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Counting the Pennies in Sport:  
UEFA's Financial Fair Play  
Regulations Under the  
Competition Law Microscope

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# Counting the Pennies in Sport: UEFA's Financial Fair Play Regulations Under the Competition Law Microscope

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## I. INTRODUCTION

It has been almost forty years since the manager of Tottenham Hotspur,<sup>2</sup> Bill Nicholson, is said to have remarked “[e]verything has changed now. Money comes before football and money is the ruination.” The economic dimension of football has never been more significant. On the one hand, BT and Sky engage in a bidding war for Premiership broadcasting rights; on the other, many U.K. and European clubs slide into insolvency. It is well-established in EU competition law that “the practice of football is an economic activity” such that football clubs or national associations may be “undertakings.”<sup>3</sup> Moreover, the finances of several leading clubs have been artificially inflated by the presence of wealthy owners who have injected large amounts of their own funds.

Amid these trends, the Union of European Football Associations (“UEFA”) has introduced regulations to ensure so-called “financial fair play.” As a restriction on the access to football competitions in Europe, objections have been made that the rules do not comply with EU competition law. In this article, we briefly set out the new regime and its enforcement to date before looking at the competition law complaints that have already been, or are likely to be, made against the regulations.

## II. UEFA'S FINANCIAL FAIR PLAY REGULATIONS

UEFA's *Club Licensing and Financial Fair Play Regulations* (“the FFPR”) were introduced in May 2010. The purpose of the FFPR is set out at Article 2(2) of the updated 2012 edition:<sup>4</sup>

- a) to improve the economic and financial capability of the clubs, increasing their transparency and credibility;
- b) to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually;
- c) to introduce more discipline and rationality in club football finances;
- d) to encourage clubs to operate on the basis of their own revenues;
- e) to encourage responsible spending for the long-term benefit of football; and
- f) to protect the long-term viability and sustainability of European club football.

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<sup>1</sup> The authors are barristers practising at Blackstone Chambers. All opinions and errors in this piece are their own.

<sup>2</sup> An English football club, located in Tottenham, England.

<sup>3</sup> Case T-193/02 *Piau v Commission* [2005] ECR II-209, at [69] and [71].

<sup>4</sup> Club Licensing and Financial Fair Play Regulations, available at

[http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf).

The FFPR introduced a number of rules into the license conditions for a football club to participate in national and European competitions; these are designed to limit imbalances in a club's finances. This is achieved by requiring clubs: (a) to provide financial information to licensing authorities,<sup>5</sup> including "future financial information;"<sup>6</sup> (b) not to have any "overdue payables" in the season preceding the application for a license, either to football clubs<sup>7</sup> or towards employees and social/tax authorities;<sup>8</sup> and (c) if they qualify for a UEFA club competition, to meet "break-even requirements"<sup>9</sup> and other heightened monitoring requirements.<sup>10</sup> This latter condition means a club's expenses must not exceed its income<sup>11</sup> beyond "acceptable deviation[s]."<sup>12</sup>

The FFPR are being implemented over a three-year period. Monitoring commenced in 2011 and the "break-even" assessment for the financial years ending 2012 and 2013 is being carried out during the course of the current season (2013/14).

To enforce the regime, UEFA's Club Financial Control Body ("CFCB"), established in June 2012 and consisting of an Investigatory Chamber and an Adjudicatory Chamber, is competent to: (a) decide on clubs' eligibility for UEFA club competitions, and (b) impose disciplinary measures in the case of non-fulfillment of the relevant requirements.<sup>13</sup> Decisions of the CFCB may be appealed to the Court of Arbitration for Sport ("CAS"), which sits in Lausanne.<sup>14</sup> Already, UEFA is heralding the FFPR as a success story, reporting "a 47 percent reduction in overdue transfer and employee payables between the first assessment in June 2011 and the June 2012 assessment."<sup>15</sup>

### III. A GROWING SERIES OF PRECEDENTS

Unhelpfully, UEFA does not publish the decisions of the CFCB. However, CAS has published a number of appeals decisions that largely concern the pre-June 2012 regimes (with decisions taken by UEFA's Control and Disciplinary Body or "CDB"). These offer a hint as to the likely approach that will be adopted by CAS and (potentially) the CFCB Adjudicatory Chamber to other aspects of the regime.

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<sup>5</sup> *Id.*, Articles 46, bis, 47, 48, & 51.

<sup>6</sup> *Id.*, Article 52.

<sup>7</sup> *Id.*, Articles 49 & 65.

<sup>8</sup> *Id.*, Articles 50 & 66.

<sup>9</sup> *Id.*, Articles 58-63.

<sup>10</sup> *Id.*, Articles 64-68.

<sup>11</sup> *Id.*, Article 63.

<sup>12</sup> *Id.*, Article 62.

<sup>13</sup> Article 3 of the Procedural rules governing the UEFA Club Financial Control Body (2012 Edition), available at [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/85/85/25/1858525\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/85/85/25/1858525_DOWNLOAD.pdf)

<sup>14</sup> *Id.*, Article 25(2).

<sup>15</sup> *Club Licensing Benchmarking Report Financial Year 2011 - 11 selected findings*, available at [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/91/62/73/1916273\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/91/62/73/1916273_DOWNLOAD.pdf) at ¶10.

Four decisions have been handed down to date: *Györi*, *Bursaspor*, *Beşiktaş*, and *Málaga*.<sup>16</sup> The first three are examined at length in an article by Brian Kennelly dated 23 May 2013.<sup>17</sup> CAS Panels have largely upheld both exclusions and fines imposed on clubs for either failing to declare or simply having overdue payables in breach of the FFPR.

The *Málaga* decision was the first in which a CAS Panel has applied the 2012 edition of the FFPR. The club had suffered severe financial hardship and was placed in insolvency proceedings while owing significant sums to the Spanish tax authorities. At the relevant reporting dates for FFPR purposes, the tax authorities had not yet determined the club's request for its tax liabilities to be deferred. This request was later granted.

The club's position was that these sums were deferred payments and not relevant to the FFPR assessment, whereas two reports drafted by independent auditors acting on UEFA's behalf concluded that the club had millions of Euros of overdue payables. It was fined EUR 300,000 and excluded from participating in the next UEFA club competition for which it would otherwise qualify on its results or standing in the next four seasons (i.e. 2013/2014 to 2016/2017). A further exclusion from a subsequent UEFA competition would be imposed if the club had not proved by March 31, 2013 that it had no overdue payables.

The appeal before the CAS Panel was almost exclusively focused on whether the concept of an "overdue payable" should be determined by national law—where the debt in question was a sum owed to tax authorities under national legislation—or whether it was an autonomous concept under the FFPR. The Panel concluded that it was the latter and, since the club "ha[d] not submitted any specific argument why the sanction imposed would not be in line with principles of proportionality," it upheld the sanction imposed as proportionate.

Outside the CAS decisions, it is difficult to discern UEFA's practice. In a recent press release, UEFA announced that the CFCB's Adjudicatory Chamber had: (i) fined and excluded three clubs from participating in the next UEFA club competition for which they would otherwise qualify on results or standing in the next three seasons (FC Metalurh Donetsk, Ukr; FC Petrolul Ploiești, Rom; and Skonto FC, Lva); (ii) fined two clubs (CS Pandurii Târgu Jiu, Rom and WKS Śląsk Wrocław, Pol) and (iii) reprimanded another (Vitória SC, Por) for the presence of overdue payables.<sup>18</sup>

Interestingly enough, in *Györi* and *Beşiktaş*, the CAS Panels had noted a decision by the UEFA Control and Disciplinary Panel concerning PAOK FC, which had significant overdue payables during the monitoring process (although not when it was awarded a license). PAOK FC submitted a reorganization plan and sought a "second chance" from UEFA. Accordingly, the

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<sup>16</sup> CAS 2012/A/2702 *Györi ETO v. UEFA* (8 May 2012), CAS 2012/A/2821 *Bursaspor Kulübü Derneği v. UEFA* (22 June 2012), CAS 2012/A/2824 *Beşiktaş JK v UEFA* (29 June 2012), and CAS 2013/A/3067 *Málaga CF SAD v. UEFA* (11 June 2013).

<sup>17</sup> Available at

[http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDsQFjAB&url=http%3A%2F%2Fwww.blackstonechambers.com%2Fdocument.rm%3Fid%3D523&ei=L2rJUpO7E5CUhQeZ4YGgDw&usq=AFQjCNGTPCgUa4x3dJePjotoIpSSd6fdpQ&sig2=PwPB\\_uvCk-zXLYJrkrMw0A](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDsQFjAB&url=http%3A%2F%2Fwww.blackstonechambers.com%2Fdocument.rm%3Fid%3D523&ei=L2rJUpO7E5CUhQeZ4YGgDw&usq=AFQjCNGTPCgUa4x3dJePjotoIpSSd6fdpQ&sig2=PwPB_uvCk-zXLYJrkrMw0A).

<sup>18</sup> UEFA Club Financial Control Body adjudicatory chamber renders decisions (20 December 2013), available at <http://m.uefa.com/news/2039912/>.

UEFA Control and Disciplinary Panel fined the club EUR 250,000, but suspended EUR 200,000 of that fine for a probationary period of three years. The club's exclusion from competition for one season was suspended for a similar period.

A number of common themes emerge from these precedents. CAS Panels have strengthened the FFPR by accepting that they operate independently of national law.<sup>19</sup> CAS decisions have also acknowledged the importance of the FFPR “to protect the long-term viability and sustainability of European club football,” and the seriousness with which UEFA treats significant breaches of the regulations.<sup>20</sup> Panels have stressed that the disclosure obligations in the FFPR are “essential for UEFA to assess the financial situation of the clubs that are participating in its competitions.”<sup>21</sup> In turn, UEFA's approach is not inflexible, as the *PAOK* case illustrates.

Given the broad discretion conferred on UEFA in terms of the type and severity of sanctions it may impose, it is clear that it will be difficult to challenge sanctions before CAS with a standard of review of gross disproportionality.<sup>22</sup> Moreover, “just because another sanction could be issued, it does not make the one issued disproportionate.”<sup>23</sup> Indeed, a number of factors suggest that the regime will be applied in a severe manner:

- **The seriousness of breaches of FFPR:** CAS has so far been unreceptive to arguments that sanctions imposed for breaches of the FFP Regulations are disproportionate when compared to those imposed for other offenses, such as match-fixing.<sup>24</sup>
- **Recidivism:** CAS has not challenged the view that the absence of a previous infringement is not a decisive factor in determining the suitability of sanctions, see *Györi*<sup>25</sup> and *Bursaspor*.<sup>26</sup> On the other hand, a systemic breach of the FFPR is likely to be an aggravating factor, as it appears to have been in *Beşiktaş*.<sup>27</sup>
- **Fault:** A system of fault-based liability that is otherwise unapparent on the face of the FFPR emerges from the case law, namely by the fixing of fines in proportion to the gains made by the club by wrongfully participating in a competition.<sup>28</sup> This need not include “bad faith” as in *Beşiktaş*—in *Györi* both the club and the HFF had failed to exercise “diligence.”<sup>29</sup>
- **The ambiguous role of national associations:** The Appeals Body in *Györi* considered that the original sanction on the club had been harsh since it had relied on the Hungarian

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<sup>19</sup> See *Györi* at [118] and *Málaga* at [9.5]-[9.7].

<sup>20</sup> *Beşiktaş* at [113] and [129].

<sup>21</sup> *Györi* at [136] and *Bursaspor* at [115].

<sup>22</sup> See, e.g. *Beşiktaş* at [127].

<sup>23</sup> *Id.*

<sup>24</sup> See *Beşiktaş* at [127]-[128].

<sup>25</sup> *Györi* at [34].

<sup>26</sup> *Bursaspor* at [24].

<sup>27</sup> *Beşiktaş* at [127].

<sup>28</sup> See *Bursaspor* at [146] and *Beşiktaş* at [127].

<sup>29</sup> *Györi* [34(c)(iv)] and [158].

Football Federation which had itself not exercised due diligence.<sup>30</sup> However, in *Beşiktaş* the CAS Panel agreed with UEFA that the FFPR did not oblige UEFA to take action against the license grantor in order to sanction the license holder,<sup>31</sup> and that “UEFA cannot be deemed to accept every single federation’s or association’s decision to issue their clubs with licences.”<sup>32</sup> It will therefore be dangerous to rely upon a national association’s conduct when dealing with UEFA monitoring.

#### IV. COMPETITION CONCERNS WITH THE FFPR

The compatibility of the FFPR with EU competition law is not resolved. A Belgian football agent named Daniel Striani has made a formal complaint to the European Commission contending, among other things, that the FFPR (as an “agreement between undertakings” under Article 101 TFEU) is incompatible with EU competition law.<sup>33</sup> The complaint—brought in parallel before a civil court in Brussels (and due to be heard in March 2014)—focuses on the “break-even requirement” which, it alleges, amounts to an obligation “not to overspend” even if such overspending is designed to expand the club and make it more competitive.

The complaint identifies a number of restrictions of competition:<sup>34</sup>

1. “restriction of investments;
2. fossilization of the existing market structure (i.e. the current top clubs are likely to maintain their leadership, and even to increase it);
3. reduction of the number of transfers, of the transfer amounts and of the number of players under contracts per club;
4. deflationary effect on the level of players’ salaries; and
5. consequently, a deflationary effect on the revenues of players’ agents (depending on the level of transfer amounts and/or of players’ salaries).”

At least publicly, the Commission has expressed its support for the FFPR. Indeed, it was specifically consulted by UEFA when the regulations were being drafted, leading to a *Joint Statement* from both organizations on March 21, 2012<sup>35</sup> which supported the FFPR, and considered that “the financial regulations by UEFA and the State aid rules by the Commission pursue broadly the same objective of preserving fair competition between football clubs.”<sup>36</sup> Indeed, the prediction was that “[g]iven that the FFP rules impose stricter financial management of football clubs, they are likely in the longer run to lower or eliminate the need for State

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<sup>30</sup> *Id.* at [38].

<sup>31</sup> *Beşiktaş* at [120].

<sup>32</sup> *Id.* at [121].

<sup>33</sup> See, most notably, the op-ed by the claimant’s lawyer in *Football’s Anticompetitive Streak*, WALL STREET J., available at <http://online.wsj.com/news/articles/SB10001424127887324077704578357992271428024>.

<sup>34</sup> Available at <http://www.financialfairplay.co.uk/latest-news/legal-challenge-to-uefa-ffp-rules-by-bosman-lawyer>.

<sup>35</sup> Available at [http://ec.europa.eu/competition/sectors/sports/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf).

<sup>36</sup> Joint Statement at [8].

subsidies for a number of clubs.”<sup>37</sup> It might therefore be expected that the Commission will not uphold Mr. Striani’s complaint—although it is not bound by this Statement.

A refusal by the Commission to uphold the complaint may lead to an application to annul that decision before the General Court of the EU (“GCEU”). The GCEU will apply the approach of the Court of Justice of the EU (“CJEU”) in *Meca Medina*<sup>38</sup> and *Wouters*;<sup>39</sup> namely: (i) does the sporting rule cause a restriction of competition within its overall context?; (ii) are the restrictions caused by the rule inherent in the pursuit of its objectives?; and (iii) is the rule proportionate in light of those objectives?

Given the clear and significant economic implications of the FFPR, including the possible retention of competition money by UEFA as a sanction for breaches of the rules, the GCEU is likely to conclude that UEFA is an association of undertakings. The real questions in the dispute will, therefore, be whether there are restrictions of competition and whether such restrictions are justified.

As to the first of these, Mr. Striani’s arguments are clearly arguable. The break-even requirement is forward-looking, so that wealthy clubs with an established fan base and sponsorship structures are likely to retain their place at the summit of the game. With significant commercial deals already in place, clubs such as Real Madrid, Bayern Munich, and Manchester United, or even relative newcomers such as Manchester City and Paris Saint-Germain, are not necessarily reliant on the injection of external equity to remain competitive at the highest level. This appears to restrict competition between these select few and those clubs aspiring to “jump to the top” through exceptional funding.

Concerns continue to be raised about sponsorship deals arranged by clubs such as Manchester City or Paris Saint-Germain, where the sponsors have been commercial parties with strong links to the same government involved in the ownership structures of the club. Moreover, the arrangements with public bodies concerning sporting facilities—often another form of funding for clubs—show no sign of abating. While the Commission has argued that the FFPR would reduce the necessity for state aid, it may in fact encourage such arrangements with national and local authorities as the prohibition on “overspending” kicks in. The Commission is currently examining Europe-wide deals in relation to stadia, with five Dutch professional clubs and six Spanish top flight teams under the lens<sup>40</sup> and other clubs to potentially follow.<sup>41</sup>

The complaint relating to players’ remuneration is also potentially problematic for the regulator since, if the GCEU were to conclude that the FFPR operate as a salary cap, there is no evidence of negotiations with the players’ representatives prior to the regulations’ entry into

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<sup>37</sup> *Id.* at [9].

<sup>38</sup> Case C-519/04P *Meca Medina v Commission* [2006] ECR I-6991 at [22]-[28] and [42].

<sup>39</sup> Case C-309/99 *Wouters* [2002] ECR I-1577 at [97]. This was recently reaffirmed in Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência* (28 February 2013), nyr at [93].

<sup>40</sup> See the press releases at [http://europa.eu/rapid/press-release\\_IP-13-192\\_en.htm](http://europa.eu/rapid/press-release_IP-13-192_en.htm) and [http://ec.europa.eu/sport/news/20131218-state-aid\\_en.htm](http://ec.europa.eu/sport/news/20131218-state-aid_en.htm).

<sup>41</sup> In relation to the Liberty Stadium in Swansea, South Wales, see <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25559959>.



force.<sup>42</sup> Finally, if the break-even rule cannot be policed effectively, or if the sanctions imposed on clubs in breach of the FFPR are applied in an “arbitrary and discriminatory manner,” the FFPR might be said to interfere with competition.<sup>43</sup>

As to the second question, the Commission had recognized as early as 2007 that “the ensuring of financial stability of sport clubs/teams” could be a legitimate objective for restricting competition.<sup>44</sup> UEFA has also argued that the FFPR are necessary to protect the integrity of its competitions. These objectives are unlikely to be contested. However, Mr. Striani has argued that the FFPR are not suitably tailored to those objectives. It is notable that the regulations restrict the injection of funds/equity into a club, even when the club’s debts have not grown despite annual losses (or losses across the monitoring period). Other alternatives have also been suggested by the claim, such as the introduction of a “luxury tax” or other redistributive mechanism (as in many U.S. sports) or, alternatively, guarantees from owners of clubs participating in competitions for the duration of that tournament.

It remains to be seen whether the courts will be swayed by these arguments. However, it appears that UEFA’s careful plans to forestall any challenges to its prized new regulations will be tested before the FFPR have fully got off the ground.

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<sup>42</sup> This might otherwise protect the cap from competition analysis: Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 at [59]-[60].

<sup>43</sup> See *Piau* at [94] or *Meca Medina* at [47].

<sup>44</sup> See §2.1.5 of Annex I of its Staff Working Document on Sport, available at [http://ec.europa.eu/sport/white-paper/swd-annex-i-sport-and-eu-competition-rules\\_en.htm](http://ec.europa.eu/sport/white-paper/swd-annex-i-sport-and-eu-competition-rules_en.htm).