Kluwer Competition Law Blog

Arbitration To Preventively Determine Competition Law Compliance? The CAS Award in PROFAA v FIFA

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On 24 July 2023, the Court of Arbitration for Sport (CAS) issued a very relevant award in case CAS 2023/O/9370 Professional Football Agents Association (PROFAA) v. FIFA (the Award), in which it examined various claims of illegality of the new FIFA Football Agents Regulations (FFAR) under several areas of law, most importantly those under EU competition law.

Issued just one month after the preliminary injunction adopted by LG Dortmund prohibiting FIFA from applying the FFAR because of their potential contradiction with Article 101 TFEU, as reported in this blog by Tim Lichtenberg just some days ago, the Award makes no reference either to that decision or any of the procedures which are looking at that same matter, including the pending preliminary reference before the CJEU. Since those aspects have been comprehensively treated in the post that has just been mentioned, this entry will limit itself to presenting the decision of the CAS and some of the questions it raises.

The contested Regulations

The FFAR, whose full text may be accessed here, was approved by the FIFA Council on 16 December 2022 in Doha, Qatar. As Article 1 proclaims, the FFAR assume that FIFA has a statutory obligation to regulate all matters relating to the football transfer system.

The "*core objectives*" of that system are said in the FFAR to include protecting the contractual stability between professional players and clubs, encouraging the training of young players, promoting a spirit of solidarity between elite and grassroots football, protecting minors, maintaining "*competitive balance*" and ensuring the regularity of sporting competitions. In addition to those core objectives, the FFAR mentions some additional goals including "*raising and setting minimum professional and ethical standards for the occupation of Football Agent*", "*ensuring the quality of the service provided by Football Agents to Clients at fair and reasonable service fees that are uniformly applicable*", "*improving financial and administrative transparency*" and "*preventing abusive, excessive and speculative practices*".

In order to advance these objectives, the FFAR regulates the activity of football agents. It is made subject to a license whose issuance by FIFA requires compliance with various eligibility requirements, an exam, and a pledge to abide by FIFA regulations. The FFAR imposes various

limitations on how these services are provided such as the need for a written agreement with a minimum mandatory content, restrictions on joint representation and, notably, a "*service fee*" cap. This latter prohibition limits the maximum level of remuneration that agents may charge to their clients, be it individual players or football teams.

Procedure

It transpires from the Award that, during the process for the adoption of the FFAR, the Professional Football Agents Association (PROFAA) raised doubts as to their legality and proposed to FIFA that the FFAR be assessed by CAS in ordinary proceedings with a view to achieving legal clarity prior to their enforcement. That invitation was accepted by FIFA on the condition that the only object of a possible dispute to be submitted to CAS be a review of the validity of the FFAR under the FIFA Statutes and regulations, Swiss law and EU law unless the Panel deemed appropriate to additionally refer also to other laws and that a strict calendar whereby the award would be issued before 31 July should be followed. The parties quickly agreed on the composition of the panel, which was composed of Romano F. Subiotto as President, Olivier Carrard and Prof. Luigi Fumagalli (the Panel).

Arguments of the Parties

The Claimant requested declarations that certain aspects in Article 12 (regulating the services of sports agents) and 15 FFAR (setting out a fee cap) and related provisions infringe multiple provisions of EU Law, Swiss Competition Law and the laws of the national regulations of Canada, France and Italy. The rules of EU Law invoked included, besides Articles 101 and 102 TFEU, Article 16 of the Charter of Fundamental Rights of the EU (CFREU) protecting freedom of economic activity and freedom of contract, Article 16 of EU Directive 2006/123/EC on Services in the Internal Market, the General Data Protection Regulation (GDPR), and Articles 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and 7 CFREU laying down the fundamental right to privacy and the protection of business secrets. While the Award examined each and every one of these claims, the comments that follow concern exclusively the discussion under EU competition law.

FIFA countered the competition law claims with the argument that the FFAR were not restrictive of competition either by object or by effect, nor did they constitute an abuse of a dominant position. FIFA further contended that, even if the FFAR were restrictive of competition, they should fall outside the scope of EU competition law under the principles established in Case C-519/04 P *Meca-Medina*, given that the FFAR pursues legitimate objectives, and any restrictions were inherent in and proportionate to the pursuit of those objectives.

Concerning specifically the fee cap, FIFA argued that its levelling permits competition by agents as they can offer discounts. In the event there were any restrictive effects, these should be considered inherent and proportionate to the legitimate objectives pursued. With respect to the licensing system, it argued that it "*serves to ensure that only people of good character and with the requisite knowledge of the football transfer system can act as agents, allowing to pursue the overall objective of the FFAR that is to protect the proper functioning of the transfer system and therefore the integrity of the sport*" and that there was no less restrictive alternative to Article 12(2)

FFAR that could meet the objectives.

In its answer, PROFAA argued that the *Wouters/Meca-Medina* principles should not apply, because the FFAR are not a regulation affecting participants in competitions or sport modalities, but a regulation of the economic and contractual activity of a professional sector that does not take part in any competition or sport, and that the FFAR do not regulate a sporting discipline or sets the prerequisites that its participants must fulfil to take part in it. Instead, PROFAA submitted that the compatibility of the FFAR should be reviewed under the principles laid down in the General Court's judgment of 26 January 2005, *Piau v. Commission* (Case T-193/02).

More generally, PROFAA disputed that FIFA acts as a public regulator, and claims that FIFA acts on behalf of national associations and football clubs, presenting itself as a collective buying entity in the market for football agent services and that the service fee cap protects the economic interests of FIFA's members by setting a maximum purchase price, which constitutes a restriction by object.

In the rejoinder, FIFA argued that the *Wouters/Meca-Medina* principles apply when the activity regulated by the measure is sufficiently closely connected to the relevant sport, regardless of whether the measure affects the economic activities of non-participants. FIFA also submitted that agents play an important role in team composition and, therefore, in sporting competition, and therefore *the Wouters/Meca-Medina* principles therefore apply to determine whether the FFAR are compatible with EU competition law. FIFA also claimed that it should enjoy a margin of discretion in determining whether the regulation of the activities of agents in connection with the international transfer system is necessary to ensure the proper conduct of the competitive sport.

Findings of the Panel

The Award commences by identifying "*one fundamental question of sports governance, namely: can FIFA extend its regulatory powers beyond the task of governing the sport of football itself and cover peripheral economic activities, particularly the market of football agent services?"* (para 171), a question it answers in the affirmative quoting AG Rantos in *European Superleague (Case C-333/21)*, para 31):

"Sports federations [such as FIFA] play a key role in [sports governance], in particular from an organisational perspective, with a view to ensuring compliance with, and the uniform application of, the rules governing the sporting disciplines in question. That role has, moreover, been recognised by the Court, which has held that it falls to the sports federations to lay down appropriate rules for the organisation of a sporting discipline and that the delegation of such a task to sports federations is, in principle, justified by the fact that those federations have the necessary knowledge and experience to perform that task. […]."

The Panel also noted that the activity of agents cannot be properly defined as being only "*peripheral*" to the world of football and its organization, since *"(a)gents, in fact, as far as they represent the interests of clubs and players, directly engage in the organization and functioning of the market of players' services, with respect to their employment and transfer – i.e., with respect to one of the core aspects of the entire football system. As a result, FIFA appears to be entitled, in general terms, to adopt rules governing the activity of agents, in the same way as (and to the extent in which) it is entitled to issue regulations concerning the status and transfer of players*".

In its analysis of the FFAR, the Panel confirmed that FIFA qualifies as an association of undertakings and that the FFAR can be considered a decision under Article 101(1) TFEU, and further accepted that FIFA would hold a collective dominant position under Article 102 TFEU in the relevant market of football agent services (para 201).

At the same time, the Panel agreed with FIFA that the case should be looked at under the so-called regulatory ancillary restraints framework laid down by the EU Court of Justice in *Wouters* (Case C-309/99) and *Meca-Medina* (Case C-519/04 P) (referred jointly in the Award as the *Wouters/Meca-Medina* framework), and finds that FIFA may, in adopting the FFAR, justifiably pursue public interest objectives recognised by the EU legal order, even if the contested provisions of the FFAR may be liable to infringe EU competition law, so long as the FFAR provisions are appropriate and proportionate to achieve the intended objectives (para 212).

Under that logic, the Award discusses the claim on price fixing, which it examines under the rules on vertical agreements, seemingly overlooking the fact that the limitation on prices affects not only the situation where an agent represents an individual but also a football club (labelled a Releasing Entity when it transfers a player and an Engaging Entity when it is hiring a player), despite the acknowledgement that FIFA is an association grouping of football clubs.

Under that viewpoint, the Panel concludes that the price cap would not be a restriction by object, as it would allow for ample price competition below the cap. As concerns a restriction by effect, it also considers there is no sufficient evidence of such a limitation, alluding to shortcomings in the material provided by PROFAA to that effect, noting that the burden of proof was on the claimant. However, after scolding PROFAA's "*unsubstantiated submissions*", it surprisingly concedes that Article 15(2) FFAR is liable to restrict competition by effect under Article 101(1) TFEU and moves on to discuss whether this restriction is justified under the *Wouters/Meca-Medina* framework.

It is under that framework that the Panel concludes, first, that Article 15(2) FFAR pursues legitimate objectives (paras 283-288), that Article 15(2) FFAR is appropriate to pursue the intended legitimate objectives (paras 289-297) and that Article 15(2) FFAR is proportionate (paras 298-322). A parallel argument is run on the limitations on the activities of agents other than in pricing in Article 12 FFAR, which are also confirmed as meeting the requirements of the *Wouters/Meca-Medina* framework.

The Award contains multiple interesting findings on other areas of law. The curious reader is invited to examine the award's discussion on whether the FFAR comply with Article 16 CFREU (freedom to conduct a business in accordance with Community law and national laws and practices), which is found not to apply to FIFA; the limitations imposed by Article 8 ECHR (respect to private life) to FIFA, which is also rejected, its discussion of PROFAA's claim concerning Article 7 CFREU (with a similar content to Article 8 ECHR) and the GDPR, which are found not to have been breached by the treatment of the data concerning agents, and various other findings on Swiss competition law and potential interference with national regulations on sports agents in Italy and France, which also allow for fee caps and impose mandatory registration which could be affected by the FFAR.

Final comments

The Award is remarkable for multiple reasons, of which three stand out.

First, the Award results from the decision to resolve a dispute on the legality of regulations adopted by an international sports organisation preventively, i.e., before such norms came into force, through arbitration, allowing the parties to resolve a deadlock that might have dragged on for years. That has been made possible by the stature reached by the CAS as a permanent structure to resolve disputes affecting international sports. On the other hand, it remains to be seen if this will evolve into a mechanism regularly used for similar situations. It is submitted that the weight to be given to the Award, in this case, will shed light on that question.

Second, the Award discusses difficult competition law issues in the sports field in a moment where these questions are on everyone's mind, not least as a result of the *Superleague* case (incidentally, AG Rantos' Opinion is quoted multiple times in the award, which does not surprise since both share deference to FIFA's position as a regulator). That is in itself to be welcomed, as it can provide food for thought in this area of law. As is happening with the *Superleague* case, the CAS Award will be dissected and questioned, and some of its findings will not fancy everyone, but it does represent a brave attempt at addressing serious issues under a solid foundation, if still under construction, and deserves to be commended for that. At the same time, however, the Award misses the opportunity to engage in a dialogue with the (yet provisional) findings that have been made before German courts on this matter, which somehow diminishes its value as a determination that presents itself as definitive.

And third, and not only because of its coincidence with the findings made by courts on this same matter, but the Award also raises the question if a discussion on whether the legality of a given instrument under competition law should be decided under arbitration mechanisms at all instead of by enforcement agencies. Not that competition law should not be arbitrable – that train left many years ago, and today both arbitration panels and ordinary courts grapple with complicated competition law questions regularly, notwithstanding recent developments such as the judgment of the German Supreme Court of 27 September 2022, which has in unusually wide terms supported the power of ordinary courts to review arbitral awards for competition law reasons (see the comment of Peter Sester in Kluwer Arbitration Blog here). The arbitrability of competition law is out of the question.

However, cases discussing public interest excuses to restrictions of competition such as *Meca-Medina* and especially *Wouters*, belong in a different realm where adjudicators are required to weigh public and private interests, an exercise that assumes a significant margin of discretion. As a result, any findings made on these cases by a panel appointed by parties, save in straightforward cases (which this case is not) will not become, as arbitral awards should aspire to be, the final word on the matter. And that is more than likely to be the case here.

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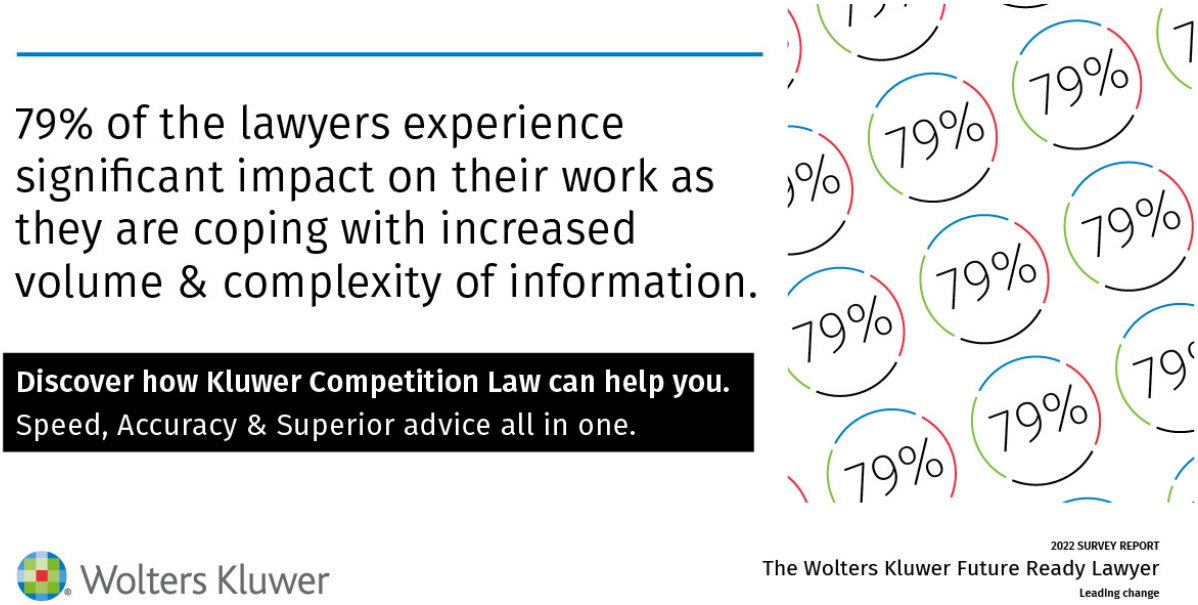

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