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Regulations: Málaga CF v. UEFA: lessons for financial fair play

UEFA's actions in strictly enforcing its Club Licensing and Financial Fair Play Regulations have been underpinned by the publication of a Court of Arbitration for Sport ruling, Málaga CF V. UEFA. Clifford J. Hendel, a Partner with Araoz & Rueda Abogados, examines the ruling in comparison with previous UEFA action in this area, and assesses what indication it gives about how UEFA will enforce its regulations in the future.

Introduction

In recent years, the financial situation of European football clubs - in particular their rising debt levels - has attracted substantial attention. Both national leagues and UEFA have taken actions to stabilise the situation, with new regulations aimed at improving the financial capability of clubs, increasing transparency and credibility and ensuring that clubs settle their liabilities. Austerity and prudence, hallmarks of the times, characterise the philosophy of these regulatory initiatives.

The 2010 UEFA Club Licensing and Financial Fair Play (FFP) Regulations have as their central and most controversial pillar the novel 'break-even' rule, which requires (in essence) a balance between football-related income and football-related expenses. The break-even rule is not yet fully applicable; it will be first applied with transitional limits in respect of the ongoing 2013-2014 season and the upcoming 2014-2015 season, and only thereafter applied in full.

But UEFA lacks neither the will nor the legal tools to act forcefully in furtherance of financial stability of clubs, even pending the full effectiveness of the break-even rule. In its decision on the Málaga C.F. case, the Court of Arbitration for Sport (CAS) confirmed the strict application by UEFA of already-existing provisions of the Regulations aimed at ensuring financial stability by penalising financial instability. The Málaga case suggests that the break-even rule and the FFP Regulations in general will be applied with similar firmness in the near future.

Licensing

Included within the Regulations are certain rules which require, as a condition to the granting of the coveted licences to play in UEFA's lucrative competitions, the absence of any overdue payable as defined in the Regulations. Under these rules (which in large part pre-date the 2010 FFP Regulations themselves, and are carried over in the same), clubs which fail to disclose overdue payables on the semi-annual reporting dates -especially in circumstances determined to involve failure to disclose and intent to mislead - have received substantial sanctions. Three quite fact-specific CAS awards issued in 2012, involving the Hungarian club Gyori ETO FC and the Turkish clubs Bursaspor Kulübü Derneği and Besiktas Jimnastik Kulübü, are illustrative.

In the Gyori case (based on Article 47 of UEFA's 2008 Club Licensing Regulations, now superseded by the FFP Regulations), the club reported only half of the amount payable, asserting that it did not receive a 'proper invoice' pursuant to Hungarian and European law and could face criminal sanctions if it paid an improper invoice. Observing that '[t]he disclosure obligations are essential for UEFA to assess the financial situation of clubs that are participating in its competitions...[and thus] the disclosure must be correct and accurate', the panel concluded that the club had not fully disclosed its debts to UEFA and that 'domestic laws are irrelevant and cannot be considered in assessing issues related to UEFA club licensing'. Further, the Tribunal concluded that the information submitted by the Appellant was 'clearly misleading'. The appeal was therefore dismissed and the sanction imposing a fine and a two-year suspension from UEFA competitions was upheld.

In a similar vein, in the Besiktas case, the CAS dismissed the Turkish club's appeal, concluding that it had violated Article 49 of the FFP Regulations (similar to Article 47

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of the prior regulations) by having numerous and significant payables and, misleadingly, characterising them as ‘disputed’, when in reality the club had never contested them. If the debts had been considered disputed, the payables could not have been characterised as overdue under the Regulations, but the panel considered that the club had done nothing to dispute the debt, noting that ‘whilst this may not amount to an acceptance of the claims, it certainly did not amount to “contesting” them’. The panel accordingly upheld a sanction of a one-year competition ban (with a second ban suspended during a probationary period) and a fine, noting that such sanction, while perhaps stiff (‘perhaps a sign of how seriously UEFA considers significant breaches of the FFP Regulations’), was nonetheless within the range established therein and was not disproportionate to the breaches committed.

Bursapor was a factually similar case (under both Article 49 and Article 65 of the Regulations, the latter being a mirroring set of rules involving ongoing monitoring obligations of a club having already received a UEFA licence), but one in which the CAS did not find a clear intention to mislead. It accordingly concluded that while providing incomplete or inaccurate information constitutes a breach of the Regulations, the sanction of exclusion from UEFA competitions should be converted into a probationary suspension, in cases where the club did not intend to conceal information.

Málaga

Málaga C.F. is a team whose recent financial situation has been particularly troubled, to such an extent that for some time during last year’s very successful (on sporting grounds) season, the club was unable to pay its players’ salaries. With this background, UEFA found that, on the relevant deadlines, the club had overdue payables (debt with Spanish tax authorities and other clubs) and denied the club a licence for this year’s European competitions and imposed monetary sanctions.

The club’s appeal was rejected in June by the CAS after an accelerated procedure so as to permit the line-up for the year’s European competitions (which begin at the end of the summer) to be finalised. Following CAS practice for urgent matters, only the operative part of the decision was released in June; the full, reasoned CAS decision was only released in mid-October. The award shows a strict application by UEFA of its Regulations, and the ratification of the same by the CAS (at least under the particular circumstances of the case).

The case revolved around the determination of the applicable law as to the concept of overdue payables, given the discrepancies between the definition provided in the Regulations and that provided in Spanish tax law and, in particular, the differing possibilities of deferring debts with national tax authorities. The CAS adopted UEFA’s view that the definition of overdue payables included in the Regulations must be interpreted in an autonomous and uniform manner, without regard to the debtor’s national law, in order to accomplish its purpose of balancing the financial conditions of the European clubs.

Concretely, Málaga had requested the deferral of the tax debt according to Spanish law (specifically, Articles 65 and 82 of the General Taxation Law and Article 44 et. seq. of the General Regulations on Tax Collection), but on the relevant dates to consider the existence of overdue payables it had not received a response from the Spanish tax authorities. The absence of a written agreement with the tax authorities accepting the extension requested (as described in Annex VIII of the Regulations, summarised below) led to the conclusion that the debt was not deferred in the terms of the Regulations and it was thus an overdue payable.

In the award, the CAS accepts UEFA’s argument that the wording of the Regulations is plain and does not require, invite or permit recourse to national law; i.e., the term ‘overdue’ is exhaustively defined in the Regulations and thus precludes any subsidiary recourse to national law. The relevant portion of the definition in question, set out in Annex VIII, provides as follows: ‘Payables are not considered as overdue, within the meaning of these regulations if the license applicant/licensee (i.e. the debtor club) is able to prove... that: b) it has concluded an agreement which has been accepted in writing by the creditor to extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline).’ In reaching the conclusion that the foregoing provision was self-sufficient and autonomous, and provided the only relevant definition of ‘overdue’ for purposes of resolving the case, the panel stressed that: Even though the underlying obligation exists by virtue of national law, another law - the UEFA Regulations - must be applied when it comes to determine aspects regarding the granting of licences, in accordance with the spirit of the UEFA norm, and its uniform application. As to the conflicting characterisations of a debt as payable under Spanish law (where the decisive criterion is whether interest accrues) and the Regulations (where the decisive criterion is whether the creditor is entitled to commence enforcement proceeding), the panel noted that ‘It is exactly a dispute of this kind that the [Regulations try] to avoid by uniformly defining the term “overdue” and thus “Spanish law does not apply within the definition at UEFA level of the expression “overdue payables”’.

The CAS also viewed the expression ‘agreement’ to refer to more than contractual

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obligations but to non-contractual obligations as well, noting that while the Annex VIII definition in general 'is not easy to understand at first sight' and that while '[a]t first glance it may appear that the definition of "overdue" is only aimed at contractual obligations... if one takes Annex VIII of the Regulations in its entirety it becomes evident that this provision not only deals with contractual debts, but with all kinds of obligations including statutory debts.'

It is particularly noteworthy that far from hiding its financial obligations like some of the clubs mentioned above, Málaga correctly and fully disclosed its liabilities. However, it considered that the debts were effectively deferred in accordance with Spanish legislation and therefore, need not be designated as overdue payables. But both UEFA and the CAS concluded that the idiosyncrasy of the national taxation system cannot compromise the uniform, pan-European application of the Regulations. Thus, in spite of the apparent good faith and transparency of the Spanish club, the strict and uniform application of the Regulations prevented the elimination or relaxation of the sanction imposed.

The future

In the coming months and years, especially as the break-even rule begins to be applied, numerous and complex disputes can be foreseen. Two principal areas of uncertainty can be identified. One is of a practical nature, that is, whether UEFA's prosecution of FFP cases will be such as to trigger conflict and numerous appeals, and if so, whether the CAS will be able to handle these quantitatively and qualitatively difficult cases efficiently and expeditiously.

The other is of a legal nature, that is, whether the clubs will be able to limit or defeat the rules under European competition law arguments that could be made to the European Court of Justice or the European Commission, or under Swiss law arguments of public policy that could be made to the Swiss Federal Tribunal (following the historic 'Matuzalem' decision of that court).

Some expert observers, including Bosman lawyer Jean-Louis Dupont, consider that there may be grounds for challenging FFP on the basis of EU competition law principles. The argument essentially is that FFP constitutes a joint agreement restricting investment by participants and, in particular, preventing small clubs from taking greater financial risks in order to achieve long-term sporting success, thereby maintaining the imbalanced structure of European football (converting the game into a kind of 'survival of the richest') and disproportionately hindering free competition.

Similarly, some consider that there might be a conceivable argument on grounds of Swiss substantive public policy. In its controversial Matuzalem decision, the Swiss Federal Tribunal made clear that it would not hesitate to set aside an award involving an undue restriction of economic freedom. In the circumstances, it decided that banning a football player from all professional activities violates the right to economic development and would prevent the player from earning a greater income to be able to cope with his debts. The decision opens the - until now, existing but only latent - possibility of challenging unfavourable awards on the grounds of substantive law, which may invite arguments analogising the situation of a footballer in debt who is precluded from working so as to be in a position to compete and satisfy his debt to the situation of a club in debt who is precluded from participating in the very competitions which might help it compete and satisfy its debt.

Conclusion

The Málaga case, and the overdue payables cases which preceded it last year, may thus be only the small tip of a large iceberg: in the near future, especially when the break-even rule is fully in force, off-pitch resolution of financial and legal battles may be as important as on-pitch sporting performance in order for European clubs to earn (or retain) slots in UEFA competitions. Lawyers and financial experts will become more and more important players on the teams of European football clubs.

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