

SO NEAR, SO FFAR

HOW LEGAL CHALLENGES TO FIFA'S NEW FOOTBALL AGENT REGULATIONS ARE PLAYING OUT IN EUROPE

As we get closer to its full implementation on 1 October 2023, this briefing looks at recent legal challenges in European courts against FIFA's new Football Agent Regulations (FFAR), including the injunction decision by a Dortmund court in May to stop the implementation of these regulations in Germany until the European Court of Justice (ECJ) has ruled on the matter.

The backdrop

Having announced its intention to reform agent regulations "to protect the integrity of football and prevent abuses" back in 2020¹, FIFA published its new FIFA Football Agent Regulations on 6 January 2023 to replace its Regulations on Working with Intermediaries, which have been in place since 2015. FFAR partially entered into force from 9 January 2023, with the rest of its provisions becoming effective from 1 October 2023 (and national member associations, such as the FA in England, due to implement their own domestic regulations by 30 September 2023).

FFAR introduced a wide-ranging suite of new regulations, with some of the most high-profile changes being caps on service fees, enhanced eligibility and licensing conditions (including the return of the agent exam) and prohibitions on offering services to more than one party except with respect to dual representation of the player and buyer club only.

FIFA's agent regulations are, historically, no stranger to dissent from agents, and unsurprisingly this has proved to be the case here, with a number of influential agents and agents' associations expressing their discontent when FFAR was announced. As has been the case before, some agents have even lodged legal challenges against FFAR, and European courts have handed down a number of interesting judgments on this matter in recent weeks and months.

Some recent challenges to FFAR

In the aftermath of FFAR, agents or groups of agents have commenced legal challenges against FIFA in the courts of several countries across Europe. For example:

- In Switzerland, an association of agents asked the Swiss federal competition commission in March to (i) opine on FFAR, and (ii) put in place temporary measures to prevent its implementation. No decision by the Swiss federal competition commission has been reported to date.
- In Germany, two agents requested an injunction preventing FFAR implementation from the Mainz Regional Court in March, arguing that it breached domestic and EU competition laws. The court denied the injunction, but referred the questions of EU competition law to the ECJ. The ECJ is yet to hand down its ruling.
- In the Netherlands, two agents and two collective agent groups also asked the Central Netherlands Court (Utrecht) for an injunction to prevent FFAR implementation in the Netherlands. The court rejected the injunction in May, referring in its ruling to the Mainz judgment, and likewise chose to wait for the ECJ ruling rather than itself block FFAR now.
- Also in Germany, there was a similar injunction request in May by three agents to the District Court of Dortmund. Deviating from the Mainz and Utrecht court decisions, the Dortmund court made the significant decision to issue an injunction against FIFA and the German Football Association (DfB). This blocks the implementation of FFAR in Germany pending the ECJ ruling.

¹ <https://www.fifa.com/about-fifa/organisation/news/reform-proposals-concerning-football-agents-regulations>

What legal arguments are the agents putting forward?

The arguments from the agents in each of the Mainz, Utrecht and Dortmund proceedings were broadly similar. As a starting point, the agents have argued that FIFA do not have a legal mandate or authority to regulate the activity of agents.

From an antitrust perspective, the main challenge the agents are putting forward is that features of FFAR contravene EU competition laws as set out in Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU). Article 101 TFEU prohibits any agreement or concerted practice between two or more “undertakings” (independent businesses) that may affect trade between EU member states and that has the object or effect of restricting, preventing or distorting competition. Article 102 TFEU prohibits dominant companies from abusing their market power in a way that may affect trade between EU member states.

The agents argue that the consequences of FFAR could amount to contraventions of the prohibitions in Articles 101 and 102 TFEU. For example, they argue that the service fee cap in particular will result in a large drop in income for the majority of agents. This could ultimately drive some agents out of the market and create barriers restricting smaller agents from reaching the level of success enjoyed by the elite. The agents also claim that FFAR curbs the commercial independence and autonomy of agents, as the regulations have full market coverage so there is no alternative way for an agent to freely negotiate their agreements or fees.

While antitrust challenges form the bedrock of their arguments, the agents have also argued that FFAR falls foul of other EU laws. For example, the licensing and eligibility requirements, such as passing an exam in a limited selection of languages, may breach EU law on the freedom of establishment and freedom to provide services. The General Data Protection Regulations (GDPR) have been cited too, particularly in relation to the disclosure and publication obligations under FFAR and whether this proposed processing of data is lawful.

How is FIFA defending FFAR?

As you would expect, FIFA is looking to robustly defend itself and FFAR in these European court cases. One of its main lines of argument is that FFAR ought to be exempt from applicable EU competition laws because the regulations aim to “ensure the integrity and functioning of

the transfer market, sporting competition and professional football as a whole.”

In addition, FIFA has argued that it is responsible for regulating the football transfer market, of which agents have major influence and are participants, and that there are and have been an array of problems and undesirable developments within the football transfer market that FFAR seeks to address and remedy (such as disparity between agent fees on the one hand and training compensation / solidarity contributions paid to training clubs on the other, a general lack of transparency over agent behaviour and fees and the thorny issue of conflicts of interest). FIFA has rebutted arguments around the freedom of establishment and freedom to provide services successfully in the past on the basis that the licence system results in a qualitative selection, appropriate for raising professional standards, rather than a quantitative restriction on access to the occupation.

FIFA looks to previous European jurisprudence for support, such as the Piau case² where, at the time of an earlier form of their agent regulations being introduced in 2008, the EU’s General Court found that the European Commission did not err in considering that the potential competition law infringements could be justified under Article 101(3) TFEU (then Article 81(3)) (FIFA argued that the 2008 regulations sought to raise the “professional and ethical standards for the occupation of players’ agents in order to protect players, who have a short career”). In another historic sporting case that related to the International Olympic Committee’s anti-doping rules³, the ECJ confirmed that, even where EU competition laws apply, rules that restrict the freedom of action of market participants will not necessarily constitute a restriction of competition that is incompatible with EU laws.

What happens now?

The Dortmund injunction effectively means that FFAR cannot be implemented in Germany by the DfB until the ECJ hands down its ruling, and it is not yet clear when that might be. FIFA commented that it was reviewing the Dortmund ruling, and reserved its right to appeal the Dortmund injunction to a higher court in Germany. Meanwhile, FIFA also noted that the Court of Arbitration for Sport (CAS) is already assessing FFAR’s compatibility with substantive EU law and a ruling is expected by the end of July.

² Case T-193/02 *Piau v Commission* [2005] ECR II-0209

³ Case C-519/04 P, *Meca-Medina v Commission* [2006] ECR I-6991

A lot will turn on these judgments by CAS and the ECJ. There will be a range of interested parties across football waiting to see any developments through the summer and autumn, and we would not be surprised to see more domestic court judgments one way or the other in the interim. But for now, and until the courts or governing bodies say otherwise, clubs, agents and players should continue to prepare for the full implementation of FFAR from 1 October 2023.

If you would like further information on this topic, please contact Hemita Sumanasuriya, Lorna Nsoatabe or Divya Pathak, or speak to your usual Slaughter and May contact.

CONTACT



HEMITA SUMANASURIYA
PARTNER
T: 0207 090 3488
E: hemita.sumanasuriya@slaughterandmay.com



LORNA NSOATABE
PARTNER
T: 0207 090 3708
E: lorna.nsoatabe@slaughterandmay.com



DIVYA PATHAK
ASSOCIATE
T: 0207 090 5149
E: divya.pathak@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2023.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com