



Sérvulo & Associados | Sociedade de Advogados, SP, RL

Update

European and Competition Law

August 2023

Competition law vs FIFA Football Agents

Regulations: who will win?

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“Game-changing regulations are shaking up the world of football agents. With FIFA’s recently approved Football Agent Regulations set to take full effect on 1 October 2023, FIFA’s interests and those of the agents seem to be at odds. With first court decisions on the table, may antitrust assume the role of a referee?”ⁱ

I. Background

Football is, in its essence, a competitive game played on the pitch. Nevertheless, the **FIFA Football Agent Regulations** (“FFAR”), approved on 16 December 2022, and applicable from 1 October 2023, has been in the spotlight of the football world.

The FFAR embodies a major shift in key aspects of agents’ activities. The main goals of the FFAR are, among others, to protect contractual stability between players and clubs, to promote transparency and to strive for fair representation and compliance with the highest standards of ethical conduct throughout the transfer process. As already mentioned in previous Sérvulo’s publications [(i) **“Guia para o novo Regulamento da FIFA sobre Agentes de Futebol - Parte I: Acesso à atividade”**; (ii) **“Guia para o novo Regulamento da FIFA sobre Agentes de Futebol - Parte II: O exercício da atividade de agente”**; (iii) **“Guia para o novo Regulamento da FIFA sobre Agentes de Futebol - Parte III: O exame”**], some of the key elements of the FFAR are:

- **The licence requirement for agents:** the licence is only granted upon application through the FIFA Platform and after passing a FIFA admission exam, plus the payment of an annual licence fee (USD 600 in 2023).
- **The prohibition of dual representation:** the FFAR introduces an express prohibition on football agents representing more than one party to a transaction. There is, however, an exception to this

rule: the football agent may represent both the player/coach and his destination club, subject to the express written agreement of both parties.

- **Fee caps:** (i) the fee of the agent acting on behalf of the buying club or the player is capped at 3 or 5 per cent of the player's annual remuneration; (ii) in case of permitted multiple representation, the agent's fee is capped at 6 or 10 per cent of the player's annual remuneration; (iii) the fee of the agent acting on behalf of the selling club is capped at a maximum of 10 per cent of the total transfer remuneration.

II. Litigation

The FFAR claims numerous advantages for parties involved in the world of football, but at the same time it has been criticised by various sectors.

The regulation of the activity of football agents is not a novelty in European case lawⁱ, with several agents and agents' associations recently bringing legal actions against FIFA in the courts of different Member Statesⁱⁱⁱ, including:

(i) the arbitration proceedings before the Court of Arbitration for Sport ("CAS") under No 2023/O/9370^{iv};

(ii) the Injunction **LG Dortmund, 24.5.2023, 8 O 1/23 (Kart)** issued by the District Court of Dortmund; and,

(iii) the proceedings before the Regional Court of Mainz, which have, for the time being, led to a **reference for a preliminary ruling** to the Court of Justice of the European Union ("CJEU"). The decision from the CJEU is being awaited.

In all these actions, the legality of certain provisions of the FFAR was challenged.

a) Case CAS 2023/O/9370

In arbitration case **CAS 2023/O/9370**, the Professional Football Agents Association ("PROFAA") requested that the CAS declare that certain articles of the FFAR violated European law rules, namely competition law rules and data protection, among others.

The CAS is the supreme global authority for settling sports disputes and is fully recognised by FIFA under Article 56 of its Statutes.

In this dispute, PROFAA invoked, among other provisions, an **infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")**.

The association argued that the fee caps constitute a breach of Article 101 TFEU as they prevent agents from competing substantially in terms of price, by eliminating any margin for differentiation at that level, which additionally has a dissuasive effect on potential new agents by creating significant barriers to market entry.

In addition, PROFAA argued that the imposition of a cap fees does not pursue a legitimate aim recognised by the CJEU, such as the protection of the integrity of the sport, but instead aims to protect FIFA's economic interests.

As to Article 102 TFEU, PROFAA argued, in summary, that FIFA abuses its dominant position, which it thereby extends to the market for football agents' services, and that the limits on the maximum fees^v amount not only to price-fixing but also to an unfair purchase price/transaction condition. It is emphasised, for example, that the setting of a cap may result in a **drop in income for the majority of football agents**, particularly those operating in the less competitive football leagues.

In this regard, the fact that a significant share of the overall universe of agents represents players who play in lower leagues and who have a relatively low market value is used to illustrate the conclusion that imposing limits on the fees of these agents, which are themselves already based on low salaries, may have the **unintended consequence of excluding these agents from the market and of increasing the market share of the small elite of "big" agents**^{vi}.

In addition to these difficulties, all agents are required to pay an annual fee of \$600 to FIFA.

Furthermore, it is argued that the licensing and eligibility requirements, such as the passing of a professional entrance exam in a limited number of languages, may constitute a breach of European law, not only as a violation of the freedom of establishment and the freedom to provide services, but also as a violation of the prohibition of discrimination, as well as an excessive restriction of the independence and commercial autonomy of agents, since the regulations have a total coverage of the market, and there is no alternative way for an agent to freely negotiate his contracts or fees.

On 24 July 2023, the CAS dismissed the action brought by PROFAA and upheld the arguments put forward by FIFA in defence of the legality of its regulations. The decision can be challenged before the Swiss Federal Supreme Court and, in any event, is not binding on the various national courts that have been and may yet be called upon to rule on the FFAR - nor on the CJEU (which will, predictably, be the last instance to rule, in final terms, on the legality of the regulation).

b) Injunction LG Dortmund, 24.5.2023, 8 O 1/23 (Kart)

In the Dortmund Regional Court, the arguments raised before the court were similar to the arguments raised before the CAS.

Differently, **the Dortmund Regional Court ruled unfavourably to FIFA**. The Court prohibited FIFA and the DFB ("*Deutscher Fußball-Bund*" - German Football Association) from applying certain provisions of the FFAR that infringe competition law, under penalty of fines of up to €250,000 for each infringement.

It should be noted that the decision of the Dortmund Regional Court - even though it was rendered in the context of an interim measure and not in the context of a main action, and even though it preceded the CAS decision, which ruled in favour of FIFA - constitutes a favourable signal to the claims of the agents challenging the regularity of the FFAR, and **this decision may pave the way for other decisions in the same direction by courts in other Member States^{vii}**.

The decision has already been appealed to the Higher Regional Court of Dusseldorf, which will hear the matter in the coming months. If favourable, the decision will render the FFAR unenforceable in Germany.

III. What is the impact for agents in Portugal?

Actions in national courts may appear to be an obstacle to domestic enforcement of the FFAR and there is speculation about similar actions being brought in Portuguese courts.

Notwithstanding the controversy and flaws that football agents have been pointing out to the FFAR, **it is advised that all football agents review their agency contracts with players to ensure compliance with the regulation before 1 October 2023^{viii}**.

ⁱ "FIFA's Football Agent Regulations – Next round of antitrust disputes", Paul Droessler, 26.5.2023, available at: <https://antitrustpolitics.com/2023/05/26/fifas-football-agent-regulations-next-round-of-antitrust-disputes/>

ⁱⁱ See, inter alia, the judgment of the Court of First Instance (Fourth Chamber) of 26.1.2005 in Case T-193/02, **Piau v Commission**, which already discussed the conformity of the then current regulation on football agents with European competition law [Judgment of the Court of First Instance (Fourth Chamber) of 26 January 2005 in Case T-193/02, *Piau v Commission*, EU:T:2005:22].

ⁱⁱⁱ Actions have been brought in the Netherlands, Spain, the United Kingdom, Switzerland and Czech Republic, among others.

^{iv} **CAS 2023/O/9370**, Professional Football Agents Association (PROFAA) v. FIFA, 24.7.2023.

^v Article 15 of FFAR.

^{vi} "Swiss soccer player agents file challenge to FIFA rules", AP News, 21.3.2023, available at: <https://apnews.com/article/soccer-fifa-player-agents-legal-challenge-2a9811e049292a385b7b29eb616828c2>

^{vii} FIFA's Football Agents Regulation Violates Competition Law", Kluwer Competition Law Blog, Tim Lichtenberg (University of Cologne), 20.7.2023, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/07/20/fifas-football-agents-regulation-violates-competition-law/>

^{viii} "Will the FIFA Football Agent Regulations reform the role of the football agent for the better?", Lexology, 1.3.2023, available at: <https://www.lexology.com/library/detail.aspx?g=c0dfd26d-02b2-4e73-8f1a-39f274443a01>