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"Financial Fair Play" or *"Oligopoleague"* of Football Clubs? An Antitrust Review

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How to kill "*football-business*"?

The UEFA, the trade association of 54 European football leagues, has a plan. Its name is the "*Financial Fair Play*" Regulation (hereinafter "the FFPR").[i] Under the FFPR "*break-even requirement*", football clubs cannot spend more than they earned in previous seasons.[ii] In essence, if Real Madrid generated a €500 million revenue in year X, (tickets sponsorship, TV rights, merchandising, etc.), its expenses in year Y cannot exceed €500 million. And the Standard Liege, whose revenues were in the ballpark of €25 million in year X, will face in year Y a spending cap of €25 million.[iii] Clubs that do not comply with the break-even requirement are exposed to a battery of sanctions: fines, ban on purchases of new players, exclusion from the Champions League and from the Europa League, etc. In May, the UEFA slapped Manchester City, Paris Saint-Germain and 6 other clubs with fines up to €60 million…[iv]

At first glance, there are sound justifications for the break-even rule. With it, the UEFA seeks to guarantee clubs long-term financial stability by forcing them to "*keep their wage bill under control*" by *"lowering salary costs and/or limiting the number of players under contract*".[v] In other words, the idea is to reduce "*player costs*" (transfer fees, agents' fees, wages, etc.), which have exploded in recent years. Moreover, the break-even requirement will arguably promote a competitive balance amongst clubs, by making sure they compete "*on an equal footing*".[vi] In short, the idea is to prevent "*fake*" financial competition from taking precedence over "*true*" sports competition.

Clearly, Financial Fair Play is in the spirit of times. In recent years, spending discipline – in layman words, "*austerity*" – has been the mantra of contemporary economic policies across the globe (*eg*, in fiscal matters, in banking, etc.).[vii] But, Financial Fair Play falls too in the ambit of law. And there are good grounds to believe that it violates both the spirit and the letter of the European Union ("EU") competition rules.

First, because several economic studies report that the break-even rule will distort competition by giving rise to an "*ossification*" of the market structure. In plain words, the break-even rule cements, freezes, congeals the clubs' existing financial positions. As a result, the "*big*" clubs – those with currently the highest revenues – are given an unparalleled advantage over the "*small*" clubs – those with currently the lower revenues – because the latter can no longer use debt to make investments similar to the former.[viii] In our example, Real Madrid can hire almost 5 Cristiano Ronaldo for €96 million. But Standard Liege cannot even afford a third of his transfer price. With this, what the FFPR promotes is the emergence of an "*oligopoleague*" of big wealthy clubs within the UEFA competitions.[ix] Those clubs will enjoy a paramount position in the upstream input market for the purchase of players. And this will likely yield a cascade of anticompetitive "*side effects*" on downstream "*secondary*" markets (tickets, merchandising, sponsoring, TV rights, mobile telephony rights, internet rights, etc.).

"The break-even rule is akin to an unlawful limitation of investment as set out in Article 101(b) TFEU"

Second, because the genuine anticompetitive nature of the break-even rule hits the core centre of the prohibition rule found in Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The UEFA is indeed an "*association of undertakings*" within the meaning of Article 101.[x] And the break-even rule is akin to an unlawful limitation of investment as set out in Article 101 paragraph b) TFEU. Surely, the FFPR does not limit all investments, but only those that yield debt (spending > revenues). That said, Article 101 paragraph b) prohibits any concerted limitation of investments, regardless of its type, magnitude and/or effects. And this is understandable. In real life markets, debt is a conventional strategy to finance productive investments, and a driver of market competition.

Third, because the case-law of the EU Commission and the Court has repeatedly held that a concerted limitation of investments is by its very 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.[xi] 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) TFUE.[xii]

Of course, in EU competition law, firms liable for a potential infringement of Article 101(1) TFEU remain free to rebut the allegation, by bringing forward justifications for their conduct. A first possibility is to assert a defence under the exemption clause of Article 101(3) TFEU. However, in practice, this defence is inapplicable in cases of by "*object*" restrictions of competition, all the more so for horizontal agreements like the FFPR.[xiii]

Another possibility is to invoke the protection of the *Wouters*[xiv] and *Meca-Medina* judgments.[xv] Under this stream of case law, the applicability of Article 101(1) TFEU can be defused 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 "*equal footing*" as the stated objective of the FFPR, the break even rule creates an asymmetry amongst football clubs: the rich clubs can make major investments, the poor ones not. This could even be akin to an additional violation of competition law, this time of Article 101(1) TFEU paragraph d), which outlaws decisions of associations of undertakings that create a "*competitive disadvantage*" in the market.

In addition to failing the "*inherency*" test, the break-even rule also fails the "*proportionality*" test. In the economic literature, less restrictive alternatives have been proposed: bank guarantees, "*luxury tax*" on overspending (*eg*, 10 cents/€ of overspending),[xvi] etc.[xvii] The disproportionality is further aggravated by the proposed prohibition of third party co-investment.[xviii] In brief, the UEFA wants to prevent third parties – banks, financial institutions, sponsors, etc. – from co-investing with a club in the purchase of players. According to the UEFA, this supplementary prohibition is necessary to ensure the effectiveness of the break-even rule.

Against this backdrop, it has been reported in the press that a football player's agent is challenging the validity of the FFPR break-even rule before a court in Brussels.[xix] In his action, the applicant has requested the Brussels court to send a preliminary reference to the CJEU in Luxemburg, to seek the latter's views on the compatibility of the FFPR with EU competition law.[xx] Given the complex and intrinsically pan-European nature of the issue, the CJEU is indeed 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 Brussels court to seek guidance from the Commission under Article 15(1) of Regulation 1/2003. In brief, once again, there is competition law everywhere. And once again, it is all in Brussels' hands…

[i] The UEFA is a Swiss law association. It has 54 members (*ie* national football associations).

[ii] Clubs cannot spend more than €5 million, compared to what they earned during the previous seasons. Tolerance is nevertheless expected if losses are fully covered by a contribution or a direct payment by the owner(s) of the club or a related party. See Article 61 of the "UEFA Club Licensing and Financial Fair Play Regulations" 2012 Edition.

[iii] The UEFA rules are available on the following link: http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf. Note that some "over-expenditures" are authorized (for example, expenditures on infrastructure and on the training of young players).

[iv] See http://www.theguardian.com/football/2014/may/16/manchester-city-fine-transfer-cap-uefa-ffp

[v] See the declarations of Andrea Traverso – UEFA responsible of the "Club Licensing and Financial Fair Play" – during the "High level debate on the UEFA Financial Fair Play rules at the College of Europe", on 23 April 2012. http://www.hkstrategies.be/en/Insights/High-level-debate-on-the-UEFA-Financial-Fair-Play-rules-at-the-College-of-Europe-s-annual-football-tournament.

[vi] See the letter dated on 21 Mach 2012 of Michel PLATINI, President of the UEFA, to Joaquin ALMUNIA, Vice-President of the European Commission: http://fr.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/23/24/1772324_DOWNLOAD.pdf .

[vii] Though one fails to see that there is a similar level of systemic risk between banks and States on the one hand, and football clubs, on the other hand.
[viii] See, in particular, Thomas PEETERS et Stefan SZYMANSKI, T. PEETERS, et S. SZYMANSKI, (2013)
"Financial fair play in European football", Working Papers 2013 021, University of Antwerp, Faculty of Applied Economics. Available on:
https://www.uantwerpen.be/images/uantwerpen/container1244/files/TEW%20-%20Onderzoek/Working%20Papers/RPS/2013/RPS-2013-021.pdf (to be published in the next edition of "Economic Policy").
[ix] In this particular respect, the break even requirement differs from "*salary cap*" agreements (those that apply, for instance in the United States) which reduce the ratio "*players spending - revenue*" of about 15% and, in turn, maintain a certain balance between sport clubs within a same league.
[x] See T- 193/02, *Laurent Piau v Commission*, 26 January 2005, Rec. 2005 p. II-209, §71 and 72.
[xi] See Decision of the Commission of 29 September 2004, COMP/C.37750/B2 – Brasseries Kronenbourg, Brasseries Heineken, OJ L 184 of 15 July 2005, pp. 57-59.
[xii] See C- 209/07, *Competition Authority v Beef Industry Development Society Ltd et Barry Brothers Meat Lt.*, 20 November 2008, Rec. 2008 p. I-08637, §21.
[xiii] See Communication of the Commission "Guidelines on the application of Article 81 paragraph 3 of the Treaty ", OJ C 101, 27 April 2004, p. 97-118, §§ 23 and 46.
[xiv] See C-303/99, *J. C. J. Wouters, J. W. Savelbergh et Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002, Rec. 2002, p. I-01577.
[xv] See C-519/04 P, *David Meca-Medina and Igor Majcen v Commission* , 18 July 2006, Rec. 2006 p. I-06991.
[xvi] Redistributed to other clubs to promote "sport balance".
[xvii] For an overview, see "Financial Fair Play, alternative instruments and competitive balance, "Jeroen Schokkaert, February 27, 2013 – http://footballperspectives.org/financialfair-play-alternative-instruments-and-competitive-balance
[xviii] See http://www.insideworldfootball.com/world-football/europe/14240-uefa-ready-for-assault-on-third-partyplayer-ownership-but-clubs-urge-caution.
[xix] See http://www.theguardian.com/football/2014/may/20/uefa-defeats-financial-fair-play-challenge
[xx] In an informal letter in 2012 Mr. Almunia, Vice-President 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 the UEFA and the Commission's policies converge. See the letter dated March 21, 2012, Joaquin Almunia to Michel Platini:
http://fr.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/40/00/1774000_DOWNLOAD.pdf.
This comparison is quite suprising. The prohibition of State aid seeks to ensure that public subsidies do not distort incentives to invest from the private sector, whilst on the contrary the break-even requirement hinders free investments from clubs.