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National Implementations - PORTUGAL

By João Lima CLUNY & Dzhamil ODA
Lawyers, MORAIS LEITÃO, GALVÃO
TELES, SOARES DA SILVA & Ass.
Lisbon - Portugal

Introduction

The new FIFA Regulations on Working with Intermediaries (FIFA RWI), approved in the context of FIFA's Executive Committee meeting held on 21 March 2014¹²⁹, has come into force on 1 April 2015. These new FIFA regulations replace the Players' Agents Regulations (2008) and represent a paradigm shift of the system in place up to date.

One of the novelties of this new regime is the change of the supervision "actors". *De facto*, from now on it will be up to the National Football Associations to implement and enforce (at least¹³⁰) the minimum standards foreseen in the FIFA RWI by adopting internal regulations incorporating the principles set out by FIFA. Notwithstanding, one should bear in mind that, in accordance with Article 1 (2) of the FIFA RWI, the implementation and enforcement of the standards foreseen in the FIFA RWI shall in any case be "subject to the mandatory laws and any other mandatory national legislative norms applicable to the associations."

This is in line with one of the arguments used by FIFA to implement the reform: existence of frequent conflicts between FIFA rules and different national legislation. Thus, and considering that a unitary system is of course not viable, FIFA's

rationale is that its Regulations should be aimed at establishing a somewhat fragmented approach to the intermediation activity around the globe.

As to the Portuguese case, we can only assume that the Portuguese Football Federation (PFF) has thoroughly examined the relevant national legislation governing the intermediation activity in order to adopt internal regulations on working with intermediaries which would be in line with the Portuguese current legal framework on the matter and, at the same time, comply with the minimum standards of the FIFA RWI. In this respect, PFF has published the PFF Regulations on Intermediaries (PFF Regulations) on 1 April 2015, effective as from the same date.

This article aims at providing an overview on the legal rules governing intermediation activity in Portugal and evaluates the impact of such rules on the PFF Regulations which, as referred above, were adopted in light of the requirements provided for in FIFA RWI.

Overview of the relevant rules applicable to intermediation activity in Portugal

The relevant rules on intermediation activity in Portugal, which is centred on the concept of sports agent, are contained in three key pieces of legislation: Law no. 5/2007, 16 January 2007; Law no. 28/98, 26 June 1998; and Law no. 50/2007, 31 August 2007.

Law no. 5/2007, which is the national base law for physical activity and sports, delineates the role of sports agent and provides the following definition: "sports agents are duly accredited natural or legal

persons who, on an occasional or permanent basis, carry out representation or intermediation activity regarding conclusion of sports training, sports employment or image rights related contracts"¹³¹.

In accordance with Article 37 (2) of Law no. 5/2007, sports agents cannot act in the name of and on behalf of underage athletes. In addition, this law establishes a confidentiality obligation applicable to sports agents regarding facts concerning the personal and professional life of athletes which are known to a sports agent due to the performance of his duties¹³².

Law no. 28/98 was the first legal instrument in Portugal addressing the concept of sports agent. This law encompasses the legal framework for athletes' employment contracts and sports' training contracts and contains a chapter dedicated to sports agents, which governs four main topics: (01) exercise of sports agent activity; (02) registration of sports agents; (03) sports agents remuneration; and (04) limitations to activity. The legal framework established by Law no. 28/98 may be summarised as follows:

(i) a sports agent is defined as "a duly accredited natural or legal person who carries out representation or intermediation activities, on an occasional or permanent basis, in consideration of a remuneration, in the conclusion of sports contracts"; therefore only persons having been previously duly accredited by competent sports authorities may perform this activity¹³³;

(ii) a sports agent may only act in the name and on behalf of one of the parties in a contractual relationship¹³⁴;

¹²⁹ Please see FIFA's statement "FIFA Executive Committee approves Regulations on Working with Intermediaries"

www.fifa.com/aboutfifa/organisation/administration/news/newsid-2301235/

¹³⁰ In accordance with Article 1 (3) of the FIFA RWI "[t]he right of associations to go beyond these minimum standards/requirements is preserved."

¹³¹ Art. 37 (1) of Law no. 5/2007

¹³² Art. 37 (3) of Law no. 5/2007

¹³³ Art. 2 par. d), in line with Art. 22 (1)

¹³⁴ Art. 22 (2)

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(iii) sports agents that intend to carry out intermediation activity in contracting athletes should be registered before the competent sports federation and, in the case of sports federations where there are professional competitions, sports agents should also be registered before the respective league¹³⁵;

(iv) intermediation contracts entered into with sports agents which are not duly registered, including the contractual clauses that establish the respective remuneration, are considered as "non-existent"¹³⁶;

(v) sports agents that carry out intermediation activities may only be remunerated by the party they represent¹³⁷;

(vi) if there is no express written agreement regarding the amount to be paid to the sports agent, this amount shall be capped at 5% of the contract's global amount¹³⁸;

(vii) without prejudice to other limitations provided for in sports' regulations adopted by competent sports federations, the following entities/persons may not carry out sports agents activity: sports' companies, clubs, sports' managers/directors, members of sports companies' bodies, coaches, athletes, referees, medical staff and masseurs¹³⁹.

Finally, *Law no. 50/2007* establishes the criminal liability framework for unsporting behaviour, also applicable to sports agents. However, the definition of sports agents provided for in this law is wider than those provided in the other two laws identified above, because it includes all the persons that carry out representation, intermediation or

assistance activities, regardless whether accredited or not.

The PFF Regulations – Main differences in light of the Portuguese legal framework

As already referred above, the PFF Regulations came into force on 1 April 2015 and are the result of a balance between the specificities of the Portuguese legal framework applicable to sports agents and the *de minimis* requirements established by FIFA Regulation RWI. Thus, in line with a FIFA RWI provision, which safeguards the National Football Associations' necessity to respect "the mandatory laws and any other mandatory national legislative norms applicable to the associations"¹⁴⁰, Article 1 (2) of the PFF Regulations expressly foresees that "[i]n case of conflict between these Regulations and FIFA Regulations on Working with Intermediaries, these [PFF] Regulations shall prevail."

In this context, the PFF Regulations contain the following main differences *vis-à-vis* FIFA RWI, which are mainly due to the Portuguese legal framework applicable to sports agents:

*The definition of "Club" includes sports companies*¹⁴¹. This refinement is in line with national legal provisions¹⁴² concerning the persons that are not allowed to carry out sports agent activity due to conflict of interests and takes into consideration that, in the Portuguese jurisdiction, clubs that intend to participate in professional competitions must adopt the form of a sports' company¹⁴³.

*Intermediaries may only act in the name and on behalf of one of the parties in the contractual relationship*¹⁴⁴, with no exceptions, as provided for in Article 22 (2) of Law no. 28/98. This is an important deviation from FIFA RWI [in particular, from Article 8 (2) and (3)], as the Portuguese legal framework does not allow intermediaries to represent both player and club, even if such conflict of interest is properly disclosed by the intermediary and the player and the club give their express written prior consent.

>> The total amount of remuneration per transaction due to the intermediaries by the players or clubs, as the case may be, is in principle capped at 5% of a player's basic gross income for the entire duration of the relevant employment contract

*Intermediaries may not act in the name and on behalf of underage football players*¹⁴⁵, a prohibition which is in line with the provisions of Article 37 (2) of Law no. 5/2007.

In accordance with Article 6 (1) of the PFF Regulations, *the exercise of the intermediation activity is only allowed to natural and legal persons that are registered with the PFF*. In addition, Article 6 (2) of the PFF

¹³⁵ Art. 23 (1) and (2)

¹³⁶ Art. 23 (4)

¹³⁷ Art. 24 (1)

¹³⁸ Art. 24 (2)

¹³⁹ Art. 25

¹⁴⁰ FIFA RWI, Art. 1 (2)

¹⁴¹ Art. 1 (4) of the PFF Regulations

¹⁴² Art. 25 (a) of Law no. 28/98

¹⁴³ Decree-Law no. 10/2013, 25 January 2013

¹⁴⁴ Art. 5 (3) of the PFF Regulations

¹⁴⁵ Art. 5 (4) of the PFF Regulations

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Regulations states that an intermediary should previously request registration whenever involved in a transaction. Considering the applicable national legal provisions¹⁴⁶, which require that (i) sports agents that intend to carry out intermediation activity should be registered before the competent sports federation, and (ii) therefore should be duly accredited when performing such activity, we deem that the registration by an intermediary should be requested before the PFF at the moment prior to entering into a representation contract and participating in a transaction. This solution seems to be in line with Article 9 (2) par. a) of the PFF Regulations, where is established that a representation contract should contain the registration number of the intermediary.

>> The registration by an intermediary should be requested before the PFF at the moment prior to entering into a representation contract and participating in a transaction

The total amount of remuneration per transaction due to the intermediaries by the players or clubs, as the case may be, is in principle capped at 5% of (i) a player's basic gross income for the entire duration of the relevant employment contract, in the case of intermediaries who have been engaged to act on a player's behalf; (ii) a player's basic gross income for the entire duration of the relevant

employment contract, in the case of intermediaries who have been engaged to act on a club's behalf in order to conclude an employment contract with a player; and (iii) the eventual transfer fee paid in connection with the relevant transfer of a player, in the case of intermediaries who have been engaged to act on a club's behalf to conclude a transfer agreement, save if otherwise agreed in writing. This non-mandatory limit is aligned with the provision contained in Article 24 (2) of Law no. 28/98, which also imposes a non-mandatory limit of 5% of the global amount of the relevant contract for sports agents remuneration. It is however clear that the parties are perfectly free to establish the intermediary remuneration that they deem fit in the representation contract, as long as such remuneration is set out in writing.

The PFF Regulations – Beyond FIFA rules

Pursuant to Article 1 (3) of FIFA RWI "[t]he right of associations to go beyond these minimum standards/requirements is preserved." Using this prerogative, the PFF introduced several provisions that go beyond FIFA RWI and which, in the majority of cases, are intended to densify the content of the minimum requirements established therein. The provisions that go beyond FIFA RWI are identified as follows:

Object, scope and definition of "intermediary"

The PFF Regulations govern the engagement of services to be provided by an intermediary to a player or a club, as the case may be, in the context of (01) conclusion or renewal of employment contracts between a player and a club; and (02) temporary or definitive transfer

agreements between two clubs¹⁴⁷, and are applicable to intermediaries and to all the players and clubs affiliated in the PFF, Portuguese League for Professional Football and district and regional football associations¹⁴⁸.

In line with the above, an intermediary is defined as "a natural or legal person with legal capacity who, for remuneration or free of charge, represents a player or a club in negotiations with the purpose of executing an employment contract or a transfer agreement"¹⁴⁹.

Furthermore, considering the definition for "sports agents" provided for in Law no. 5/2007¹⁵⁰, it seems that the law has a wider scope of application than the PFF Regulations, by also including intermediation contracts related to image rights exploitation agreements. Therefore, one may assume that intermediaries are also allowed to carry out their activity in this context.

Engaging intermediaries

Clubs, players and intermediaries are not allowed to propose to any other party involved in a transaction (directly or indirectly), that such transaction becomes dependent on, or conditioned by, the agreement of the player with a particular intermediary¹⁵¹.

Registration of intermediaries

Pursuant to Article 6 of the PFF Regulations, without prejudice to the intermediary obligation to previously

¹⁴⁶ Art. 22 (1) and 23 of Law no. 28/98 and Art. 37 (1) of Law no. 5/2007

¹⁴⁷ Art. 2 (1) of the PFF Regulations

¹⁴⁸ Art. 3 of the PFF Regulations

¹⁴⁹ Art. 4 of the PFF Regulations

¹⁵⁰ Art. 37 (1): "sports agents are duly accredited natural or legal persons who, on an occasional or permanent basis, carry out representation or intermediation activity regarding conclusion of sports training, sports employment or image rights related contracts."

¹⁵¹ Art. 5 (5) of the PFF Regulations

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request registration whenever involved in a transaction, such registration may also be requested for a whole sporting season in which case the PFF shall issue the respective supporting document.

Registered intermediaries, when carrying out their activity, are allowed to use the designation "Intermediary registered in the PFF"¹⁵², but cannot, however, use PFF's brands, logos or any other PFF's distinguishing marks in any case¹⁵³.

Requisites for registration of intermediaries

Regarding requisites for intermediary registration or renewal of registration, apart from the Intermediary Declaration foreseen in the FIFA RWI (which, in the PFF Regulations, has some minor differences), the intermediaries must submit the following additional elements¹⁵⁴: (01) a copy of civil and fiscal identification; (02) a declaration on honour that there are no contractual relationships with Leagues, Associations, Confederations or with FIFA which may give rise to a potential conflict of interests; (03) an updated criminal record; (04) a copy of civil liability insurance policy suitable for carrying out the intermediation activity, which must cover liability for damages up to an amount of EUR 50,000; (05) a statement of non-existence of intermediary insolvency situation; and (06) a certification issued by competent authorities that tax and social security obligations are fulfilled. All this documentation should be drafted in Portuguese¹⁵⁵.

In addition to violent and financial crimes, persons convicted for (01)

crimes related to racism, to violence and xenophobia in sports, up to five years after serving the relevant sentence, unless a different sanction is applied by judicial decision¹⁵⁶, (02) doping related crimes or unsporting behaviour crimes¹⁵⁷, up to five years after serving the relevant sentence, unless a different sanction is applied by judicial decision¹⁵⁸, and/or (03) for any crime punishable with a sentence of imprisonment in excess of three years, up to five years after serving the relevant sentence, unless a different sanction is applied by judicial decision¹⁵⁹, may not carry out intermediary activities.

>> A fee of EUR 1,000 is due for registration as an intermediary or renewal of registration

If the intermediary is a legal person, in order to be registered, one of its legal representatives must also be registered as an intermediary with the PFF. A fee of EUR 1,000 is due for registration as an intermediary or renewal of registration¹⁶⁰. Players' agents previously licensed by the PFF up to March 2015 wishing to carry out intermediation activities are exempted from paying the registration fee during sporting seasons 2014/15, 2015/16 and 2016/17¹⁶¹.

Representation contract

In addition to the minimum details foreseen in FIFA RWI, pursuant to the PFF Regulations the

representation contract should also contain the registration number of the intermediary¹⁶².

In accordance with Article 9 (2) par. c) of the PFF Regulations, the duration of representation contracts may not exceed two years, nor be subject to automatic renewal. In this regard, it will be interesting to see what will happen in practical terms in case other federations establish different terms for the duration of the representation contract.

Furthermore, representation contracts must be concluded in four copies - one copy for each party, one for the PFF and one for the Portuguese Professional Football League, when the contracts are related to players or clubs who participate in the respective competitions¹⁶³. In addition, in representation contracts with players, their signature must be certified in presence and the contract must mention that the player was provided with a copy¹⁶⁴.

Intermediaries have to deposit the representation contract with the PFF before registration of the relevant transaction¹⁶⁵.

Lastly, players, clubs and intermediaries should immediately inform PFF of any assignment, early termination, subcontracting, amendment or any other situation affecting the deposited representation contracts, within 10 days after the circumstance that caused the amendment¹⁶⁶. The assignee intermediary also has to be registered with the PFF¹⁶⁷.

¹⁵⁶ Art. 7 (2) par. b) of the PFF Regulations

¹⁵⁷ Crimes related to behaviours capable of affecting the truth, loyalty and correction of the competition and its result in the sports activity, foreseen in Law no. 50/2007

¹⁵⁸ Art. 7 (2) par. c) of the PFF Regulations

¹⁵⁹ Art. 7 (2) par. d) of the PFF Regulations

¹⁶⁰ Art. 7 (5) of the PFF Regulations

¹⁶¹ Art. 14 (2) of the PFF Regulations

¹⁶² Art. 9 (2) par. a) of the PFF Regulations

¹⁶³ Art. 9 (2) of the PFF Regulations

¹⁶⁴ Art. 9 (2) par. h) of the PFF Regulations

¹⁶⁵ Art. 9 (3) of the PFF Regulations

¹⁶⁶ Art. 9 (4) of the PFF Regulations

¹⁶⁷ Art. 9 (4) of the PFF Regulations

¹⁵² Art. 6 (4) of the PFF Regulations

¹⁵³ Art. 6 (5) of the PFF Regulations

¹⁵⁴ Art. 7 (1) of the PFF Regulations

¹⁵⁵ Art. 7 (3) of the PFF Regulations

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Payments to intermediaries

In the case of intermediaries who have been engaged to act on a club's behalf to conclude a transfer agreement, the PFF Regulations expressly foresee the possibility of intermediary remuneration being subject to future terms¹⁶⁸.

Sanctions applicable to intermediaries

Regarding sanctions framework, the PFF Regulations make reference to PFF's competence to apply penalties to any of the parties that breaches the rules foreseen therein¹⁶⁹, but do not densify the applicable infringements. In this context, one may presume that possible infringements of the PFF Regulations will be dealt with under the PFF Disciplinary Regulations.

Conclusion

In our previous publication on FIFA RWI¹⁷⁰ we stated that, in our opinion, *"the path chosen [by FIFA] was not the best to the extent that the deregulation of this activity will harm clubs and players which now, rather than relying on the collaboration of specialized and properly accredited professionals, are 'in the hands' of anyone interested in developing this activity, regardless of their competence and knowledge of the rules that govern the profession."*

In this context, however, we also mentioned that *"we can only see how the Portuguese Football Federation will regulate this matter, because, only then, we will be able to*

*fully comprehend the impact it will have on the way the intermediation activity will be performed in Portugal."*¹⁷¹

An analysis on the PFF Regulations allows us to conclude that the PFF has taken into due account the risks of intermediation activity being carried out by persons that may not meet all the necessary requirements for this purpose. This conclusion is based on the wide set of registration requirements necessary to become an intermediary (which, recognizing FIFA's view, seems to try to avoid abuses), together with the obligations that intermediaries, players and clubs are subject to.

In order to minimize the above identified risks, it is now important that the rules contained in the PFF Regulations are effectively enforced (and we may only assume that this will be the main goal of the PFF), as it would be of essence to send a clear message that intermediation activity should be carried out in a serious manner and in compliance with the rules of the game.

From a purely legal perspective, the PFF Regulations seem to be a balanced set of rules that manage to combine the minimum standards of FIFA RWI and the Portuguese legal framework applicable to intermediation activity.

However, and despite PFF's Regulations efforts as detailed above, we still believe that FIFA's option to change the system that was implemented and working well may produce adverse effects and may be responsible for serious cases of players' exploitation. We hope that the future proves us wrong. •

¹⁶⁸ Art. 11 (3) of the PFF Regulations

¹⁶⁹ Art. 13 (1) of the PFF Regulations

¹⁷⁰ Please see M. LEITÃO, G. TELES, SOARES DA SILVA & Associados Sports Law Newsletter, no. 3, November 2014, J. LIMA CLUNY, "The New Intermediaries" www.mktts.pt/xms/files/Publicacoes/Newsletters_Boletim/2014/3_Newsletter_Sports_Law.pdf

¹⁷¹ *Idem*.