

Insights

WHEN USE OF SPORTS TECHNOLOGY GOES WRONG - VAR AND OTHER TECHNOLOGIES

DIGITAL SPEAKS SERIES / SUMMER OF SPORTS TECH SERIES / EURO 2024

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Ahead of Euro 2024 final on Sunday, in the third blog in our series focusing on the tournament, and as promised [in our last edition](#) we turn our attention to the use of VAR in the competition. Already a source of controversy in the tournament, with incidents in the group stages (notably in Netherlands v France) and in the first round of the knockouts (e.g. Germany v Denmark) we examine what remedies, if any, are available to teams at the wrong end of a controversial VAR decision. We have also looked at how these issues apply in respect of the deployment of technologies in other sports, where similar debates are being played out.

International tournaments have long been beset by controversial game-defining, and occasionally championship-defining, moments: we have previously talked about Frank Lampard's disallowed goal against Germany in the 2010 World Cup, but think also of Thierry Henry's helping hand against Ireland in the 2010 World Cup qualifiers, and not to mention the 'Hand of God' from a certain Argentinian maestro.... The Video Assistant Referee (VAR) system was introduced to combat such scenarios and, as the name suggests, use technology to help the on-pitch refereeing team reach the correct decision when incidents occur in games. VAR is largely applied to rule on offsides, penalty decisions, and disciplinary action in situations where the refereeing team has made a clear and obvious error in the field. Its proponents would argue that, overall, VAR has been successful in improving the accuracy of decision making by the referee teams (in the Premier League VAR has been said to have raised the accuracy of decisions from 82% to 96% correct). However, VAR's introduction has been far from plain sailing, with several high profile mistakes and failures leading to criticism from fans and teams alike, as well as repeated calls to stop using the system altogether, the most recent of which coming from Georgia head coach Willy Sagnol following his team's tournament exit after their defeat to Spain.

With VAR already making its presence felt in the Euros (despite a last-minute injunction application heard in the German courts on the eve of the tournament, in which a tech company issued an application against UEFA (amongst others) alleging that the VAR technology to be used in the Euros

infringed its patent) and where the potential ramifications of incorrect decisions will only increase as the knock-out stages progress, what options if any, are available to teams?

LEGAL CHALLENGE – THE OPERATIVE REGIME

The starting point for any question considering the options available to teams for a legal challenge must first consider the operative legal structure in which VAR decisions take place. The regime under which the European Championships operate is complex, however the rules governing the use of VAR are comprehensive. UEFA Member Associations are allowed to enter their senior men's national team for the competition provided they confirm in writing that they themselves, their players and officials comply with the IFAB Laws of the Game, and agree to respect the statutes, regulations protocols, directives and decisions of UEFA^[1]. These include the Regulations of the UEFA European Championship 2024 and the UEFA Disciplinary Regulations 2024, which both contain directives on the application of VAR decisions. These regulations govern when VAR ought to intervene, and also provide a set of protections to officials using VAR and protections to the finality of refereeing and VAR decisions.

The most important of these come under rule 5 of the IFAB Laws of the Game, namely that:

- i. decisions of the referee regarding facts connected with play, including whether or not a goal is scored and the result of a match are final and decisions must be respected;
- ii. referees may be assisted by a video assistant referee only in a certain set of circumstances, however the referee will ultimately make the final decision; and
- iii. the referee or other match officials will not be held liable for injuries, damage or any other loss suffered from any decision made.

The IFAB VAR Protocol further provides that a match will not be invalidated because of malfunctions of the VAR technology, wrong decisions involving VAR, decisions not to review an incident due to VAR, and reviews of non-reviewable decisions or situations.

Under the UEFA Disciplinary Regulations 2024, teams are only permitted to bring challenges to review the disciplinary consequences of a decision made by a referee (such as the mistaken identity of a red card and the ensuing bans for subsequent fixtures) not the decision itself. Protests may not be lodged against the factual decisions taken by the referee and such decisions of the referee regarding facts connected with play (including whether or not a goal is scored) are, again, final.

LEGAL CHALLENGE – POTENTIAL SCENARIOS

The comprehensive protections to decision making under the UEFA and IFAB regulations mean that challenges to the result of matches for on-field decisions involving VAR are very unlikely to get off

the ground in the first place. This is borne out when examining the potential scenarios in which a team might look to challenge a VAR decision.

There are two potential scenarios here:

1. VAR has reached an incorrect decision

In this scenario, the VAR system and process have operated as intended, however the match officials have come to the 'wrong' decision in the eyes of the challenging team. This is the most common scenario in which complaints about VAR arise and is one that has already been seen several times in the competition. The most controversial example so far came in the knockout match between Germany and Denmark, where a penalty was awarded to Germany, the eventual winners of that game, using VAR and the new 'snicko' technology to determine there was a hand-ball in the box. Germany went on to win the game 2-0, knocking out the Danes.

In this scenario, the rules are clear. The referees are entitled to use the VAR process set out in the VAR Protocol to examine and rectify decisions where a clear and obvious error is adjudged to take place. Whilst the referee may be assisted by an assistant video referee, the referee will ultimately make the decision on the field and that decision will be final. No matter how much players and fans alike complain about the use of VAR in decisive moments of the game, where VAR has been used to come to a decision in line with UEFA and IFAB regulations this decision is final and must be respected, no matter the outcome.

2. VAR fails and, as a result, an incorrect decision is made

This scenario is more nuanced than the first, although the result is ultimately the same. It arises where the VAR system has failed (either through a procedural or technical failure) and an incorrect decision is reached as a result of that failure. This scenario is (thankfully) yet to arise in this year's Euros, but examples can be taken from previous controversial moments in the Premier League, such as:

- i. the '£200 million mistake', where goal-line technology failed to spot the ball crossing the line in a game between Aston Villa and Sheffield United, two relegation candidates in the 2019/20 Premier League Season. VAR failed to intervene, Sheffield were not awarded the goal, and Aston Villa stayed up that season, on goal difference, whilst Sheffield were relegated; and
- ii. the high-profile error in a game between Liverpool and Tottenham Hotspur in the 2023/24 season where a Luis Diaz goal (that would have put Liverpool 1-0 up) was ruled out for offside. In this case the failure was a procedural one, the VAR check had revealed a 'clear and obvious error' as the player was, in fact, onside, however the VAR team mistakenly told the referee that the check was complete (indicating no error had been made). The game was restarted before they could inform the referee of the correct decision and Tottenham went on to win the game 2-1. At the time

Liverpool manager Jurgen Klopp suggested that the club would 'consider their options' in the fallout, however no challenge was brought.

Taking the second example, should a similar event occur at Euro 2024 it is again highly unlikely that a challenge would get off the ground. Whilst, in theory, it could be arguable that IFAB rules were breached by the officials' failure to follow the procedure set out in the IFAB VAR protocol, the UEFA regulations remain clear that any 'failure, unavailability, use or non-use of VAR technology will in no way prejudice the validity of the referee's decisions, with such decisions being final in all cases'. Once play had restarted, the officials were unable to intervene to change the decision (per IFAB Law 5.4) and, as such, the decision made by the referee on the pitch was final and was not invalidated by the failure of the proper use of VAR.

FURTHER CONSIDERATIONS: DOES TECH FAILURE CHANGE OUTCOMES?

Causation is another important consideration. Even if challenges brought against referring decisions were permissible, participants wishing to bring these challenges would likely encounter difficulties in proving that the relevant technology failure was decisive in changing the outcome of the game. In the context of disciplinary challenges (which are permitted, for example, under the UEFA Disciplinary Regulations 2024), the protest is only admissible if the challenged violation had a decisive influence on the final result of the match.

In sports which deploy technology to assist in the determination of the outcome itself, this causation test would be easier to satisfy – see, for example, the [100-m butterfly race](#) between Michael Phelps and Milorad Cavic at the 2008 Beijing Olympics, which was so close that the FINA (the swimming's world governing body) had to deploy video and electronic timing reviews which eventually determined the 10-thousandths of a second difference between the two athletes. In such cases, the correlation between the contribution of technology and the final result is easier to prove. In football however, participants would likely struggle to establish that a technology failure happening during the game changed its outcome definitively. It would be difficult to prove, for example, that a penalty not awarded because of a VAR failure would have resulted in a goal and an eventual win – or that, *vice versa*, a penalty wrongly awarded is what cost the challenging team the match and but for that penalty the result would have been different. In the second scenario above, three more goals were scored after the VAR incident, and again it would be difficult to convincingly argue that the incident was the decisive influence on the final result of the match.

The same difficulties apply to challenges in Formula 1, and former F1 driver Felipe Massa is no stranger to this difficulty. Earlier this year, Felipe Massa brought proceedings before the English High Court in relation to the 2008 F1 World Championship, which Massa lost to Lewis Hamilton. The challenge relates back to the Singapore Grand Prix of that year, in which Renault staged a win for one of its drivers, Fernando Alonso, by ordering its other driver, Nelson Piquet Jr, to deliberately crash his car. Massa was leading at the time of the crash, but ended up finishing 13th in the race

before eventually losing the championship to Hamilton by just one point. Massa brought legal proceedings against, amongst others, Federation Internationale de L'Automobile (FIA) alleging that FIA breached the regulations by not investigating the crash properly and that if such an investigation had been properly conducted, Massa would have won the drivers' championship that year.

Although at an early stage, Massa's challenge may need to deal with a number of legal issues including limitation and, most importantly, causation: Massa is likely to need to prove the proposition that, but for the lack of investigation, he would have won the race and would have therefore won the World Championship.

FURTHER CONSIDERATIONS: AVAILABLE REMEDIES

Further, even if failure could be proven to be causative and decisive in changing the outcome of the game, it is unclear what remedy the challenging team or athlete would be pursuing and against whom. Match officials, who actually made the decision, are protected by the UEFA Regulations from any injuries, damage or any other loss suffered from any decision made, so governing bodies would likely have to be pursued. One option would be to demand that the match be replayed, but this could not only involve a disproportionate deployment of resources, but also pose logistical difficulties: for example, by the time a challenge against a VAR decision awarded in a group stage game is resolved, the subsequent knock-out matches could have already been concluded, such that replaying a group stage match would be redundant.

Further, the remedy sought would also depend on the body hearing the challenge. If, like Felipe Massa, the athlete is seeking to bring legal action before a civil court for a breach of a sporting regulation, overturning the results is likely to fall outside the scope and jurisdiction of a court, with damages being a more likely remedy. However even in those instances, causation and remoteness are likely to pose evidentiary challenges.

Equally, the way technology is deployed as part of the VAR process makes it difficult to attribute responsibility for a technological failure to one specific individual or entity. A VAR decision is essentially a multiple stage decision making process, whereby the video assistant referee reviews the video footage and provides advice to the referee based on that review. The deployment of that footage is also made possible with the assistance of the assistant video assistant referees (AVARs) who help the VAR in the video operation room and around the pitch. The VAR and AVARs are also assisted by replay operators who help select the cameras with the best angle. Identifying precisely where things went wrong in this chain can be difficult, especially when there is an omission or a value judgment being made somewhere in the process – for example, when the referee decides not to conduct an on-filed review (OFR) of the footage, or when the referee decides to ignore the VAR advice.

OTHER SPORTS

The finality of refereeing decisions is a well-established principle across multiple sports, which is reflected in the difficulty (and sometimes impossibility) of challenging those decisions.

Tennis is a prime example. The main way in which tennis deploys technology is through a system known as “hawk-eye” (the same system which is also used in sports such as cricket or rugby). “Hawk-eye” uses a series of cameras to capture the movement of the ball and creates a 3D representation of the ball’s trajectory from when it is hit by the player to the moment it lands on the other side of the net. Importantly, players wishing to challenge a call made by the line judge by having recourse to the “hawk-eye” must do so immediately after the call – delay may result in the umpire denying the request for challenge, likely due to the very consideration of finality. In the same vein, once “hawk-eye” is deployed, players cannot challenge the decision reached any further. Again, this is to ensure that the game is not disrupted by the calling into question of the way the umpire and judges exercised their function. At clay court tournaments, players do not even have recourse to the electronic system and must instead rely on the call made by the umpire based on the marks left by the ball on clay.

Interestingly, the VAR system has also recently been used in tennis for some tournaments (including the US Open) to challenge situations like double bounces or the ball hitting the player. Similarly to football, the umpire will review the relevant video footage and either confirm or overturn the original call. Despite the useful nature of this feature, it is also not without fault: at the US Open last year, the video review system resulted in a failure when Andy Murray’s ball was called to have double bounced before Corentin Moutet could hit it. Moutet wanted to challenge the decision, but the chair umpire’s tablet malfunctioned and did not show the replay, such that she could not review the footage. Moutet had no avenue to challenge this technology failure, and instead had to accept the original call.

THE FINAL WHISTLE

Ultimately, when controversial decisions are made at this year’s UEFA European Championships, the opportunities for bringing any form of challenge are limited, even in scenarios where the failure of VAR technology has resulted in an incorrect decision being made. Whilst the UEFA/IFAB regulatory framework allows for teams to bring challenges to the effect of erroneous disciplinary action taken, no challenge is available to the validity of decisions made by the refereeing team. Even if such a challenge were available, difficulties would remain in proving that that failure was decisive in changing the outcome of the game and in finding an appropriate remedy for the failure. In many ways this is no bad thing, as protecting the finality of refereeing decisions prevents tournaments from being mired with countless legal challenges to the results of fixtures. With the speed and accuracy of VAR technology improving, we can only hope that the outcome of the 2024 European

Championships is decided by sporting acts on the pitch and not by a VAR failure that cannot be challenged.

[1] Arts 3 & 4 Regulations of European Football Championship.

This article was written with Trainee Solicitor Henry Cross.

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