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& ASSOCIADOS
SOCIEDADE DE ADVOGADOS

NEWSLETTER

Nº 4 | NOVEMBER 2015

SPORTS LAW

FIFA Regulations on Working with Intermediaries – once again, EU Law: the German case

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Background

Following the approval of the new FIFA Regulations on Working with Intermediaries (***FIFA Regulations***)[1], National Football Associations (***NFAs***) were required to implement and enforce (at least[2]) the minimum standards foreseen in the FIFA Regulations by adopting internal regulations incorporating the principles set out by FIFA, "subject to the mandatory laws and any other mandatory national legislative norms applicable to the associations."[3].

This was a major paradigm shift and required the NFAs to achieve balanced solutions in adapting their rules to the minimum standards required by FIFA, taking into consideration applicable national (and, for the European NFAs, also EU) legal and regulatory provisions. Such minimum standards include, *inter alia*, recommended intermediary fee caps, several duties of disclosure, representation of minors, and suitability of intermediaries. All matters of contentious nature have already been highlighted[4].

Well, less than one month after the entry into force of the FIFA Regulations, there is already a *battle* in place in Germany, where the Regulation on Intermediaries recently adopted by the German Football Federation (*Deutscher Fußball bund*, ***DFB***) (***DFB Regulation***)[5] is under *siege*. Guess what are the *weapons* used to challenge this Regulation? Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), *idusest*, EU Law all over again (!)

The "battlefront"

The battle took place in a summary proceeding before the Regional Court (*Land gericht*) of Frankfurt am Main (***Court***) in which the intermediary Rogon Sport management (***Applicant***) requested an interim injunction against the application by the DFB of certain provisions of the DFB Regulation, claiming that they breached Articles 101 and 102 TFEU. The Court, following a summary review, considered some of the EU-law missiles launched by the Applicant to be prima facie well-aimed and, due to the upcoming transfer window and the potential loss of business and clients, granted injunctive relief (***Judgement***).[6]

Considering the challenged provisions of the DFB Regulation to constitute a decision by an association of undertakings appreciably restricting competition and trade within the meaning of Article 101(1) TFEU[7], the Court analysed whether they could nevertheless escape that provision under the so-called "rule of reason" doctrine[8]. While acknowledging the general need to regulate the activity of intermediaries in order to preserve the integrity of the transfer system and to protect clubs and players, in particular minors, the

1 Which has come into force on 1 April 2015 and replaced FIFA's Players' Agents Regulations (2008).
2 In accordance with Article 1 (3) of the FIFA Regulations "[t]he right of associations to go beyond these minimum standards/requirements is preserved.".
3 Article 1 (2) of the FIFA Regulations.
4 *See* Nick DE MARCO, "The New FA Intermediaries Regulations & Disputes Likely to Arise", LawInSport, 31 March 2015, accessed at http://www.lawinsport.com/articles/item/the-new-fa-intermediaries-regulations-disputes-likely-to-arise.
5 Accessed at http://www.dfb.de/fileadmin/_dfbdam/61514-DFB-Reglement_fuer_Spielervermittlung_120515.pdf.
6 Regional Court Frankfurt/Main, Judgment of 29 April 2015, Case2-06 O 142/15.
7 In line with EU General Court, Judgement of 26 January 2005, Case T-193/02, *Piau v Commission*, paras. 69 et seq.
8 Based on EU Court of Justice, Judgment of 18 July 2006, Case C-519/04 P, *Meca-Medina v Commission*, paras. 42; Judgement of 19 February 2002, Case C-309/99, *Wouters*, paras. 97 et seq.

Court considered the following provisions to go beyond what is necessary to attain this goal, or to be disproportionate, and therefore to fall foul of Article 101(1) TFEU: ***(i)*** the requirement for clubs and players to engage only intermediaries who submit to the rule book and jurisdiction of the DFB and other football associations and confederations, including FIFA[9]; ***(ii)*** the requirement for clubs to remunerate intermediaries in the form of a flat fee to be agreed upon prior to conclusion of the relevant transaction, to the extent this would exclude a calculation of the fee on the basis of the transfer value[10]; and ***(iii)*** the requirement for clubs not to remunerate intermediaries for services related to minors, as far as this applies to licensed (1st and 2nd Division, *Bundesliga*) players[11] (***Problematic Provisions***)[12].

As a result, the Court granted an injunction prohibiting the DFB from applying the Problematic Provisions on pain of an administrative penalty of € 250,000 for each violation. In response to theJudgement, the DFB published a note on its website restating the operative part of the Judgement and informing that intermediaries may, for the time being, be registered with the DFB without submitting to the rule book and jurisdiction of the DFB and other associations and confederations[13].

Final notes

Given that the Judgement was handed down in a summary proceeding, a final decision is left to a judgement in the main proceeding. The Court might therefore still change its mind, although experience suggests that this is not very likely. However, as far as is publicly known, the DFB has neither appealed the Judgement nor, to date, requested the Applicant to initiate the main proceeding. The issue is therefore currently in a state of legal limbo.

Should the main proceeding at some point be initiated, and should the final judgement confirm the prima facie conclusions in the Judgement that the Problematic Provisions fall foul of Article 101(1) TFEU, they would be null and void (Article 101(2) TFEU) and could thus no longer be validly applied by the DFB. Vis-à-vis the FIFA, the DFB could in that case arguably invoke Article 1(2) FIFA Regulation in defence of its non-implementation of the corresponding (and essentially identical) provisions of the FIFA Regulation[14]. Such an outcome, if not the current state already, might well prove to be the first nail in the coffin for at least part of the new FIFA Regulation. ■

The German Court, in a summary proceeding, considered several provisions of the DFB Regulation prima facie to fall foul of Article 101(1) TFEU. Should a final judgement confirm these prima facie conclusions, the provisions concerned would be null and void (Article 101(2) TFEU) and could thus no longer be validly applied by the DFB.

9 § 2 (2) DFB Regulation. In the Court's view, there were no indications that the contractual obligations of intermediaries could not be enforced as effectively under common law and in ordinary courts.
10 § 7 (2) DFB Regulation. The Court failed to see how an exclusion of this most typical form of intermediate remuneration could contribute to the attainment of the goals pursued.
11 § 7 (7) DFB Regulation. According to the Court, licensed players, due to their elevated market position, did not require the same degree of protection as players in lower divisions. Moreover, given the higher transfer values and potential remuneration involved, the prohibition would, in the Court's view, disproportionately encroach on the rights of intermediaries.
12 Regional Court Frankfurt/Main, supra note, paras. 71-73, 85-94.
13 DFB's note accessed at http://www.dfb.de/fileadmin/_dfbdam/60842-Aktueller_Hinweis_zum_Reglement.pdf.
14 Articles 2(2), 7(2), 7(8) FIFA Regulation.

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Participation of Football Clubs in the 1st and 2nd League – prerequisites of financial nature

At the end of each sports season, and in preparation for the next season, all Football Clubs classified to compete in the 1st and 2nd Leagues are invited to apply before the Portuguese League for Professional Football ("Liga Portuguesa de Futebol Profissional", the ***LPFP***).

The growing movement towards transparency, "sports truth" and competitions' sustainability is the reason behind a more refined scrutiny of the Football Clubs involved in the competitions.

Apart from a wide set of general and eminently formal conditions – such as documentation on companies statutes, their capital distribution, list of employees and binding declarations about some future compliance conducts – "chronic" debt regularization declarations to players, coaches, Social Security, and Tax Authority (Prerequisites 11 and 15, respectively) are the documents that usually draw more attention.

> In order to participate in the 1st and 2nd League Football Clubs are obliged to fulfil some prerequisites of a financial nature, such as the absence of debts to players and coaches, Social Security and Tax Authorities. In fact, however, those requirements are fulfilled based on proper concepts or wide exceptions of the absence of debts.

With more or less difficulty – sometimes with extreme, public and notorious difficulty – Football Clubs have been able to "conquer" their right to participate in the competitions and to meet all those requirements (for example, last season only Beira Mar Futebol SAD was excluded from the 2nd League due to its inability to meet the solicited financial requirements).

It is also very well known the public controversy that has emerged from the objections raised by some Football Clubs which call into question the effective fulfilment of the identified requirements by other Football Clubs, with the intention to see those that allegedly not comply replaced by other participants in the competition.

The response to whether all the Sports Companies participating in the 1st and 2nd Leagues have outstanding debts towards players and coaches (or ex-players and ex-coaches), Social Security and Tax Authority, is negative. And being so, the next immediate – and legitimate – question is how can those Football Clubs obtain favourable opinion from the Audit Committee responsible for the assessment of their applications.

The answer is simple. Quite simple. It is because the mentioned requirements do not actually include the inexistence of such debts. These requirements – which, as mentioned, are approved by the Football Clubs themselves – have their own concept of outstanding debts to players, coaches, Social Security, and the Tax Authority.

As for the wage debts to players and coaches, the requirement restricts the set of creditors to players and coaches registered in the LPFP in the previous season (2014/2015), the reference date being May 5th. Therefore, eventual debts to players and coaches that worked with the Football Clubs in previous seasons are not included. Furthermore, any wage debt subject to a written settlement agreement is expressly considered as settled.

In what regards Social Security and Tax Authority debts the requirement is, simply, that in the absence of a certificate attesting inexistence of such debts issued by the competent authorities (which is, obviously, in any case, sufficient), Football Clubs may comply with this condition in three alternative ways: (i) by showing that the lawfulness of those debts is being disputed, within the respective deadline to do so and in the context of the correspondent legal procedure, and therefore independently of any guarantee being presented to the Social Security or Tax Authority; (ii) by proving that such debts are subject to the Mateus Plan[1]; or (iii) by showing that those debts are part of an agreement with the Social Security or the Tax Authority, within the scope of an economic recovery program, namely the SIREVE, PER or Insolvency Proceedings.

It is, therefore, within these terms, and with these "contemplations" that Football Clubs have been able to ensure compliance with the financial requirements. If it is true that some discipline is already required of Clubs – in the name of greater transparency, equality and "sports truth" – it is also true that the compliance with such requirements does not allow inferring that there are no debts to players, coaches, Social Security or the Tax Authority. ■

1 Plan for the exceptional regularization of fiscal debts in instalments, approved by Decree-Law no. 124/96, of March 23rd.

The Justice Councils of the Sports Federations and the Court of Arbitration for Sport

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It is now clear that, since the Court of Arbitration for Sport ("Tribunal Arbitral do Desporto") began operating on the 1st of October, and the period of 90 days having already passed since the declaration of its installation, it's of this Court's competence to decide on the appeals of the decisions on disciplinary matters taken by the Disciplinary Councils of Sports Federations (except if the decision emerges from the application of technical and disciplinary norms directly connected with the practice of the particular competitive sport).

If this point is clear, it is important to note that the competence of the Court of Arbitration for Sport to decide on disputes that were already pending when this Court was installed depends on the agreement of the parties.

Therefore, it is important to answer the following question: what happens if the parties don't agree on the Court of Arbitration for Sport's competence? Will the Justice Councils of the Sports Federations be competent to decide on the appeals of the Disciplinary Councils' decisions regarding disciplinary matters?

This question has been previously brought up, in very similar terms, after Decree-Law no. 93/2014, of June 23rd, came into force. In fact, with this Decree-Law, the legislator intended, unequivocally, to limit the scope of the Justice Councils' competence regarding disciplinary matters to the decisions that resulted from the application of technical and disciplinary norms directly connected with the practice of the respective sport.

Still according to this Decree-Law, the legislator determined a period of 120 days after the publication of the Decree-Law (which occurred on the 23rd of June, 2014) for the Sports Federations to adapt their Statutes to this new reality.

This means that, since the 21st of October, 2014, as established by the legislator, the Justice Councils of the Sports Federations lost their competence as second instance courts in most of the decisions taken by the Disciplinary Councils on disciplinary matters.

Thus, if the Justice Councils lost this competence on the 2nd of October, 2014, and if this competence wasn't automatically acquired by the Court of Arbitration for Sport before the 1st of October, 2015 (and, in this case, the competence is automatically acquired, without the need of an agreement between the parties, only for procedures initiated after this date), who has the competence to decide on the appeals of the Disciplinary Councils' decisions filed before the 1st of October, 2015, or in ongoing procedures when the required parties' agreement was not obtained?

The answer, at first sight, seems to be the attribution of this competence to the Administrative Courts. This is the conclusion of the combined reading of the many Laws here in discussion, Law no. 74/2013, of September 6th, amended by the Law no. 33/2014, of June 16th ("Court of Arbitration for Sport's Law"), Decree-Law no. 248-B/2008, of December 31st, amended by the Decree-Law no. 93/2014, of June 23rd ("Legal Framework for the Sports Federations") and the Procedure Code of Administrative Courts.

For all those cases that were already pending when the Court of Arbitration for Sport started operating, what happens if the parties don't reach an agreement on the Court's competence? Will the Justice Councils of the Sports Federations be competent to decide on the appeals of the Disciplinary Councils' decisions regarding disciplinary matters?

In many decisions taken after the 21st of October, 2014, the Justice Council of the Portuguese Football Federation considered that the Court of Arbitration for Sport has the competence to decide on the appeals of the Disciplinary Council's decisions, ruling that all appeals filed in the meantime should be sent to the Court of Arbitration for Sport as soon as the Court started operating.

However, this is not the solution that has been followed by the Justice Council of the Portuguese Football Federation ("Federação Portuguesa de Futebol").

In fact, in many decisions taken after the 21st of October, 2014, the Justice Council of the Portuguese Football Federation (Federation that changed, in the legal timeframe, its Statutes according to the Decree-Law no. 93/2014, of June 23rd) considered that the Court of Arbitration for Sport has the competence to decide on the appeals of the Disciplinary Council's decisions, ruling that all appeals filed in the meantime should be sent to the Court of Arbitration for Sport as soon as the Court started operating.

The logic behind this Justice Council's ruling is that the legislator gave a timeframe of 120 days for the Sports Federations to adapt their Statutes to the content of the Decree-Law no. 93/2014, of June 23rd, convinced that the Court of Arbitration for Sport would already be operating by then, and never intended to see the competence transferred to the Administrative Courts.

This interpretation of the Justice Council of the Portuguese Football Federation has the advantage of being in accordance with the intention behind the Court of Arbitration for Sport's creation (to avoid the competence of the Administrative Courts, characterised by its slowness), but, in the way we see it, it's an interpretation that may be in disagreement with the transitory norm the legislator created for the Court of Arbitration for Sport, especially if the parties are unable to reach an agreement on this solution.

If the goal is to find a solution in the context of the legislator's intentions (the transference of the competence directly from the Justice Councils to the Court of Arbitration for Sport), then it is defensible that the competence to decide on the appeals remained still with the Justice Councils of the Sports Federations(especially in the cases of the Federations that didn't changed their Statutes in order to take that competence from the Justice Councils).

Thus, if the 120 days time frame given to the Sports Federations to adapt their Statutes was fixed considering that, by that time, the Court of Arbitration for Sport would already be operating, it is, in our view, acceptable to defend that, since that did not occur , the duty to change the Statutes, in the part related to the competences of the Justice Councils, only came into force with the declaration of the installation of the Court of Arbitration for Sport. ■

Legislation, Case Law and other Developments Relevant to Sports Law – November 2015

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I. The Portuguese Court of Arbitration for Sport has initiated its activities

On October 1, the Portuguese Court of Arbitration for Sport (*Tribunal Arbitral do Desporto* or "**TAD**"), created by Law no. 74/2013, of 6 of September, an independent jurisdictional entity with specific competence to administrate justice within the legal framework for sports, has initiated its activities.

TAD is competent to intervene in the context of compulsory arbitration, voluntary arbitration and mediation, and is also entitled to act as a consultation body for the issuing of non-binding opinions upon request by any of the public administrative bodies of sports, the Olympic Committee of Portugal, the Paralympic Committee of Portugal, sports federations endowed with the statute of sports public utility, professional leagues and the Portuguese Anti-Doping Authority.

The court's website[1] has already made available its Regulation on Procedure and process costs under Voluntary Arbitration, Regulation on Mediation and Regulation on Consultation Services.

II. Portuguese legislation relevant to Sports

1. **Law no. 93/2015**, of 13 of August, introducing the first amendment to Law no. 38/2012, of 28 of August, which approved the sports anti-doping regime, by transposing to the Portuguese jurisdiction the rules established in the World Anti-doping Code.

2. **Decree of the President of the Portuguese Republic no. 92/2015**, of 7 of August, ratifying the Convention of the Council of Europe on Manipulation of Sports Competitions, open for signing in Magglingen, on 18 of September 2014, which was approved by the Resolution of the Portuguese Parliament no. 109/2015, of 7 of August.

3. **Order of the Presidency of the Council of Ministers and the Ministry of Finance no. 231/2015**, of 6 of August, introducing the first amendment to the Statutes of the Portuguese Institute for Sports and Youth, I.P., approved in Annex to Order no. 11/2012, of 11 of January.

4. **Decree-law no.** 45/2015, of 9 of April, establishing the means for protection of name, image and activities developed by sports federations, as well as the correspondent misdemeanour framework.

III. Case Law of Portuguese Higher Courts related to Sports Law Matters[2]

1. Supreme Court of Justice

Decision of 25/06/2015

Case no. 3345/11.0TTLSB.L1.S1 (Rapporteur Fernandes da Silva)

A sports coach shall not be qualified as a sports practitioner; however, given that there is an employment relation, which, due to its specific characteristics, requires an adequate regime, there is a clear legal loophole which shall be rectified by the analogical application of the legal framework for an employment agreement of sports practitioners, enacted by Law no. 28/98, of 26 of June.

Decision of 25/03/2015

Case no. 4776/05.0TTLSB.L2.S1 (Rapporteur Fernandes da Silva)

The liability of one of the parties for the termination of a sports employment agreement is determined by reference to the legal criteria foreseen on Article 27 of Law no. 28/98, of 26 of June (legal framework for employment agreement of sports practitioners), therefore is no applicability of Articles 446 to 448 of the Portuguese Labour Code (which is only subsidiarily applicable and in so far it is not incompatible with any specific characteristic of the sports employment agreement).

1 Available at www.tribunalarbitraldesporto.pt.
2 All decisions listed in this section are available online at www.dgsi.pt.

2. Lisbon Court of Appeal

Decision of 11/03/2015

Case no. 204/13.6YUSTR.L1-3 (Rapporteur Carlos de Almeida)

Abuse of dominant position by Sport TV

Confirms the decision of the Portuguese Competition Authority ("**AdC**") which found that SportTV had abused its dominant position in the market of *premium* restricted access channels specialised in sports contents, thereby hindering competition, for a period of six years. In 2013, AdC imposed a fine on Sport TV in the amount of € 3.7 million. The amount of the fine was later reduced to € 2.7 million by the Portuguese Competition Court.

IV. Other recent developments with relevance to Sports

1. Complaint to the European Commission by FIFPro against the player transfer system

The International Federation of Professional Footballers ("**FIFPro**") has lodged, on September 18, 2015, a complaint to the European Commission against the current FIFA rules on the transfer of football players (which are established by the FIFA Regulation on the Status and Transfers of Players), arguing their incompatibility with EU law, specifically with competition law[3].

According to FIFPro, the current transfer system has an effect on competition between football clubs by significantly restricting their freedom to attract the players and, therefore, harming the latter's interests as well as the interests of small and medium-sized football clubs which are not able to compete with the inflated transfer prices that derive from the current system.

2. Complaints to the European Commissionin relation to *third-party ownership*

Third party ownership of the economic rights of football players ("**TPO**") is currently under the scrutiny by the European Commission with regards to its compatibility with EU law, following two different complaints, which were lodged after the TPO prohibition by FIFA, which entered into force on 1 of May 2015, as well as the adoption of transitory measures on this matter.

The first complaint was submitted in February 2015 by the Portuguese and the Spanish Football Leagues, arguing that TPO prohibition infringes EU competition rules as well as freedom of establishment, free movement of services, workers, and capital[4]. Conversely, on April 1, 2015, FIFPro and UEFA lodged a complaint requesting the European Commission to go beyond the prohibition imposed by FIFA by preventing the execution of new agreements of this nature and rendering illegal any current agreements establishing TPO[5]. Both complaints are still being analysed by the European Commission. ■

3 *Cfr.* Executive summary of FIFPro complaint, available athttp://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf.
4 *Cfr.* Press release of the Spanish Football League website, of 9 February 2015, available athttp://www.laliga.es/noticias/las-ligas-espanola-y-portuguesa-denuncian-ante-la-comision-europea-la-prohibicion-de-los-tpo-de-la-fifa.
5 *Cfr.* Press release of FIFPro and UEFA, of 1 April 2015, available athttp://www.fifpro.org/en/news/fifpro-uefa-launch-joint-legal-action andhttp://www.uefa.org/stakeholders/players-unions/news/newsid=2230203.html.

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