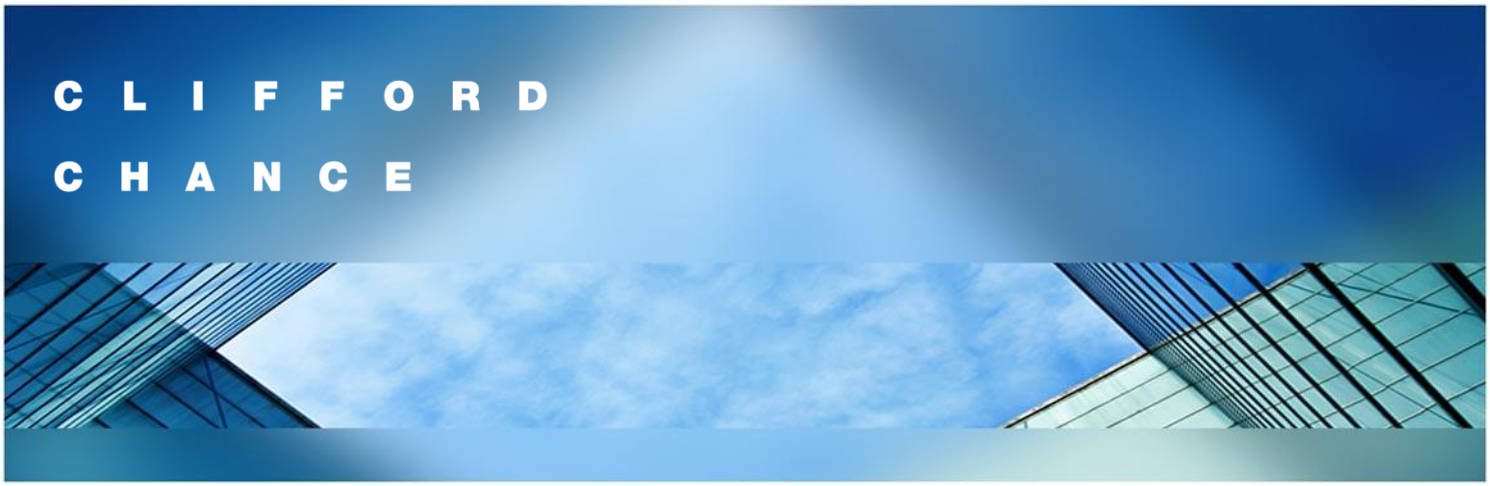

VICTORY FOR FOOTBALL AGENTS: FIFA'S FEE CAP ON AGENTS FOUND TO BE ILLEGAL IN THE UK

Overview

On 30 November 2023, a major blow was struck against FIFA's attempts to cap the fees that football agents can charge for their services. A prestigious arbitration tribunal comprised of Lord Collins, Lord Dyson and Christopher Vajda KC (former CJEU judge) ruled that key elements of FIFA's Football Agent Regulations would, if implemented by the Football Association ("**FA**") in the UK, constitute an illegal agreement and an abuse of a dominant position in breach of UK competition law. In particular, the panel found that the proposed fee cap was plainly a decision to fix purchase prices and the Tribunal could not discern any justifiable connection between the cap and any perceived abuses or market failures. Clifford Chance acted for the football agents in their successful challenge and the published Award can be found here.

While FIFA's football agent regulations (the "**FFAR**") have been challenged in many jurisdictions, including an unsuccessful appeal before the Court of Arbitration for Sport ("**CAS**"), a successful challenge in Germany, and a pending reference to the Court of Justice of the EU ("**CJEU**"), this represents the most significant defeat for FIFA in the most lucrative football market in the world. The finding that the FA has a dominant position in the market for agents' services in England is also of wider significance. This means that the FA has a special responsibility not to abuse that position and it may limit their ability to regulate the economic activities of agents in the future for fear of breaching competition law.

More generally, the case underscores the risk that sports governing bodies face from competition law challenges. While such bodies have a right to regulate the rules of the game, they need to exercise considerable caution when seeking to regulate economic activities related to sport, particularly those of third parties. Other bodies, including industry associations, should give careful thought to whether their rules comply with competition law.

THE FFAR

On 16 December 2022, the FIFA Council approved the FFAR, which seeks to regulate the activities of football agents in a wide range of respects, including by introducing enhanced licensing and requiring agents to pass certain tests. There were various stated objectives of the FFAR including "*improving contractual stability between players and clubs*", maintaining "*competitive balance*", "*improving financial and administrative transparency*" and "*preventing abusive, excessive and speculative practices*".

Key issues

- Tribunal finds that FFAR would, if implemented by the FA, constitute an illegal agreement and an abuse of a dominant position in breach of UK competition law.
- The proposed fee cap was plainly a decision to fix purchase prices and there was no justifiable connection between the cap and any perceived abuses or market failures.
- This represents the most significant defeat for FIFA in the most lucrative football market in the world.
- The finding that the FA has a dominant position in the market for agents' services in England may limit their ability to regulate the economic activities of agents in the future.
- Sports governing bodies should be alive to the risk of competition law challenges when setting their rules, as should industry bodies.
- While sports governing bodies have a margin of appreciation when regulating the conduct of the sport itself, that margin does not provide a blank cheque to regulate the activities of third party commercial actors.

The core element of the FFAR was to cap the fees that can be paid for football agency services to 10% of the transfer fee for agents acting for selling clubs, and up to 6% of a player's salary for agents acting for both the buying club *and* the player (the "**Fee Cap**"). The FFAR also required that payments be made on a pro rata basis every three months throughout the contract, rather than up front as is current practice (the "**Pro Rata Payment Rule**"). In addition, the FFAR prohibited multiple representation, except when acting for a player/coach and a selling club in the same transaction (the "**Dual Representation Rule**"). The FFAR further required that third parties were prohibited from paying agents on behalf of players or coaches (the "**Client Pays Rule**"), (together the "**Challenged Rules**"). There were many other rules under the FFAR which were not challenged, indeed a number were welcomed by the Claimants.

National football associations, including the FA, are under an obligation to comply fully with FIFA's rules and regulations including the FFAR. As a result, the FA was due to implement its equivalent national regulations (the "**NFAR**") by 30 September 2023, but agreed to delay implementation pending the Tribunal's award. The FA has since confirmed that it will not implement those elements of the NFAR which have been found to fall foul of UK competition law.

THE CLAIM

In March 2023, four football agencies (CAA Base, Wasserman, ICM Stellar Sports and Aréte, the "**Claimants**") served a notice of arbitration on the FA alleging that the NFAR constituted a breach of Chapter I and II of the Competition Act 1998 ("**CA1998**"). The challenge was brought on an expedited basis - the trial commenced just 6 months after the claim was filed and saw evidence from over 20 witnesses of fact and two expert competition economists.

FIFA sought to join the proceedings, which the Claimants agreed to, subject to certain conditions. In broad terms the Claimants alleged that the Challenged Rules were: (a) an agreement between football clubs and the FA (and/or a decision of an association of undertakings) which prevented, restricted or distorted competition in the UK (akin to a buyers' cartel) and (b) constituted an abuse of a dominant position by the FA. Alternatively, the Claimants contended that the Challenged Rules were an improper restraint of trade at common law.

THE TRIBUNAL'S AWARD

Wouters/Meca-Medina

FIFA and the FA accepted that they are each properly characterised as an association of undertakings (of football clubs in the case of the FA, and national football associations in the case of FIFA). However, they argued that the Challenged Rules fell within the *Wouters/Meca-Medina* principle such that FIFA and the FA are afforded a "margin of discretion" to implement rules regulating sporting activities. Furthermore, FIFA and the FA sought to extend this principle to regulation which is not aimed at ensuring that the sport is conducted in a fair way, but to prevent alleged abuses. The Tribunal rejected these arguments and accepted the Claimants' arguments that the FA and FIFA were seeking not to regulate sporting activities, but to regulate prices (or who should contract with agents) in a "purely economic" context.

Consequently, the Tribunal did not consider that the Challenged Rules fell within the *Wouters/Meca-Medina* principle.

The Fee Cap and Pro Rata Payment Rules are restrictions by object and effect

The Tribunal noted that the reasoning for the Fee Cap was "*driven (and continued to be driven) by the view that agents' fees were excessive".* Doubts as to the compatibility of the Fee Cap with competition law had been raised at an early stage and FIFA's internal documents demonstrated that the rationale for seeking to substantiate the Fee Cap made an appearance *after* the policy of curbing agent fees had been developed. In reaching that decision, the Tribunal noted that FIFA's documentation served as "*striking confirmation that FIFA was primarily concerned with the fees which agents were earning*" and, in one instance "*contained an offensive caricature representing an agent with dollar signs above his head and a money bag in one hand and bank notes in the other*". In rejecting FIFA's arguments that the Fee Cap was justified in view of the "market abuses" identified by FIFA, the Tribunal found that the evidence on the alleged abuses was "*not compelling*". Importantly, the Tribunal had "*not been able to discern any justifiable connection between the Fee Cap and the claimed abuses and market failures or with the avowed reasons to apply it*". Ultimately, the Fee Cap was not justified by a legitimate objective and therefore constituted a Chapter I infringement.

The Fee Cap was also found to be a restriction of competition by object (i.e. regarded by its very nature as being harmful to the proper functioning of competition such that there is no need to consider the effects). It fixed the price at which agents offer their services in a competitive market. While it was not necessary to do so, the Tribunal went on to find that the Fee Cap was likely to have an appreciable effect on competition. There was no dispute that the cap would reduce very considerably the payments made to agents and that large and well-resourced clubs would be the beneficiaries of those reductions, distorting competition between those clubs. The Tribunal also found that the Cap was likely to have a substantially adverse effect on the business models of the agencies, particularly in relation to those areas which are less profitable (i.e. young players and female players). The Tribunal rejected the argument that more ancillary agency services could be 'unbundled' and charged separately as FIFA and the FA had contended.

Pro Rata Payment Rules

FIFA and the FA argued that the Pro Rata Payment Rules aimed to address so called "contractual stability" concerns. In particular that agents encouraged players to leave their clubs before the end of their contractual term and thereby 'engineered' transfers.

The Tribunal found that the Pro Rata Payment Rules were also a by object restriction on competition and that the terms were intended to interfere with (and ultimately reduce) payments made by clubs to agents for services provided.

The Tribunal, in rejecting the justification tabled by FIFA, determined that the Pro Rata Payment Rules were "*not an adequate or proportional response to the perceived threat"*. Importantly, there was no evidence before the Tribunal that abuses of the kind alleged were so common that it was necessary to make agents' fees contingent on the subsistence of the player's contract.

Exemption

The Tribunal briefly considered whether the Fee Cap or the Pro Rata Payment Rules were exempt under section 9 Competition Act ("**CA**") 1998 (which contains four cumulative conditions). As to the Fee Cap, the Tribunal found Mr Harman's evidence (FIFA's expert) went nowhere near enough to meet the test to satisfy the first condition (i.e. efficiency gains), and therefore there was no need to consider the other conditions. No separate argument was put forward to justify the Pro Rata Payment Rules, and therefore these were not exempt either.

The Dual Representation and the Client Pays Rules

The Tribunal did not find that the implementation of the Dual Representation Rule and the Client Pays Rule would infringe competition law.

FIFA and The FA argued that both rules intended to introduce greater transparency into the transfer system and, in the case of the Client Pays Rule, prevent the risk of abuses relating to the circumvention of the Fee Cap (i.e. that important information was said to be hidden from players).

The Tribunal held that the Dual Representation Rule and the Client Pays Rule were both of a "*different character*" to the Fee Cap and the Pro Rata Payment Rule. Neither of these rules were restrictive of competition by object or effect. The Tribunal was not satisfied that these rules would cause a sufficient degree of harm to competition. In particular, the Dual Representation Rule pursued a legitimate aim of limiting conflicts of interest and protecting players.

ABUSE OF DOMINANCE

The Tribunal found that, in view of its conclusions on Chapter I (above), the FA had committed an abuse. The only question was whether the FA was dominant in the market for football agent services. It considered, relying on the approach in the CJEU case of *Piau* that the clubs, through the FA, were collectively dominant in the market for football services. It found that the FA has a dominant position in the market for agents' services in England as an emanation of the clubs. On that basis, the Fee Cap and the Pro Rata Payment Rules would be an abuse of a dominant position.

RESTRAINT OF TRADE

The Tribunal, having reached the conclusion that the Fee Cap and Pro Rata Payment Rules are anti-competitive, considered whether the Dual Representation Rule and the Client Pays Rule are unenforceable at common law under the restraint of trade doctrine. In broad terms, all covenants in restraint of trade are *prima facie* unenforceable at common law unless they are reasonable and with reference to the interests of the parties concerned and the public.

At the outset, the Tribunal noted that the doctrine of restraint of trade had not been abolished by the CA 1998 and that the previous approach (e.g. under *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44) which found that restraint of trade is superseded by competition law on the basis of the supremacy of EU law, does not apply post Brexit.

The Tribunal observed the Dual representation Rule and the Client Pays Rule, while *prima facie* restraints of trade, serve the purpose of reducing conflicts of interest and ensuring that players and coaches are aware of the fees being charged by the agent. The Tribunal concluded that these rules are reasonable

restrictions such that the common law doctrine did not render them enforceable.

KEY TAKEAWAYS

There are a number of implications of the Tribunal's judgment:

- Any further attempt, by the FA, to cap the fees that clubs and players pay to agents are doomed to fail for breach of UK competition law. The Award, by an illustrious panel, found that such a rule constituted a buyers' cartel and was a clear restriction of competition by object and effect.
- The FA has been found to be dominant in the market for agents' services in England. That means the FA will have a special responsibility not to abuse that position and will have to tread with great care if it decides to regulate the economic activities of agents (or third parties) in the future.
- Sports governing bodies and leagues should not under-estimate the risk they face from competition law challenges. While they have a margin of appreciation when regulating the conduct of the sport itself, that margin does not provide a blank cheque to regulate the activities of third party commercial actors.
- This case is just one example of a number of competition law challenges brought in the sports sector including the DP World Tour's successful challenge against LIV Golf and the ongoing preliminary reference before the CJEU relating to the Super League.
- The Tribunal has also helpfully clarified that it is possible to run common law restraint of trade arguments in parallel to competition claims in the UK, post-Brexit. Prior to Brexit, once competition law was engaged common law restraint of trade could not be engaged (*Days Medical*). We would expect that other courts in the UK will take note of this finding.

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