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European Football Governance – Looking Backward, Looking Forward

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Highlights

On the eve of the full entry into force of the UEFA Financial Fair Play Regulations (hereafter FFP regulations), the need to discuss the future (and the past) of European football regulation is pressing.

A group of renowned scholars, UEFA officials, representatives of leagues, clubs player associations and civil society, met for a High-Level Policy Seminar, conveyed by the Global Governance Programme of the European University Institute, to discuss the future of European football governance and address three main questions: What is the objective of FFP regulations? Are the FFP regulations compatible with European Union Law? How can the FFP Regulations be improved or complemented?

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POLICY

BRIEF



Background

At the beginning of the next football season the UEFA FFP regulations⁴ will be fully applicable. Football teams not in compliance with the regulation might face sanctions, up to the level of a full ban from the competitions organised by UEFA.⁵ Given that these competitions, especially the Champions League, are an important source of revenue for the participants, exclusion from them has similar effects as a substantial fine. Coupled with the licensing requirements introduced by UEFA, the accounting criteria defined in the FFP regulations are conceived as an economic hurdle for the clubs wanting to participate in the Champions League or the Europa league. The FFP regulations are not solely contested because of the financial costs they impose. Some clubs perceive the FFP regulations as an unlawful brake on their sporting development.

The perspective of a legal challenge to the FFP regulations, on the basis of national law or more likely of European law, makes it necessary to discuss in greater detail its purpose and its compatibility with EU law requirements. The urgency of this discussion is raised by the need to avoid a violent and destabilising legal confrontation between EU law and the private regulation of sport, as already experienced

4 See the UEFA Club licensing and Financial Fair Play regulations 2012 (http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf) and the Procedural rules governing the UEFA Club Financial Control Body, 2012 (http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/85/85/25/1858525_DOWNLOAD.pdf)

5 For example the Malaga F.C. has been deprived of its right to play the UEFA Europa league next year, this decision was confirmed by Court of Arbitration for Sport (CAS), see (<http://www.tas-cas.org/d2wfiles/document/6820/5048/0/2013.06.1120Communication20aux20medias20%28Fran%E7ais%29.pdf>)

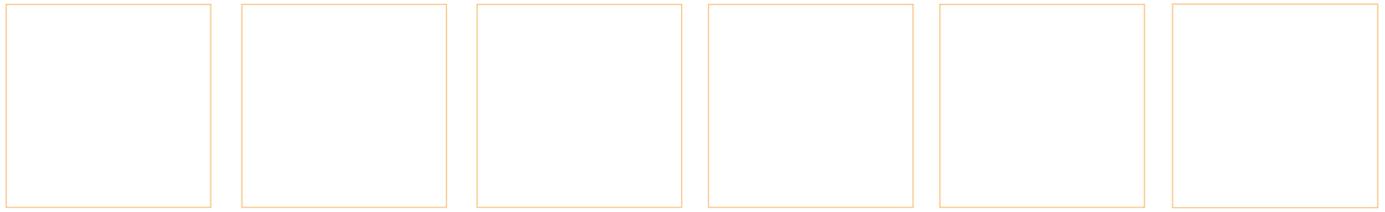
with the Bosman ruling of the European Court of Justice.⁶ The developments in European football governance since then have been largely guided by the intention to avoid any direct conflicts between the two sets of rules.

In that sense, what makes the issue of the compatibility of the FFP Regulations with EU law even more important is the fact that it constitutes the first comprehensive economic regulation of football put forward by UEFA since Bosman. Its entry into force and the questions that it raised deserved a specific encounter with both scholars and practitioners involved in the drafting and the implementation of such new piece of football regulation.

Key Issues and Policy Recommendations

The FFP regulations are meant primarily to “curb the excesses and irrational gambling for success which have brought many clubs into difficulty.” In fact, all that UEFA wants “is for clubs – richer and poorer alike – to spend no more than they earn and to balance their books, this being the only sure way for them to survive.” More precisely, the FFP regulations aim, according to article 2.2, to improve the economic and financial capability of clubs, protect creditors, ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually, introduce more discipline and rationality in club football finances, encourage clubs to operate on the basis of their own revenues, encourage responsible spending for the long-term benefit of football

6 Case C-415/93, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman (1995) ECR I-4921



and protect the long-term viability and sustainability of European club football.

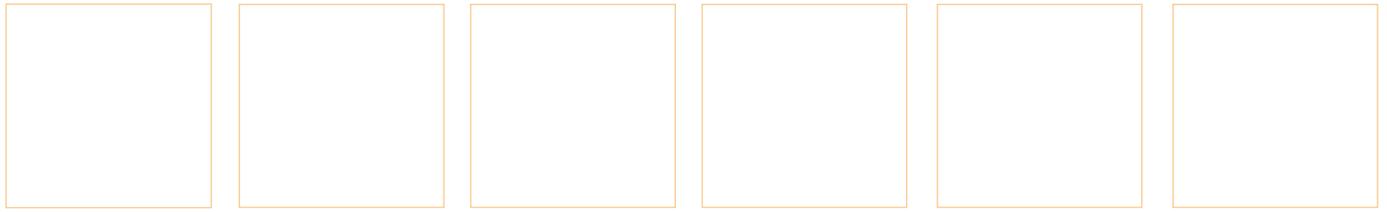
Hence, for its proponents, the FFP regulations have nothing to do with competitive balance, even if they don't necessarily correlate negatively with it. Indeed, it is devised to put an end to the 'arms race' raging amongst Europe's wealthiest football clubs, which overwhelmingly support this regulation because they are tired of losing money. The objective is to deal with the threat of managerial moral hazard that, in the absence of hard budget constraints, may lead to an unsustainable salary bubble. For FFP's proponents, it is the financial stability of the system as a whole that is at stake, and the FFP's rules would allow for a healthy competition. All this is meant to ensure that, at some point, teams meet with equals on the sporting field. Another way to put it, to avoid referring directly to the issue of competitive balance, would be to consider that the objective of the FFP regulations is to promote good corporate governance in order to build a sustainable market. Hence, this regulation could lead to a more balanced and efficient form of competition – even though competitive balance has not been put forth as its explicit aim.

However, some questions remain open for debate: is the insolvency of a single football club a real economic problem susceptible to “have negative external effects or even exhibit systemic risks”? Why are the usual insolvency and corporate laws inadequate to fulfil the objective of financial stability? Is this another case where sport claims to be special and explicitly rejects legal scrutiny?

The Compatibility of FFP regulations with EU law

The fact that the FFP regulations produce negative externalities, especially but not exclusively for workers and consumers, exposes it to the scrutiny of EU law, primarily under competition law, but potentially also under the rules on free movement of workers. Indeed, several participants of the High-Level Policy Seminar have raised the possibility of such a challenge due to the horizontal and vertical restraints of competition law that the FFP regulations would entail. This might become relevant before the Court of Arbitration for Sport (and, later on, before the Swiss Federal Tribunal), which would be competent to review cases involving the FFP regulations.

The UEFA has claimed that it is working hand in hand with the European Commission concerning the FFP regulations. However, we all know, since the Bosman case at the latest, that such cooperation is no bulletproof guarantee against the FFP regulations breaching EU law. Maybe there won't be anybody to challenge the FFP regulations, as the various football stakeholders seem to have approved them and the European Commission favours them. There is nevertheless a need to assess thoroughly the compatibility of the FFP regulations with EU law. Assuming that no general exemption from EU law for sporting regulation would be available, and that in the light of the previous discussion FFP regulations are likely to constitute a restriction on the free movement of sportsmen (through the 'fake salary cap' it creates) as well as a restriction of competition, the main question is that of their justifiability. Apart from the relatively narrow justifications provided by Art 101(3) of the Treaty on the Functioning of the European Union (TFEU), a regulation having restrictive effects



on competition could be justifiable only if those are inherent to the legitimate objectives pursued and do not go beyond what is necessary to achieve it.

A. *Legitimate Objective*

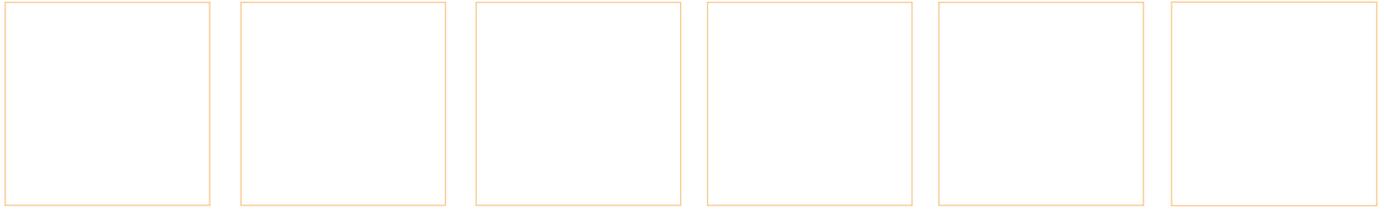
As we have seen previously, the FFP regulations are not explicitly aimed at maintaining competitive balance. In fact, they could even have the effect of worsening competitive balance by raising barriers to entry for new competitors. Therefore, UEFA will not be able to rely on such an objective to justify the FFP regulations in light of EU competition law or free movement challenges. Hence, the key question is “whether the Court will accept the actual aim of the rules - to achieve and maintain long-term financial viability and continued competition - as legitimate.” It has been argued that addressing the problem of over-indebtedness of clubs, in the context of sports, may be a legitimate argument in itself. The prospect of bankruptcy for famous football clubs, for reasons of culture as well as on competitive grounds, may be something that sports regulators could legitimately seek to avoid.

If the objective of the FFP regulations is to impose good corporate governance, this might easily be recognised by the Court of Justice of the European Union as a legitimate objective. However, there is a need to clarify precisely what kind of poor management those regulations are supposed to tackle. Moreover, the stated objective has to be in accordance with the actual implementation of the FFP regulations.

B. *Suitability and Necessity*

There is scepticism regarding the means necessary to conduct a detailed assessment of the accounting practices of more than 600 European clubs each year. Indeed, the evaluation of the fair value of a sponsor deal or of a specific asset in each particular case reaching the UEFA Club Financial Control Body (CFCB) will prove highly problematic and contextual. The evaluation of the efficiency of an investment might prove to be very difficult. The system might turn out to be a gigantic ‘usine à gaz’, a very costly institutional set-up that is not at all certain to be able to rein the practices it is supposed to supervise. Even if the goal of financial stability or sustainability is desirable as such, actually implementing the FFP regulations might become a bureaucratic nightmare, not really worth the trouble for all the involved parties.

Furthermore, to be justified under EU law a restriction must be necessary, meaning that no less restrictive alternative is available to attain the legitimate objective at stake. At this stage, many alternatives could come into play. A true salary cap might be a better solution to achieve both financial stability and competitive balance. Moreover, it would also imply a more inclusive approach toward the affected third-parties, especially the players through their representatives. Other alternatives, ranging from a ban on cash trade to revenue sharing could also be proposed. On the other hand, in light of the entry into force of the Lisbon Treaty and its limited recognition of the specificity of sport, it may be argued that the appreciation of the best available means should be left to the sporting margin of appreciation of UEFA. This implies, however, that a UEFA regulation provides for a transparent legal process and determinate



legal sanctions. The lack of precise sanctions for specific contraventions of the FFP regulations opens up the field for speculation about the arbitrariness of the enforcement process.

Beyond the FFP Regulations: Policy Recommendations

It is regrettable that the FFP regulations' link with the issue of competitive balance remains unclear. Indeed, the FFP regulations may not result in vibrant and competitive football leagues. In fact, a comparative analysis with the US tends to indicate that governing bodies of football should devise institutional mechanisms capable of reducing the inequality amongst the various European clubs, if football's attractiveness is to be sustainable in the long run.

This lacuna of the FFP regulations could be addressed via various solidarity enhancing mechanisms, or via a more stringent salary cap – which could, however, also lead to serious questions of compatibility with EU law. Some of these innovations might draw inspiration from the American model of professional sport; however, we have to be conscious that this model cannot be transposed literally in Europe. Some features of European football – the promotion and relegation system being the most notable – are deeply-rooted and should not be modified. A new model of European football governance, guaranteeing also a wider inclusiveness of stakeholders – sportsmen, consumers or local authorities – needs to be developed autonomously by the European football family.

Finally, concerning the FFP regulations as such, it is important for the legitimacy of the enforcement pro-

cess that precise sanctions, especially linked with the nature of the infringement, are put in place. There is a need to enhance legal certainty and to reduce the arbitrariness of a decision adopted by the UEFA Club Financial Control Body. Otherwise, there would be a risk that the extent of the sanction is perceived as depending on extra-legal factors (popularity, economic power etc.). This could undermine the legitimacy of the process in the eyes of the parties, in turn raising the risk of legal challenges before national or European Courts.

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The Global Governance Programme

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