in a prudent and purposeful manner and all stakeholders involved must condemn unethical, immoral and illegal behaviour from such individuals. More importantly, the different regulators in football must ensure they deal with complaints effectively and efficiently by applying the appropriate sanctions against such individuals. As prevention is always better than cure, it is submitted that agents must be qualified (based on the proposals in this work) and their regulation must, to a certain extent, be left to independent monitoring committees or the relevant state authorities (where collection and evaluation of evidence are concerned). It is only when tough and fair sanctions could apply against such individuals, that the problem of unscrupulous agents may be eliminated for ever.

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