

# Agenda

## Advancing economics in business

### ‘Financial fair play’ or an ‘oligopoleague’ of football clubs?

**Do the new provisions in the ‘Financial Fair Play’ Regulation (FFPR) introduced by the Union of European Football Associations (UEFA) increase competition in the football industry? Or do they create an ‘oligopoleague’ of football clubs and ‘chill’ competition? Nicolas Petit, Professor at the University of Liège, Belgium, and Director of the Liège Competition and Innovation Institute, reviews the new rules and discusses what they mean for competition in the market for competitive football**

UEFA, the trade association of 54 European football leagues, has recently updated its FFPR. In essence, the FFPR, which has been in force since 2011, defines the minimum financial criteria for a club to fulfil in order to qualify for UEFA competitions, and includes conditions such as restrictions on overdue amounts payable to other clubs, their players and social authorities, as well as other monitoring and reporting requirements.<sup>1</sup> The FFPR has introduced a ‘break-even requirement’ from 2013/14, which stipulates that football clubs cannot spend more than the amount they earned in previous seasons (with a tolerance level of €5m).<sup>2</sup>

For example, if Real Madrid generated revenues of €500m in year X (through ticket sponsorship, TV rights, merchandising, etc.), its expenses in year Y would not be allowed to exceed €500m. Similarly, if Standard Liège’s revenues were in the ballpark of €25m in year X, it would face a spending cap of €25m in year Y.<sup>3</sup> Clubs that do not comply with the break-even requirement are exposed to a battery of sanctions—including fines, a ban on purchases of new players, exclusion from the Champions League and the Europa League, and withdrawal of a title or award. In May 2014, UEFA penalised Manchester City, Paris Saint-Germain and seven other clubs with fines of up to €60m each.<sup>4</sup>

At first glance, there are sound justifications for the break-even rule. In using it, UEFA seeks to guarantee the long-term financial stability of the clubs by forcing them to ‘keep their wage bill under control’ by ‘lowering salary costs and/or limiting the number of players under contract’.<sup>5</sup> In other words, the idea is to reduce ‘player costs’ (e.g. transfer fees, agents’ fees and wages), which have exploded in recent years. Moreover, the break-even requirement is claimed to help promote a competitive balance among clubs, by making sure they compete ‘on an equal footing’.<sup>6</sup> In short,

the idea is to prevent ‘fake’ financial competition from taking precedence over ‘true’ sports competition.

Clearly, the FFPR is in the spirit of the times. In recent years, spending discipline—i.e. ‘austerity’—has been the mantra of contemporary economic policies across the globe (in fiscal matters, banking, etc.).<sup>7</sup> However, the FFPR is still subject to the law, including competition law—and there are grounds to believe that it violates both the spirit and the letter of EU competition law.

#### Is the FFPR in violation of EU competition law?

A number of aspects suggest that the FFPR is likely to be in violation of EU competition law.

First, several economic studies highlight that the break-even rule will distort competition by giving rise to an ‘ossification’ of the market structure. In other words, the break-even rule freezes the clubs’ existing financial positions and, as a result, the big clubs—i.e. those with the highest current revenues—gain an unparalleled advantage over the small clubs with lower current revenues. This is because the latter can no longer use debt to make large investments in order to compete with the former.<sup>8</sup> In our example, Real Madrid, with revenues of €500m, can purchase five Cristiano Ronaldos at a price of (say) €96m each. However, Standard Liège, with revenues of €25m, cannot even afford a third of this transfer price. The FFPR is therefore promoting the emergence of an ‘oligopoleague’ of big, wealthy clubs within the UEFA competitions.<sup>9</sup> These clubs will continue to enjoy a strong position in the upstream input market for the purchase of players which, in turn, is likely to lead to a cascade of anticompetitive effects on downstream secondary

markets such as those for football tickets, subscriptions, merchandising, sponsoring, TV rights, mobile telephony rights, and Internet rights.

Second, the anticompetitive nature of the break-even rule violates the core principle of the prohibition rule under Article 101 TFEU. UEFA is, indeed, an ‘association of undertakings’ within the meaning of Article 101,<sup>10</sup> and the break-even rule is a ‘limitation of investments’ within the meaning of Article 101(1)(b) TFEU. Although the FFPR does not limit all investments, it does limit those that lead to debt (i.e. where spending exceeds revenues), and Article 101 prohibits any concerted limitation of investments, regardless of its type, magnitude and/or effects. Indeed, this is understandable, given that, in real-life markets, debt is a conventional strategy to finance productive investments, and a driver of market competition.

Third, European Commission and Court case law has repeatedly held that a concerted limitation of investments is, by its nature (‘by object’), unlawful. In *Brasseries Kronenbourg and Brasseries Heineken*, the Commission sanctioned as a hard-core infringement an agreement whereby two rival breweries had jointly agreed to halt investments in downstream capacities.<sup>11</sup> Similarly, in *Irish Beef*, the EU Court of Justice held that a ‘crisis cartel’ that sought to reduce overinvestment was a restriction of competition ‘by object’, contrary to Article 101(1) TFEU.<sup>12</sup>

Of course, under EU competition law, firms liable for a potential infringement of Article 101(1) TFEU remain free to rebut the allegation by bringing forward objective justifications for their conduct.

## Are there any objective justifications for the FFPR?

One potential justification involves a defence under the exemption clause of Article 101(3) TFEU—which is that agreements that improve the production or distribution of goods, or promote technical or economic progress, are exempt from the Article 101(1) TFEU prohibition rule as long as consumers receive a fair share of the resulting benefit, and these agreements are required to achieve such benefits. However, in practice, this defence is almost systematically inapplicable in cases of ‘by object’ restrictions of competition, and in particular for horizontal agreements such as the FFPR.<sup>13</sup>

Another possibility is to invoke the protection of the *Wouters*<sup>14</sup> and *Meca-Medina* judgments.<sup>15</sup> Under this stream of case law, the applicability of Article 101(1) TFEU can be neutralised if the restriction of competition is ‘inherent’ in the pursuit of the objectives of the regulation, and if it is ‘proportionate’.

However, far from placing clubs on an ‘equal footing’, as in the stated objective of the FFPR, the break-even rule creates an asymmetry among football clubs: the rich clubs can make major investments; the poor ones cannot. This could even be akin to an additional violation of competition law, and in particular of Article 101(1) TFEU paragraph d), which prohibits any conduct that creates a ‘competitive disadvantage’ in the market.

In addition to failing the ‘inherency’ test, the break-even rule fails the ‘proportionality’ test. In the economic literature, less-restrictive alternatives have been proposed, such as bank guarantees, and a ‘luxury tax’ on overspending (e.g. 10 cents for each €1 that is overspent, which can be redistributed to other clubs to promote a ‘sport balance’).<sup>16</sup> The disproportionality is further exacerbated by the proposed prohibition of third-party co-investment, which essentially prevents third parties, including banks, financial institutions and sponsors, from co-investing with a club in the purchase of players.<sup>17</sup> According to UEFA, this supplementary prohibition is necessary to ensure the effectiveness of the break-even rule.

## What next?

Against this backdrop, legal challenges to the FFPR have commenced. In May 2013, a complaint against the break-even rule was lodged with the European Commission by a football player’s agent, followed by a civil case challenging the validity of the rule before a court in Brussels.<sup>18</sup> In his action, the applicant requested that the Brussels court send a preliminary reference to the Court of Justice of the European Union (CJEU) in Luxembourg, to seek the latter’s views on the compatibility of the FFPR with EU competition law.<sup>19</sup> Given the complex and intrinsically pan-European nature of the issue, the CJEU is the best-placed judicial expert to handle this matter, and the sole competent court to rule authoritatively on the interpretation of the TFEU. An alternative would be for the Court to formally request the *amicus curiae* Opinion of the Commission pursuant to Article 15(1) of Regulation 1/2003. Once again, it is all in Brussels’ hands...

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<sup>1</sup> UEFA is a Swiss law association of national football associations. See UEFA (2012), 'UEFA Club Licensing and Financial Fair Play Regulations'.

<sup>2</sup> This means that a club's spending cannot exceed its earnings from previous seasons by more than €5m, although tolerance is expected if losses are fully covered by a contribution or direct payment by the owner(s) of the club or a related party. See Article 61 of UEFA (2012), 'UEFA Club Licensing and Financial Fair Play Regulations'.

<sup>3</sup> Some 'over-expenditure' is, however, authorised (for example, expenditure on infrastructure and on training young players).

<sup>4</sup> UEFA (2014), 'Nine clubs sign settlement agreements', media release, 16 May. See also Bouchez, Y. (2014), 'Fair-play financier : le PSG sanctionné par l'UEFA', *Le Monde*, 16 May; and Gibson, O. (2013), 'Manchester City accept £49m fine and transfer cap from Uefa over FFP', *The Guardian*, 16 May.

<sup>5</sup> Andrea Traverso, Head of Club Licensing and Financial Fair Play at UEFA, quoted in Becker, A. and Carroll, D. (2012), 'High level debate on the UEFA Financial Fair Play rules at the College of Europe's annual football tournament', Hill + Knowlton Strategies, 23 April.

<sup>6</sup> See letter from Michel Platini, UEFA President, to Joaquín Almunia, Vice-President of the European Commission, 21 March 2012.

<sup>7</sup> Although there is no obvious similarity in systemic risk between banks and member states on the one hand, and football clubs on the other.

<sup>8</sup> See, for example, Peeters, T. and Szymanski, S. (2013), 'Financial Fair Play in European football', Working Papers 2013 021, University of Antwerp, Faculty of Applied Economics, also forthcoming in *Economic Policy*; and Sass, M. (2012), 'Long-term Competitive Balance under UEFA Financial Fair Play Regulations', working paper 5/2012, Otto von Guericke Universität Magdeburg, Faculty of Economics and Management.

<sup>9</sup> In this respect, the break-even requirement differs from 'salary requirements' (such as those in the USA), which reduce the ratio of spending on players to revenue to about 15% and, in turn, maintain a certain balance between sports clubs within a league.

<sup>10</sup> See, for example, *Laurent Piau v Commission*, 26 January 2005, case T-193/02, Rec. 2005 p. II-209, paras 71 and 72.

<sup>11</sup> Decision of the Commission of 29 September 2004, COMP/C.37750/B2 – *Brasseries Kronenbourg, Brasseries Heineken*, OJ L 184 of 15 July 2005, pp. 57–9.

<sup>12</sup> C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers Meat Ltd*, 20 November 2008, Rec. 2008 p. I-08637, para. 21.

<sup>13</sup> See Communication of the Commission 'Guidelines on the application of Article 81(3) of the Treaty', OJ C 101, 27 April 2004, pp. 97–118, paras 23 and 46.

<sup>14</sup> C-303/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002, Rec. 2002, p. I-01577.

<sup>15</sup> C-519/04 P, *David Meca-Medina and Igor Majcen v Commission*, 18 July 2006, Rec. 2006, p. I-06991.

<sup>16</sup> For an overview, see Schokkaert, J. (2013), 'Financial Fair Play, alternative instruments and competitive balance', *Football perspectives*, 27 February.

<sup>17</sup> See Warshaw, A. (2014), 'UEFA ready for assault on third-party player ownership, but clubs urge caution', *Inside World Football*, 6 March.

<sup>18</sup> BBC (2013), 'Bosman lawyer challenges Uefa ruling', 6 May; and Conn, D. (2014), 'Uefa defeats legal challenge to financial fair play rules', *The Guardian*, 20 May.

<sup>19</sup> In an informal letter in 2012, Joaquín Almunia, Vice-President of the European Commission in charge of competition, assimilated the prohibition of 'over-spending' set out in the FFPR to the prohibition of state aid under Article 107 TFEU, stating that UEFA and the Commission's policies converged. Letter from Joaquín Almunia, Vice-President of the European Commission, to Michel Platini, 21 March 2012. This comparison is quite disconcerting. The prohibition of state aid seeks to ensure that public subsidies do not distort the private sector's incentives to invest, while the break-even requirement hinders free investments from clubs.