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IMPLEMENTATION AT NATIONAL LEVEL

II EDITION

Michele Colucci (ed.)

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INTRODUCTION

The running FIFA landmark regulations on intermediaries define the intermediary as "*a natural or legal person who, for a fee or free of charge, represents players and/or clubs in negotiations with a view to concluding an employment contract, or represents clubs in negotiations with a view to concluding a transfer agreement*".

Now, anyone with a "self-certified" impeccable reputation and no conflict of interest may qualify as an intermediary.

Targeting the commonly recognised need of upgrading the transparency in the close and economically attractive fields of transfer of players and intermediaries' activities, FIFA has established a new registration procedure. From now on, clubs and players are due to submit to their national associations the relevant documents related to the activities of their intermediaries. In doing so, the latter must be registered every time they assist clubs and players in concluding a transaction.

This radical change in FIFA's approach focuses more on monitoring the intermediaries' transactions rather than the formalities of their access to the profession as it was the case before. However, FIFA regulations require national associations drafting an annual report on the intermediaries' activities and remunerations. Such obligation has been further confirmed by the FIFA circular n° 1519 of 11 January 2016.

The updated comparative analysis outlines the FIFA self-constraint in verifying the national associations' duties in registering intermediaries as well as their transactions and reporting to the international association.

The FIFA regulations aim to better protect the integrity of football and the interests of sports stakeholders. Indeed, footballers engage intermediaries in order to wrangle for the best contracts while clubs' managers rely on them to get the best players at the best conditions.

In this new legal context, the FIFA rules set minimum standards to be implemented by the national associations, which are free to adopt even stricter requirements, if they wish so.

Eventually, the variety of local, legal and traditional sports frameworks heads for various forms and types of implementations of national regulations.

Therefore, the inevitable result is that there is a huge diversity of national measures to govern the profession's activity.

As a consequence, therefore, those who are interested in transferring a player to a given country are obliged to know the relevant intermediaries' regulations if they do not want to put at risk the successful outcome of any relevant transfer.

Starting from the latest official figures and statistics concerning the FIFA regulations, the second edition of this book offers an updated analysis of the implementing measures in 36 national associations.

Finally, it highlights the still existing discrepancies and their impact on the sports stakeholders as well as the best national practices.

Brussels, 30 November 2016

Michele Colucci

INTERNATIONAL SPORTS LAW AND POLICY BULLETIN 1/2016

THE FIFA REGULATIONS ON WORKING WITH INTERMEDIARIES

by *Paolo Lombardi*[*]

1. Introduction

The FIFA Regulations on Working with Intermediaries replace the FIFA Players' Agents Regulations (2008) ("Agents Regulations"). This was the last set of rules through which FIFA had regulated the activities of Players' Agents since their official recognition in the early 1990's. The need for reform in this area has long been understood, not least of all by FIFA itself. In this chapter, I will briefly look at the FIFA Players' Agents Regulations, and explore FIFA's understanding of the need for reform. There will be a detailed review of the Regulations on Working with Intermediaries ("Intermediaries Regulations"), putting them into the context of the current international football industry, and I will conclude with an examination of the main issues coming from the Intermediaries Regulations. It should be noted, however, that at the time of writing, the new regime has been in force for only sixteen months. Although all aspects can and will be discussed, many practical outcomes, such as dispute resolution, essentially remain untested.

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2. The FIFA Players' Agents Regulations

2.1 Becoming a Players' Agent

"Players' agent: a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract, or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations".[1]

From this statement, several things are immediately clear. An Agent could only have been a natural person, acting player to club (representing the player in the negotiation of an employment contract), or club to club (assisting a club to conclude a transfer agreement). As is extrapolated further on in the Agents Regulations, an agent's work was solely based on transfer-related activities, and the Agents Regulations did not cover any other type of work such as image rights, services to coaches or managers or such like. A corporate entity could not act as an agent, however a corporate entity could support a Licensed Agent to assist in administration.

To become a Licensed Players' Agent it was necessary for an individual to firstly apply to the relevant association in which they resided, showing themselves to be a person with an "impeccable reputation".[2] The individual could not simultaneously hold any position at an Association, Confederation, League, or at FIFA.[3] If these basic prerequisite were satisfied, the individual then had to pass an exam, set partly by FIFA, for questions relating to the FIFA Statutes and Regulations, and partly by the association, for questions relating to national subjects. The exam was administered by the association, although minimum pass marks were set by FIFA. Additionally, the individual had to take out appropriate insurance (or provide a bank guarantee) and this was subject to control by the association. Once all these steps had been undertaken, the licence was issued, and the name entered onto a Licensed Players' Agent register.

The Agents Regulations allowed for certain "exempt Individuals" to represent players without being a licensed players' agent. These were either the parents, siblings or spouse of a player, or a legally authorised practising lawyer, and any activity undertaken by them would fall outside of the scope of FIFA.[4]

[1] FIFA Players' Agents Regulations (2008), Definitions.
[2] FIFA Players' Agents Regulations (2008) define this to be someone who had never had a criminal sentence for a financial or violent crime passed against them.
[3] FIFA Players' Agents Regulations (2008), Article 6.
[4] FIFA Players' Agents Regulations (2008), Article 4.

2.2 Representation Contract[5]

Only upon the conclusion of a representation contract, was an agent properly permitted to represent a party in negotiations. The contract had to be a written mandate and could last for up to two years, with any renewal of the contract effective only with a further written mandate being signed by all parties. An agent was allowed to represent a minor, with the parents or guardians additionally required to sign the mandate.

Crucially, the Agents Regulations stipulated that all conflicts of interest were to be avoided, and under no circumstances could a players' agent represent more than one party to the relevant transaction. The constant jurisprudence of the FIFA Players' Status Committee[6] is adamant in indicating that Article 19 par. 8 of the Agents Regulations was enacted in order to ensure that a players' agent is not remunerated twice for the services he renders in the same transaction.

2.3 Remuneration[7]

Also included in the representation contract were the details of the agent's remuneration. For the representation of a player, the remuneration was calculated with direct reference to the annual basic gross salary, including any fixed remuneration. The amounts could be paid in a lump sum, or in instalments over the course of the playing contract (even if this was longer than the representation contract). If the amount had not been specified in the contract, the Regulations allowed for a default amount of 3% of the basic salary to be paid to the agent.

An agent representing a club would have the remuneration agreed in advance and would be paid in a lump sum.

2.4 Rights and Obligations of Players and Clubs

Under the obsolete Agents Regulations, both the Players and the Clubs, when engaging representation service, were obliged to ensure that the individual engaged was a fully licensed players' agent.[8] They also were to ensure that the name of the agent was noted in the employment contract or transfer agreement. If no agent has been used, the agreement should have noted this explicitly.[9]

The relevant provision of the Agents Regulations clearly provided for the crucial element of proof: while if the agent's name and signature appear in the contract it cannot be denied that the agent took part in the relevant negotiation, if there is no mention of the agent in the relevant contract the activity may hardly be

[5] FIFA Players' Agents Regulations (2008), Article 19.
[6] Cf. *inter alia* decision number 712988 under www.fifa.com.
[7] FIFA Players' Agents Regulations (2008), Article 20.
[8] FIFA Players' Agents Regulations (2008), Article 27.3.
[9] FIFA Players' Agents Regulations (2008), Article 28.

FIFA REGULATIONS ON WORKING WITH INTERMEDIARIES. ANALYSIS FROM THE PERSPECTIVE OF THE CLUBS

by *Ornella Desirée Bellia*[*]

1. Introduction

The new FIFA Regulations on Working with Intermediaries (hereafter the "FIFA Regulations") is probably the most important recent change to the FIFA regulatory framework. The main objective of the new Regulations consists in setting up a more transparent system, whereby players and clubs are able to choose any parties as intermediaries, as far as certain minimum requirements are met. Therefore the new system aims to seek a broader control over individuals who represent players and/or clubs in the negotiations of employment contracts and transfer agreements, but also to control the activity itself rather than the access to such activity.

Thus, for the sake of transparency, a registration system for intermediaries is set up at national level, where intermediaries shall be registered each time a player or club engages his services. As the old licensing system ceased to exist, being replaced by the registration system, the mandatory procedure to become an intermediary is now much simpler than before.[1]

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[1] According to the new FIFA regulatory framework, the applicant no longer has to pass an examination, nor has to conclude professional liability insurance or provide a bank guarantee for a minimum amount of CHF 100,000. However, in implementing their own regulations, some National Associations have maintained the prerequisite to pass an exam (Mexico) or an interview (Spain); several associations have maintained the prerequisite to have a professional liability insurance (e.g. Brazil, Mexico, Portugal).

In the aforementioned registration process, clubs play an active role as several duties are to be carried out by them when signing a representation contract with an intermediary.[2]

Clubs engaging the services of an intermediary have to:

i) act with due diligence, ensuring that the intermediary has filled in and signed the so-called *intermediary declaration*,[3]
ii) submit such a declaration to the relevant association, i.e. the association where the player is to be registered, or to the previous association in the event the club engaging the services is the releasing club,[4]
iii) disclose to their respective association the full details of any and all agreed remuneration or payments of whatsoever nature that they have made or that are to be made to the intermediary.[5]

In addition to the foregoing, clubs have a general obligation to ensure that any transfer agreement or employment contract concluded bears the name and signature of such intermediaries, if any. Therefore, in the case that no intermediaries have been involved in the negotiations, clubs have to ensure that the relevant documentation contains a specific disclosure of this fact.[6] For the sake of completeness, it shall be noted that on occasion of international transfers, specific information in this respect also has to be uploaded onto the FIFA Transfer Matching System (TMS).

Furthermore, when signing a representation contract, the club has to specify the nature of the services offered by the intermediary for each specific transaction: for instance, consultancy in view of concluding a transfer agreement or an employment contract, or any other kind of services.

Last but not least, clubs must declare whether the intermediary acts exclusively on behalf of the club itself or also on behalf of the player, as a specific duty of disclosure is provided in the latter case. In fact, the FIFA Regulations introduced the possibility for clubs and players to engage the services of the same intermediary for the same transaction. The dual representation, which was forbidden and sanctioned in the previous system, is now allowed as long as both the club and the player give their express written consent prior to the start of the relevant negotiations and specify who will remunerate the intermediary for his professional services.[7]

[2] It shall be noted that in practice, even in those cases where the intermediary is engaged exclusively by the player, it is unlikely that the latter will put in place all the commitments required by the new rules, for the simple reason that he has neither the expertise nor the willingness to do so. Players engage intermediaries in order to receive their assistance during the negotiations and in administrative activities associated with football transactions. Thus, in practice it is the acquiring club that takes care of those activities rather than the player.
[3] Art. 2.2 FIFA Regulations.
[4] Art. 3.2 FIFA Regulations.
[5] Art. 6.1 FIFA Regulations.
[6] Art. 6.2 FIFA Regulations.
[7] Art. 8.3 FIFA Regulations.

2. Pros and cons of the new Regulations with a focus on the clubs' perspective

As already pointed out, the new regulations provide a much simpler process for those wishing to execute intermediary activities, since the applicant no longer has to pass an examination, nor has to conclude a professional liability insurance or provide a bank guarantee.[8]

However, it appears that, while the new rules have facilitated the access to the profession for those wishing to conduct intermediary activities, the bureaucratic activities of football clubs may have been burdened, particularly on occasion of those transfers conducted with the services of foreign intermediaries.

As it will be explained in the following paragraph, the system appears now particularly fragmented due to the discrepancies existing between national regulations and FIFA Regulations. Indeed, National Associations have been entitled to go beyond the minimum standards/requirements established by the FIFA regulatory framework[9] and have had wide autonomy in the implementation of their own rules. Such a "de-internationalisation" has led to a system where international transactions may be complicated due to several factors explained below.

In addition to the foregoing, the new system has brought more commitments and liability on clubs (and players). It is interesting to note that, while the previous Regulations governed the activities, duties and responsibilities of agents, the new rules regulate the activities, duties and responsibilities of clubs and players in their relationship with intermediaries, rather than the intermediary's activity itself.

The different wording in the titles of the Regulations – the previous and the current ones – is quite eloquent in this respect.[10]

a) Registration with the national associations

According to the new FIFA Regulations "*Intermediaries must be registered in the relevant registration system every time they are individually involved in a specific transaction".*[11]

[8] As mentioned above, in implementing their own regulations according to Art. 1.2 FIFA Regulations, several National Associations have maintained some prerequisites, such as to conclude professional liability insurance.

[9] Art. 1.3 FIFA Regulations.

[10] FIFA could have opted for titles such as "Intermediaries' Regulations" or "Regulations for Intermediaries' Activity", rather than "Regulations on Working with Intermediaries". The title reflects the content of the Regulations, which has as direct subjects clubs, players and associations, rather than the Intermediaries. It shall be noted that the previous Regulations were entitled "Players' Agents Regulations" rather than "Regulations on Working with Players' Agents".

[11] Art. 3.1 FIFA Regulations.

TEASER

THE FIFA REGULATIONS ON INTERMEDIARIES. THE PLAYERS' POINT OF VIEW

by *Wil van Megen*[*]

1. Introduction

When speaking about agents/intermediaries with club representatives it regularly appears that they are considered as an unavoidable evil. Agents are described as greedy people taking too much money out of football. In fact not many people empathize with football agents. However, it is those same clubs, paying the fees they describe as exceptional. In the end it is always a matter of budget. Do the transfer sum, the player's remuneration and the fee for the agent/intermediary fit into the budget?

In fact this means that the more the intermediary receives, the less the player earns. The point is that players don't always realize this and presume that their representatives are paid by the club and not – indirectly – by themselves. On the other hand, it is true that players need someone to negotiate the best possible result for them at a reasonable price.

FIFA started to regulate agents' activities back in 1996. By introducing the regulations in 2001, FIFA introduced a sophisticated framework for agents' activities in football. A free service of FIFA for agents to collect unpaid fees was part of the package.

The system seemed to function to a certain extent and was updated on several occasions. In October 2007 the FIFA Executive Committee decided to increase the standard of players' agents with new criteria. One of these criteria was the renewal of the license every five years in combination with a new exam for each agent.

The new criteria triggered a group of, mainly Belgian, agents to take action against these changes. According to their lawyers this decision was illegal. They argued that a private organization was not allowed to regulate a profession – only a government could do so. A court case was prepared in order to have preliminary questions for the ECJ.[1]

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[1] www.espnfc.com/story/514392/des-agents-de-joueurs-attaquent-la-fifa-pour-abus-de-pouvoir.

Before this, in 2005, we had the Piau-case before the ECJ in which FIFA strongly defended the Agents' Regulations.[2] Piau complained about the FIFA Regulations on Agents, on the grounds of competition law, as he felt that those rules included unjustified restrictions on trade, like the exam and the financial deposit. He also argued that FIFA abused its dominant position and that the Regulations infringed the freedom of movement of services regarding players' agents.

After the European Commission rejected the complaint, the case ended up in the Court of First Instance.

It is important to notice that the Court stated that FIFA is an association of undertakings within the meaning of Article 101(1) TFEU and therefore is subject to EU competition law. The work of agents is an economic activity that falls under EU-law and so were the FIFA Regulations regarding agents.

The Court ruled that the Commission was right in rejecting the complaint, because there was sufficient justification for the system since the measures were proportionate and necessary, keeping in mind the specific demands of the industry.

The initiative of the Belgian group, in combination with the implications of the Piau-case, triggered the process for the new regulations. Looking at the considerations of the Court, we can assume that the new Regulations also fall within the scope of Article 101(1) TFEU.

2. Relevant regulations

FIFA delegated the authorization of making regulations to the national Federations. The FA's will set their own regulations based on the FIFA Regulations on Working with Intermediaries.

According to the International Trade Union of Football Players (from henceforth FIFPro) the system needed improvement on five main issues:

- Regulation of agents' remuneration, since a substantial number of payments were extremely disproportionate in relation to the work performed;
- Protection of minors;
- Conflict of interest by representing both parties (club and player);
- Prevention of tapping up contracted players;
- Lack of professional competence.

These points match, more or less, a resolution by MEP Doris Pack on behalf of the Committee on Culture and Education on 18 March 2010.[3]

Participation in the FIFA Working Group on Intermediaries gave FIFPro a possibility for direct influence on the new system.

By regulating the activity, rather than the profession, FIFA tried to prevent

[2] Case T-193/02 Piau v Commission [2005] ECR II-0209.[1] Case T-193/02 Piau v Commission [2005] ECR II-0209.

[3] MOTION FOR A RESOLUTION 18.3.2010 B7 0000/2010 further to Question for Oral Answer B7 0000/2010. pursuant to Rule 115(5) of the Rules of Procedure on players' agents in sports.

Piau-like cases. The efforts of the working group resulted in a set of minimum requirements for intermediary activities.

When we look at these requirements, we see that the first step is registration instead of licensing. The new regulations require registration of the representation contract, by the national federation, as well as every transaction (art. 2.3 and art. 3.1).

The fact that intermediaries can be either natural persons as legal persons might lead to problems in case the regulations are violated. Legal entities can turn into "hiding places " for less respectable activities. An infringement of regulations can only be performed by persons. If the intermediary is a legal person the people involved in intermediary activities must also qualify as an intermediary. The question is what to do in case of sanctions. Does a sanction against a legal person affect only the legal person itself or also the people involved or only the person who violated the regulations? Also the liability in case of mistakes can be problematic, especially now that there is no longer a requirement for liability insurance. The person violating the regulations can hide behind a bankrupt legal entity if things go wrong – neither the FIFA requirement, that the individuals representing the legal entity within the scope of the transaction in question have an impeccable reputation, nor the Intermediary Declaration for legal persons will help here. The single recommendation of the English FA in the Declarations, Acknowledgments and Consents for Legal Persons regarding insurance needs strengthening, as a recommendation cannot be enforced.

3. Remuneration

Looking at the figures of the FIFA TMS system there were indications that agents took out much more money than the recommended 5% fee of the first year of the player's contract.[4]

The aim of the new regulations is to provide a better balance in intermediaries' fees. The system now applies, not only to the former players' agents, but to all who represent players and/or clubs in negotiations with a view to concluding an employment contract.

According to TMS, only 25-30 % of transfers were managed by official FIFA licensed agents.[5] In order to cover every form of representation of players, the exceptions for relatives and lawyers as representatives were excluded. Each transaction needs registration with a mandatory mention of the details of the intermediary involved.

Regarding the remuneration, there is a strong recommendation to limit the remuneration to 3% of the fixed income of the player for the entire duration of the contract. It needs to be seen whether this recommendation can be maintained,

[4] http://ec.europa.eu/sport/library/documents/xg-gg-201307-final-rpt.pdf.

[5] http://ec.europa.eu/sport/library/studies/final-report-eu-conference-sports-agents.pdf.

THE IMPLEMENTATION OF THE FIFA REGULATIONS IN ENGLAND

by *Daniel Lowen*[*]

1. Introduction

The implementation of FIFA's Regulations on Working with Intermediaries (the "FIFA Regulations") on 1 April 2015 signaled the biggest transformation of player and club representation in the history of professional football.

Whilst Article 1 of the FIFA Regulations requires national associations to implement and enforce its provisions, it expressly reserves associations' rights "to go beyond these minimum standards/requirements".[1]

On 5 February 2015, the English Football Association ("The FA") became one of the first national associations worldwide to publish its own supplemental regulations, the FA Regulations on Working with Intermediaries (the "Regulations"). This chapter examines briefly the national laws relevant to intermediaries' activities, provides an overview of the Regulations, its key principles and requirements, and assesses certain practical effects of the new regulatory regime in England.

2. Relevant national law

In England, intermediaries' activities are regulated in three ways: (i) by the common law, (ii) by UK legislation and (iii) by the Regulations and other relevant rules and regulations laid down by football's governing bodies. Whilst this chapter focuses on the third item (and in particular the Regulations), it is important to note the other regulatory strands, which together form the regulatory landscape that an intermediary is required to navigate.

2.1 The common law

The common law definition of agency is:

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[1] The FIFA Regulations on Working with Intermediaries, Articles 1.2 and 1.3.

> "the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation".[2]

The common law duties to which an intermediary is subject when carrying out activities on a player's behalf are extremely broad and include (non-exhaustively) the duty to use due skill and care,[3] to act in accordance with the terms of appointment and not to exceed his or her express or implied authority, to obey the lawful instructions of the principal, not to put himself into a situation where his interests will conflict with those of his principal[4] and, as was highlighted in *Imageview Management Ltd v Jack,*[5] a high profile case between a player and his agent, not to make a secret profit.[6] The 2009 case underlined the high standards imposed upon agents (i.e. intermediaries) by the common law (in addition to the requirements of any regulations laid down by football's governing bodies). As stated by Lord Justice Jacob in the Court of Appeal in that case, "The law imposes on agents high standards. Footballers' agents are not exempt from these. An agent's own personal interests come entirely second to the interests of his client… An undisclosed but realistic possibility of a conflict of interest is a breach of [an agent's] duty of good faith…".

[2] B. Bowstead and FMB Reynolds, '*Bowstead & Reynolds On Agency*' 19th ed, United Kingdom, Sweet and Maxwell, 2010.

[3] *Beal v South Devon Ry Co* (1864) 3 H&C 337.

[4] *Aberdeen Railway v Blaikie Bros [1854] 1 Macq 461.*

[5] *Imageview Management Ltd v Jack [2009] EWCA Civ 63.*

[6] The agent of Kelvin Jack, a Trinidad and Tobago international goalkeeper, negotiated his client's contract of employment with Dundee United FC. A commission of 10% was agreed, calculated with reference to the player's gross salary. Unbeknown to the player, the agent negotiated a side agreement with the club under which the club would pay £3,000 for the agent's efforts in obtaining the player's work permit. When the player subsequently found out about the side agreement, he ceased paying the commission to the agent. The agent sued the player for unpaid commission and the player counterclaimed not only for the secret profit paid under the agent's side deal with the club, but also for all of the commission already paid to the agent. The Court of Appeal found in favour of the player and the agent's commission was forfeit – the player did not have to pay any further commission and was entitled to repayment of all of the fees paid by him to the agent. Furthermore, the £3,000 fee paid by the club to the agent under the side deal was a secret profit made by the agent acting as a fiduciary and, as such, it was recoverable by the player. The Court reasoned that in the circumstances, the agent had clearly used his connection with the player to obtain a benefit for himself. There had been a clear conflict of interest (it was preferable for the agent to move the player to Dundee United FC as opposed to any other club, in view of his side agreement with Dundee United FC, and the more that was paid to the agent, the less there might be available to be paid to the player), and the agent had acted in breach of his fiduciary duties to the player. The case was a salutary lesson for agents and highlighted the need under common law for agents or intermediaries to disclose to his or her principal any and all commission he or she may earn – if they allow themselves to be in a position where there is a real possibility of their interests conflicting with those of their principal, they risk losing not only any secret profit but also their legitimately received commission.

2.2 UK legislation

There is no UK legislation that directly regulates the activities of players' representatives. There are, however, various statutes which impact upon and constrain the conduct of intermediaries in certain ways.

The Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 set minimum standards of conduct for employment agencies and employment businesses which provide services for the purposes of finding employment for workers and supplying potential employees to employers. The legislation imposes various obligations on employment agents, many of which overlap with the common law duties imposed upon intermediaries. For example, offering workers financial benefits or benefits in kind to use the intermediary's services is prohibited[7] and there is an obligation to disclose to the principal at the outset of the relationship details of fees payable, who will pay the fees and the services for which fees will be payable.[8] However, to the author's knowledge, an intermediary (or, previously, licensed agent) has yet to be charged with a breach of the Act or the Regulations.

The Bribery Act 2010 (the 'Bribery Act') is a piece of legislation of which all intermediaries should be aware, as it established two criminal offences:

a) Bribing another person – an intermediary will be guilty of an offence if they offer or give a financial or other advantage with the intention of inducing another person to perform a public or commercial function or activity improperly or reward that person for doing so;[9] and
b) Being bribed – an intermediary will be guilty of an offence if they receive a financial or other advantage intending that a public or commercial function or activity should be performed improperly as a result.

Under s. 4 of the Bribery Act, improper performance is performance or non-performance which breaches expectations of good faith or impartiality or breaches a position of trust. The penalties under s. 11 of the Bribery Act are potentially serious – an unlimited fine or imprisonment for up to 10 years.

If an intermediary pays or accepts payment from a third party in relation to the duties he carries out for his principal (the player), including payments to or from individuals at a club in connection with a player transfer,[10] that will in theory constitute an offence under the Bribery Act.[11]

[7] Employment Agencies Act 1973, s. 6.
[8] Conduct of Employment Agencies and Employment Businesses Regulations 2003, Regulation 13.
[9] Bribery Act 2010, s. 1.
[10] Excluding, of course, remuneration payable to the intermediary in accordance with a representation contract and/or Transaction documentation.
[11] Such payments (or gifts) are traditionally known in the football industry as 'bungs' (a much-discussed topic in football).

TEASER

THE IMPLEMENTATION OF THE FIFA REGULATIONS IN FRANCE

by *Jean-Michel Marmayou*[*]

1. Introduction

Let it be said from the outset: there are at least four reasons why the new FIFA regulations will not apply in France.[1]

Firstly, because France has long had very strict regulations governing the profession of sports intermediaries. These regulations cover all sports and the decision has been taken not to waiver them just for football. The second reason is because the FIFA regulations cannot have a direct applicable in French law as they emanate from a private association governed by Swiss law.[2] Furthermore, the FIFA regulations themselves state in their Article 1.2 that "*associations are required to implement and enforce at least these minimum standards/ requirements in accordance with the duties assigned in these regulations, subject to the mandatory laws and any other mandatory national legislative norms applicable to the associations.* […]. And in their Article 1.3 *"The right of associations to go beyond these minimum standards/requirements is preserved."* Lastly, French law, that the French football association (Fédération Française de Football – FFF) is required to apply, is broadly in line with the "*minimum standards/requirements*" set out in the new FIFA regulations.

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[1] The French Regulations on Working with Intermediaries (Règlement des agents sportifs FFF) is available on https://www.fff.fr/common/bib_res/ressources/450000/5000/160719135241_reglement_des_agents_sportifs,_saison_2016-2017.pdf (2 September 2016). The FFF has written to the FIFA informing it that the new regulations would not be applicable on French territory.
[2] CA Metz, 30 June 2011, Cah. dr. sport nº 25, 2011, 120, note J.-M. Marmayou. – CE, 8 nov. 2006, nº 289702. – CE, 2 February 2006, nº 289701. – TGI Saint-Étienne, 26 January 2005, Cah. dr. sport n° 3, 2006, 100, note J.-M. Marmayou. – CA Aix, 17 April 2002, Bull. Aix 2002/2, 88, note F. Rizzo – CA Metz, 20 March 2002, Rev. jur. éco. sport 2003, n° 66, 50.

And finally, there are only three real difficulties: the requirement for the domestic football associations to publish the details of each transaction and the cumulated amount of the sums paid to the agents by the clubs, the equivalence of qualifications and the cap on commissions.

[Although the English version of the FIFA regulations uses the term "intermediary", this paper will use the more familiar term of "sports agent"].

2. *Relevant national law*

In France, the job placement business is regulated and in principle reserved to authorised public or semi-public bodies.[3] For private individuals to become involved in the placement of sports persons, the authorities had to[4] regulate the profession of the sports agent by adopting a special text that derogates from public law. They did so in 1984.[5]

Current French law relating to sports agents is set out in Articles L.222-5 to L.222-22, R.222-1 to R.222-42 and A.222-1 to A.222-6 of the *Code du Sport* [codified Sport Laws].[6] These Articles result from several modifications and reforms over the years, the last of which was law 2010-626 dated 9 June 2010.

Sports associations have been awarded considerable powers by the *Code du Sport*. This has resulted in the FFF issuing specific regulations applicable to sports agents. These regulations reiterated the main principles of the law while adding certain technical details. They are published on the FFF website.[7]

3. *Principles et definitions*

The principles of French law governing sports agents are fairly simple. The law fixes the criteria that limit its application. And in those cases where it has to apply, it requires that the agent (i) hold an official licence to operate a business as a sports agent (the conditions for obtaining which are very strictly detailed); (ii) comply with certain good practice rules; (iii) submit to the disciplinary procedures of the sports association.

4. *The sports agent's role*

Scope - Under Article L.222-7 of the *Code du Sport*, *"the profession that consists in bringing together, for payment of a remuneration, the parties*

[3] Art. L. 5311-1 et s., C. trav.
[4] CA Montpellier, 28 Feb. 1996, *Juris-Data* n° 1996-034119 having qualified the sports agent's business as "operator of a job placement business".
[5] Art. 15-2, loi n°84-610, 16 July1984.
[6] www.legifrance.gouv.fr.
[7] www.fff.fr.

interested in signing a contract under which a person will be paid to practice a [professional] sport or training activity, or concerning the signature of an employment contract for a paid sport or training activity can only be exercised by an individual holding a sports agent's license." Therefore, within the meaning of the *Code du Sport*, the agent acts as an intermediary whose role is to bring together two future contracting partners. The person may be either acting only as a broker, or as an agent for one of the parties under an agency agreement that mentions this "bringing together" aspect. A simple advice given to the parties interested in signing a sports contract is not covered by the sports laws and therefore does not require that the person hold a licence to act as an agent.

However, the law does not define its field of application based solely on the criteria of the agreement under which the agent is appointed. It also takes account of the nature of the operation in which the agent is participating. In fact, this operation consists in the placement of a person in employment: the agent's role is to "place" the sportsperson or trainer so that he may practice his sport or exercise his profession. This notion of placement is envisaged very pragmatically if a direct placement is being sought, it will covers all the associated contractual transactions, both the contract and any pre-contract agreements (such as promise of employment, preference pact, etc.), transfer agreements (transfers, loans, transfer promises)[8] and contracts of collaboration between sports agents.[9]

On the other hand, Article L.222-7 of the *Code du Sport* does not apply to the actions by an intermediary leading to the signature of image contracts, endorsements or even wealth management. In such cases, the intermediary is not subject to the *Code du Sport* and does not require a licence to exercise his profession.

International scope - The agent's business often includes an international aspect due to the nationality of the agent, the sportsperson or the club for whom he is acting (currently or in the future). This international dimension raises the question of the territoriality of the French system relating to sports agents. Moreover, France is one of the few countries[10] to have adopted rigorous legislation in this field and questions have to be asked as to its possible classification as a public order law. In other words, should French law routinely take priority over foreign law?

[8] Cass. 1re civ., 18 July. 2000, Dr. et patr. 2001, n°91, 40, note F. Rizzo ; JDI 2001, 97, note E. Loquin et G. Simon.
[9] CA Aix, 21 sept. 2006, JCP G 2006, II, 10202, note F. Rizzo, reforming T. com Grasse, 7 June 2004, Cah. dr. sport n°1, 2005, 105, note F. Rizzo. Therefore, an unlicensed operator whose role is to simply introduce contracting partners (and receive a "finder's fee") should be considered someone who is illegally exercising the business of sport's agent.
[10] C.R. Siekman et alii, Player's agent worlwide legal aspects, T.M.C Asser Press, 2007. – Kea Kea & *alii*, Sports agents in the European Union, Study conducted in 2009 for the European Commission. (http://ec.europa.eu).

THE FIGC REGULATIONS ON INTERMEDIARIES

by *Salvatore Civale*[*] and *Michele Colucci*[**]

1. *Introduction*

On 26 March 2015, the Italian Football Association (*Federazione Italiana Giuoco Calcio*, hereafter "FIGC") issued the Regulations regarding the services of the intermediary (hereafter "the FIGC Regulations"),[1] implementing the relevant FIFA Regulations.

The FIGC Regulations have deeply reformed the previous legal framework under which the acquisition of a licence was an essential requirement to provide professional services as an "Agent".[2]

Now everybody can act as intermediary provided that he signs a representation contract and a declaration by which he obliges himself to follow the FIGC, UEFA and FIFA rules.

He can act in the interests of a player, a club or both of them but he must avoid conflict of interests especially when he is already a member of the Italian football federation.

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[1] FIGC, C.U. 190/A, "Regolamento per i servizi di procuratore sportivo", available on www.figc.it/it/104/3818/Norme.shtml (17 September 2016).

[2] Under the previous regulations, in order to get a license the applicant had to pass an exam, take out a professional liability insurance and accept a "Code of Conduct", which imposes on the agents duties of transparency, impartiality and respect for the relevant sports laws and regulations.
Moreover, the applicant had to meet some eligibility criteria and comply with strict conflicts of interest's rules. Only a fully licensed agent was legally entitled to provide the intermediation services to players and clubs.
However, the same FIGC Regulations did equate to the agents those lawyers and player's relatives (parent, brother or spouse) who usually act on behalf of the players.
Finally, albeit not a FIGC member, the Agent was subject to its disciplinary rules in order to ensure full compliance with the relevant FIFA and FIGC Regulation.

Contrary to the previous regime, the activity of intermediaries is not limited to natural persons but it is also open to legal entities which are subject to the same rules and requirements applicable to natural persons.

The present article aims to detail the new provisions by underlying the differences with the previous regulations, some legal gaps, and provide some suggestions in order to make the legal framework more effective.

2. *Definitions and Principles*

A first observation concerns the terminology adopted by the Italian Football Association.

Although, the new regulations aim to implement the new FIFA rules on working with intermediaries in Italy, none of its articles and annexes refers to agents or to intermediaries. The FIGC legislator prefers rather using the term "procuratore sportivo" (hereafter always mentioned as "intermediary") in order to have a clear cut distinction of this category of sport professionals from any other existing type of broker in Italy.[3]

So, the "procuratore sportivo" is defined as "*the person or the legal entity who, on a permanent basis or occasionally, assists or represents a sports club and/or a player*[4] *(...), under a specific contract, with no regard to his/her professional qualification and to his/her relationship with the athletes represented*".

The regulations only apply to clubs and players[5] when receive services of an intermediary in order to deal with the activities linked to an employment agreement and/or a transfer agreement,[6] provided that the following two conditions are fulfilled:

- the parties sign the relevant representation agreement enclosed with the regulations;
- the intermediary is already registered to the "register of intermediaries" established by the FIGC.

With regard to the second condition, the regulations must be interpreted in the way that an intermediary must file an application with FIGC and wait for the acceptance/ratification of his request, before providing his services or signing a representation agreement with a Club or a Player.

[3] M. Lai "*Dagli Agenti di Calciatori ai Procuratori Sportivi: la nuova disciplina in materia di intermediari nel calcio professionistico*", Rivista di Diritto ed Economia dello Sport 1/2015, SLPC, 79-103.

[4] The word "player" means not only a professional footballer who has already been registered by a club with a professional contract, but also a player who signs/concludes a professional contract for the first time.

[5] The regulations, as indeed required by FIFA, concerns only the representation agreement that an intermediary concludes with a club or a player. It is not applicable for coaches, assistant-coaches or physical trainers.

[6] Although the definition of club in article 1 refers to a club affiliated to the FIGC, the activities of an intermediary may also involve a transfer of a player from or to a club based in foreign countries.

As a consequence, any document signed by the intermediary who is not duly registered is considered as null and void.

3. The registration

3.1 Registration procedure and fees

The Italian registration procedure is stricter and more complicated than the old FIFA one.

In fact, pursuant to article 4 of the FIGC regulations any person, legally resident in Italy, is entitled to apply to the FIGC to register as intermediary.

Nevertheless article 5 the FIGC Regulations require a "double" registration:

- one for the natural person or the company, acting as intermediary; and
- one for each contract of representation.

Moreover intermediaries need to pay yearly registration fee of 500 euros in addition to a fee of 150 euros for each individual representation contract.

The registration is valid for one year only and it can be renewed. There are no specific provisions on renewals of representation contract and, therefore, intermediaries need to file a new application and submit all relevant documentation *ex novo*.

3.2 The Declaration of intermediaries

The registration is accompanied by a declaration that partially mirrors the FIFA one in terms of compliance with the relevant ordinary and sports rules.

Such a declaration must be signed by both natural and legal entities. In the latter case, all the company's representatives and intermediaries must be mentioned and those acting as intermediary within the company must be clearly identified.

By signing such a declaration the intermediary agrees to:

- be bound by the FIFA and FIGC' statutes and regulations;
- submit himself to the disciplinary jurisdictions of both FIGC and FIFA;
- declare that he has no contractual relationship with leagues, associations, confederations or FIFA that could lead to a potential conflict of interest;
- consent for the association to process his/her personal data, and to publish on the website, or in the official communication, the mandates received and even the publication of the payments received for the services as intermediary;
- authorize the national association and the leagues to discover all relevant information and documentation from any source, including the public administration, the intermediary himself or third parties, in order to verify the truth of his/her declarations and the fairness of his/her actions;
- authorize to publish disciplinary sanctions, in his/her regard, given by the relevant sports judicial bodies;

FIFA REGULATIONS ON WORKING WITH INTERMEDIARIES AN UPDATED COMPARATIVE ANALYSIS

by *Michele Colucci*[*]

1. Introduction

Twenty months after the entry into force of the FIFA regulations on working with the intermediaries on 1 April 2015, at least one intermediary was involved in 21% of all international transfers of players carried out in 2016.[1]

According to the International Transfer Matching System (ITMS)[2] the intermediaries were 1680 just before the entry into force of the regulations. They rose to 2221 until 31 March 2016 and from that day until October 2016 they were already 1700.

Worldwide, the clubs spent a total of 368 Million USD in commission to intermediaries in 2016, while 274 were spent in 2015 and 238 in 2014.[3]

The above figures clearly show that the entry into force of the regulations determined a significant transparency increase in getting the real figures of intermediaries involved in international transfers and the amount of their turnover. In fact comparing the 2015-2016 figures with those of the first seven months of the term 2016-2017, the observer can easily verify the positive outcome of the mandatory registration established by the FIFA regulations and implemented – although in a quite fragmentary way – by the member associations.

The FIFA Regulations' goal to better protect the integrity of football as well as the interests of its stakeholders has been met and – in this way – they contribute to fulfill their financial responsibilities.

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[1] K. Morris, presentation on FIFA TMS and FIFA Regulations on working with intermediaries., Players Contracts, London, 21 October 2016. The FIFA TMS website is available on www.fifatms.com.

[2] The ITMS is the online platform containing all data related to international transfers of players (employment and transfer agreements, reference to other agreements, TPO declarations, Intermediaries declaration) that introduced standardisation and enhanced transparency based on FIFA's Regulations on the Status and Transfer of Players.

[3] FIFA TMS, Intermediaries in International Transfers, 2016, https://www.fifatms.com/wp-content/uploads/dlm_uploads/2016/11/Intermediaries-2016.pdf (visited on 25 November 2016).

FIFA has deeply revised its regulatory strategy passing the governance responsibilities on to the member associations which must implement some minimum standards.

Moreover FIFA addresses itself directly to players and clubs in order to upgrade the safeguard of their rights and entitlements rather than governing the legal and organisational aspects of the category of intermediaries, who are traditionally not considered as parties of the international football community.

This revolutionary change of approach looks like a cautious retreat within the more familiar regulatory scope covering the traditional stakeholders.

In doing so, FIFA offers a new definition of intermediary covering also legal persons. It requires associations to set up a new registration system of the intermediaries and their activities (Art. 3 FIFA regulations), and virtually opens the profession to anyone with a "self-certified" impeccable reputation, meaning that he has not been sentenced with a financial or criminal offence during the last years.

Of greater significance is that FIFA has actually shifted the focus from managing the agents' profession to monitoring the obligations of players and clubs while working with the intermediaries. They must act with due diligence when choosing an intermediary and they are responsible for the obligations concerning the signing and submission to the national association of the relevant requested documents, *in primis* the representation contract and the intermediary declaration (Art. 2 FIFA regulations).

On this basis, the main target of the FIFA reform is to provide maximum transparency to players' employment and transfer negotiations, so as to comply with both legal and ethical requirements as it is solemnly stated in the FIFA regulations' preamble.

In order to achieve this, FIFA rules set some minimum standards to be implemented by the 211 national associations, which remain free to adopt stricter criteria, subject to the ordinary laws applicable to the associations (Art. 1, paragraphs 2 and 3).

In this regard, although in some countries (**Argentina, Belgium, Cyprus, Czech Republic, England**) intermediaries in football are not explicitly regulated, they do not fall completely outside the scope of ordinary law.

Indeed, the relevant ordinary law provisions dealing with matters such as employment and social security law, tax law, and so on, duly apply to their activities.

The legal framework can be even more complicated in federal states like **Belgium, Switzerland** and **UAE** where multiple regional laws apply.

In **France**, the strict ordinary rules governing the profession of intermediaries prevail in principle over the FIFA rules.

The same principle applies in those countries where public order law protects the political, social, or economic organisations and interests and it is preeminent over any other source of law.

Therefore, devolution in favour of the national associations rather than de-regulation, seems to be a more appropriate definition of the new FIFA policy. Indeed, FIFA has willingly limited the scope of its own intervention in this field.

By relinquishing a detailed regulatory perspective, FIFA has privileged a "functionalist" approach: the intermediary is not recognised as a registered professional but he acquires relevance only when carrying out activities linked to the negotiations leading to a transfer or employment contract of a player.

Out of these activities, the profession of intermediary has a limited or no relevance to FIFA. If the profession of agent/intermediary still survives, the compliance with quality standards is exclusively up to the national associations to deal with. They are bound to create mechanisms that ensure the intermediaries' compliance with high standards of professionalism, expertise and competence.

The agents are definitively doomed for the international federation of football. FIFA's intervention in relation to intermediaries is limited to extending at international level the scope of those national sanctions concerning intermediaries' malpractices.

2. Access to the profession

FIFA receded from any attempt to regulate the access to the profession of intermediaries at global level.

They are neither required to pass a selection anymore nor do they need to have a professional liability insurance nor provide a bank guarantee. However, the FIFA aloofness can live smoothly with the more regulatory approach of some national associations. In fact, the access to the profession of intermediary has been regulated in different ways at national level.

Some federations have kept the condition to pass an exam (**China, Czech Republic, Denmark** (only for the optional category of *"certified intermediaries"*), **France** and **Ukraine** (in the latter, only for the so-called *"permanent intermediaries"*), or an interview (**Argentina, Slovak Republic** and **Spain**), or both an exam and an interview (**Mexico**).

China waives the exam condition for foreign intermediaries who can provide their services after having given a bank guarantee.

With regard to the interview, we share the concern and the perplexity expressed by some authors about its subjectivity's pitfalls. However we believe that a final judgment must be made in due course, when we will be able to count on a congruous number of relevant cases to review and identify possible trends.

Several other associations have maintained the prerequisite to have a professional liability insurance (**Argentina, Brazil, Czech Republic, Mexico, Paraguay, Portugal**), or a proof of tax compliance (**Belgium, Mexico, Portugal, Slovak Republic**) and social security obligations (**Belgium** and **Portugal**).

Some associations require foreigners to have residence in their country (**Argentina, Paraguay, Turkey**), to have a work permit (**Mexico**) or to submit a bank guarantee (**China**).