On The Ball

Our regular football-focused legal round-up

Welcome to *On The Ball.*

In this issue, we gaze again into the complex world of football and the law. We delve into subjects such as broadcasting, conflicts of interest, match fixing and financial regulations.

On The Ball is produced in conjunction with Football Aid, a sports charity organisation, which enables football supporters to 'Live the Dream' and bid online at Footballaid.com to play on the hallowed turf of their cherished team.

On The Ball aims to give the reader a good understanding of the core legal issues in the football industry.

I hope you find the newsletter both useful and interesting. If you have any questions or comments you can contact me at my email below.

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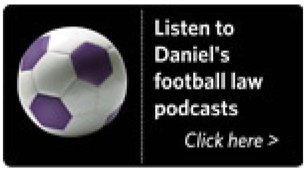

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What Does Competition Law Have to do with Sports Broadcasting?

Competition law and broadcasting issues have continued to offer interesting insights into the dynamics of the UK broadcasting market. This has manifested in various disputes between the UK's most well-known television and satellite providers.

BSkyB (Sky) seem to be at the very heart of the debate, especially in the realms of sports and movies. Various challengers including BT, Virgin and Top Up TV have questioned the satellite broadcaster's behaviour in a number of broadcasting markets. Of significant interest some time ago was the pub decoder case, where publican Karen Murphy was prosecuted after purchasing a Greek decoder and decoder card in order to broadcast live Premier League (PL) matches in her pub. The little known outcome, after EU court intervention, was that the English court concluded that the PL owned copyrighted works such as the anthem and the logo which were embedded in the broadcast. As such Murphy needed authorisation to broadcast the copyrighted material which was something the PL were unlikely to provide.

Similarly, Sky was successful in overturning an Ofcom decision requiring Sky to sell its Sky Sports 1 and 2 channels to its competitors at a regulated price. Its main concerns were that Sky (as a wholesaler and retailer of PL football through its Sky Sports channels) could have had an interest in limiting the distribution of premium content, and that it could set its prices at a level as to make selling its Sky Sports channels uneconomical for its competitors like Virgin and BT.

Recently, BT Sport, the new entrant in the sports broadcasting market, made a complaint to Ofcom who has launched an investigation into whether Sky is abusing its dominant position by withholding Sky Sports channels from BT's rival You View internet-connected TV service. This comes in the same week that Ofcom rejected a complaint by BT in relation to Sky refusing to carry advertising of BT Sport on its own Sky Sports channels.

At a time when purchasing live sport can cost several billion pounds, complainants and claimants alike will continue to use competition law to advance their cases in an effort to access premium content.

By Daniel Geey

UEFA Financial Fair Play and Sanctions: An Unsatisfactory Situation?

This latest blog sets out how clubs will be sanctioned and the timing of such sanctions for breach of the break-even provisions under the UEFA Financial Fair Play Licensing regulations. The rules leave open the possibility of allowing clubs in breach of the break-even criteria to participate in that season's UEFA club competition.

In order for UEFA Financial Fair Play (FFP) to be taken seriously many believe that UEFA needs to sanction non-compliant clubs appropriately. No doubt FFP compliant clubs would agree. For a summary of UEFA FFP, click here. The below sections set out what sanctions can be imposed by UEFA and how they will be imposed.

What sanctions can be imposed?

FFP is already in action and has allowed UEFA to sanction a number of clubs including Malaga recently. The initial step for all clubs wanting to play in UEFA competition is to submit various documents and approvals required as part of the licensing documentation to their national football association (FA). The FA then makes the licensing decision which is then communicated to UEFA. For the break-even calculations, clubs submit their financial information direct to UEFA.

UEFA, through its Club Financial Control Body (CFCB), has the power to conduct club audits and ask further questions to ensure that the national FA approval/rejection system is applied correctly. If the Panel believes that the FFP rules have not been correctly applied, it has the disciplinary power to sanction clubs in breach. It is important to bear in mind that FFP applies not only to ensure that clubs break-even, but it covers a wide range of licensing conditions, including requirements to ensure clubs pay their debts in a timely manner. Such sanctions include a reprimand, a fine, withholding of prize monies, points deductions, refusal to register players for UEFA competition, reducing a club's permitted squad size, disqualification from competitions in progress and/or exclusion from future competitions.

Sanctions, as explained above, will take many forms. It should be stressed that it is far from certain that a club that breaches the FFP regulations will be automatically excluded. Although the above are all possible sanctions, it appears likely from the outset (from the 2013-14 season) that a raft of sanctions will be imposed and not just the harshest sanctions for breaching the rules. This is unless, presumably, there is a blatant flouting of the rules (i.e. someone posting a loss similar to Chelsea's £140m loss in the 2004/5 season). High profile club sanctions should not be ruled out, but exclusion will certainly be saved for only the most blatant offenders.

When can sanctions be imposed?

For the first 13-14 monitoring period, a club's 2011-12 (T-1) accounts must be submitted by 15 July 2013. This will be the first time that UEFA has collected such detailed financial information for actual compliance purposes from its applicant clubs. Significantly, the CFCB cannot impose any sanctions on clubs for break-even purposes in the Summer of 2013 because clubs are only required to provide their 12-13 accounts by October 2013 (if their accounting year ends in June) or March 2014 (if their accounting year ends in December). **Only with both sets of accounts for the 13-14 monitoring period will the CFCB be able to verify the break-even situation.**

This is important as it practically means that initial UEFA CFCB decisions on break-even sanctions for non-compliant clubs will only occur at the very earliest from April/May 2014. For example, a club will be able to participate in the Champions League or Europa League this coming season (13-14), so long as it fulfils the other UEFA licensing requirements. This is even if they fall well outside of the break-even criteria because UEFA will not have the requisite information in time for the start of the competition. A club that has significantly overspent may only be sanctioned as late as April 2014 which may be only weeks before the final games of the tournament. The practical effect will presumably mean clubs who fall foul of break-even will be likely sanctioned based on the following UEFA season competition.

There are at least three sanctioning scenarios which appear to be taking shape:

1. Club A is knocked out in, for example, the group stages of the 13-14 Champions League competition and has fallen outside of the acceptable deviation provisions in the break-even test based on their 11-12 and 12-13 accounts. They will likely be sanctioned for the 14-15 season;

2. Club B gets to the semi-final of the Europa League in May 2014. The CFCB announce that they have not complied with the break-even requirement before the semi-final. Significant sporting issues as to whether club B should be expelled from a competition in progress (which is a power the CFCB possess) becomes a difficult judgment call for the CFCB. Any subsequent appeal to CAS raises question marks as to whether UEFA or CAS would allow the competition to continue with the non-compliant team able to participate, subject to the appeal outcome.

3. A CFCB decision could possibly occur after the final game of the competition. If a non-compliant club wins the Champions League in May 2014, they could be sanctioned by having their title removed. The licensing requirements would not however bar that club from participating in the competition in the first place.

From UEFA's perspective, it is difficult to see how they can get the requisite financial information earlier in order to make decisions before the UEFA competitions get into full swing. To many, however, such 'late in the day' sanctioning may still be seen as somewhat unsatisfactory.

By Daniel Geey

The Financial Fair Play Challenge to UEFA

When competition law mixes with football, strange things happen. Football pundits become EU law experts and EU law experts become minor radio celebrities. This is all because Jean Louis-Dupont who successfully represented Jean-Marc Bosman in his free movement case back in 1995 is on the war path. His new client is Belgian football agent Daniel Striani, who has complained to the European Commission (EC) that, among other things, the UEFA Financial Fair Play Rules (FFP) are anti-competitive.

In short, FFP's aim is to ensure clubs balance their books or face tough sanctions. The substantive complaint is that it restricts the amount of money owners of clubs can spend on player transfers and wages. Agents fear reduced commissions because of fewer lucrative transfers due to FFP's deflationary effect.

The EC complaints notice sets out the relevant procedural framework that will now be followed. It ensures that the complaint must have a community dimension and a legitimate interest (i.e. the individual must stand to suffer injury or harm). The adoption of any interim measures to suspend the FFP regulations are also discussed. Commitment procedures (which are shorter and stop the need for a formal, more drawn out process) to amend the UEFA rules could be initiated by the EC too.

It is however unlikely that a quick resolution will be found. Whilst an initial EC Decision to reject a complaint or open formal proceedings may occur within a year, the subsequent appeal steps will take much longer. If the EC believes there are anti-competitive features inherent in the FFP rules (and the Commitment route is not used), formal proceedings may be opened. Alternatively, a EC rejection of Striani's complaint will likely be appealed to the General Court which may mean 3-5 years before a definitive conclusion.

They think it's all over; it won't be for a while.

By Daniel Geey

Images supplied by Matt Nuttall Photography

One Small Step for the Premier League; One Giant Leap for Financial Prudence?

Introduction

It seemed only a matter of time before the Premier League (PL) boarded the financial regulation ship. Some of its clubs have already been subject to the break-even regulations since UEFA made an initial splash with its groundbreaking regulations. The Football League (FL) has recently introduced its own financial fair play (FFP) regulations for its Championship league and the Salary Cost Management Protocol for its Leagues 1 and 2. Financial prudence comes at a time of global austerity but the effects of the latest broadcasting windfall appear to have struck a chord with a number of PL owners.

Background

PL and foreign clubs alike (bar a few jurisdictions) have historically been able to spend beyond their means in their search for success. Such astronomical spending usually occurs through the injection of funds from benefactors willing to subsidise a club's cost base. The PL, just like other leagues, has welcomed external investment into its football clubs. The one regulatory jigsaw piece missing from the PL handbook is something which has formed the basis of the updated UEFA Club Licensing Regulations as well as the recent FL FFP rules. It is the break-even aspect that is absent in the current PL regulatory framework. The reasons why the PL are now contemplating further cost controls may include the following:

- PL club owners are keen to ensure the new likely £5bn+ television deal stays (to a degree) out of player's pockets. The rationale is that a salary cap will collectively dampen the wage market because the twenty PL clubs will only have finite wage resources to allocate to their players.

- Around half of the clubs competing in the PL may already be planning to compete in UEFA competition and therefore will have to adhere to types of cost control mechanisms like the UEFA FFP rules in any event.

- In an age of 'fiscal prudence', there may also be a heightened appreciation of the public mood of austerity and belt-tightening.

On 7 February 2013, the PL voted in favour of draft proposals covering profitability and sustainability and short term cost control measures. This translated into FFP style regulations along with a quasi-wage cap that will be explained below. The actual vote of these wide-ranging regulations could not have been closer. It was reported that six clubs (Southampton, Swansea, Manchester City, Fulham, West Brom and Aston Villa) voted against the proposals and Reading abstained. Under the PL constitution, a two-thirds majority is required to authorise regulatory change. As only 13 of the 19 votes cast were in favour, the vote was a close call.

UEFA and the FL have previously justified such regulation as a means of ensuring that PL clubs balance their books and do not spend more than they earn so that they ultimately become self-sustainable. In the context of the PL regulation, this is now to be achieved through:

- some losses being acceptable in the first years of implementation;

- only incremental wage increases being permitted; and

- a wide selection of sanctions including the possibility of fines, transfer bans and points deductions.

The Details

In relation to FFP, clubs can make a £15m loss over a three year rolling accounting period. This means that a £5m per season loss can be covered by owner loans. Clubs can make a cumulative £35m loss over a three year rolling accounting period (i.e. the first being 2013/14, 2014/15 and 2015/16) I.e. a total loss of £105m if:

- owners guarantee the funding;
- show financial forecasting projections to the PL (which is already required); and
- £90m of the loss is injected into the club by way of equity (shares).

Regarding the salary control restrictions, only a £4m increase in the wage bill for PL clubs will be permitted. If a PL club spends more than an additional £4m on wages from the previous season, the additional wage cost can only be funded by increased commercial revenues that the club has made during that season. The below table sets out the defined amounts.

ultimate sanction range, a points deduction. The changes will show everybody that we are serious about financial fair play. A new owner can still invest a decent amount of money to improve their club, but they will not be spending hundreds and hundreds of millions in a very short period of time."

Just as is the case with the UEFA and FL rules spending on academies, training facilities, community schemes and stadiums can be offset against other defined costs

Season	The extra amount of PL Central Fund revenue that can be used to fund player wage costs (cumulative)	If the wage bill is below the following figure, then the club are exempt from the restrictions
2013/14	£4m	£52m
2014/15	£8m	£56m
2015/16	£12m	£60m

With regard to the salary control regulations, it appears that such rules will be in place for the 2013/14 season. Therefore for the 13/14 season, the £4m cap on wages will be enforced. There are already reporting requirements that ensure that PL clubs have to submit certain types of information like providing Future Financial Information (FFI) showing clubs can meet all liabilities that fall due for the year ahead. The outcomes of such reporting requirements may result in breaches of such salary control provisions which could lead to sanctions like points deductions.

PL chief executive Richard Scudamore said at the time of the announcement:

"The clubs understand that if people break the £105m cap we will be looking for the top-end

like player wages and transfer fee amortization for FFP compliance. It means such longer term spending strategies are encouraged and are excluded from the break-even calculation. Until the regulations are made public (likely in the PL handbook this summer), it is not clear whether these exempt costs will be defined in the same way as the UEFA and FL regulations.

What the regulations will have to deal with

In relation to restrictions on the cumulative £105m loss, the club accounts for next season will be the first in a three year accounting cycle that clubs will need to provide to the PL to demonstrate FFP compliance. A number of questions will no doubt be raised by such an approach and will have to be clarified in the drafting of the FFP regulations. In particular:

- How will the PL require a club who spends large sums in the first regulated year (the 13-14 season) guarantee the loss that has been made? The regulations may have to stipulate that, if indications from year 1 (13-14) show that losses over that period will exceed the permitted £15m, then the PL will ask for 3 years ahead of secured guaranteed funding. This leads to timing issues as to when the guarantee will have to be made by the owners. Presumably, it would have to be when the spending is taking place and not at the end of the first three year cycle. Therefore such a guarantee would be needed when the future financial information is provided to the PL. This leads to the most important question as to whether clubs could be sanctioned for non-adherence to the FFP regulations from next season if owners do not guarantee certain spending levels.

- What sanctions could be imposed? In theory, anything is a possibility but in practice, just as the FL have done when implementing their FFP rules, the harshest sanctions (e.g. expulsion/relegation) were not considered appropriate. FL FFP sanctions involve either a registration embargo or a fine. The UEFA Club Financial Control Body have been given express powers which include at Article 21 the possibility of a points deduction, disqualification and/or removal of title. Until the UEFA FFP regulations are tested with relevant cases, it is difficult to assess which sanction will be afforded to which circumstance. Undoubtedly, the harsher the infringement, the more severe the penalty. It therefore remains likely that the PL clubs who voted in favour of regulation will decide that registration embargoes or fines will be preferred to expulsion or relegation.

- There is then the thorny issue regarding how FFP will affect promoted clubs. Will their accounts for years that they are in the FL be used to assess PL FFP compliance? Similarly, will a promoted club's accounts for the previous year they were in the FL be used as the wage benchmark for how much a club can spend on wages?

- The PL may also seek to adopt:

  - luxury tax provisions that the FL put in place for its regulations. Such a sanction allows for any fines for breaches of the financial rules to be circulated to the compliant clubs as a way of incentivising compliance; and

  - the wage exemption used by UEFA in their Annex XI provision which excludes wages for contracts entered into before the rules were brought into force. This has the advantage of allowing further costs to be excluded for the break-even calculation purposes.

- Close scrutiny of the related party transaction (RPT) clauses in any drafting will be necessary too. This should be borne in mind with particular reference to the recent controversy surrounding the sponsorship deals entered into by Manchester City and PSG in relation to Etihad and the Qatar Tourism Authority.

- Lastly, a fundamental question that this author is currently investigating into further is whether the rules could be challenged by the OFT/European Commission as being anti-competitive.

Conclusion

What is certain is that financial regulation is now firmly entrenched into a once fiercely free market, laissez-faire league. Controlling costs through escalating wages and transfer fees is something clubs have resolved to limit in advance of the latest television bonanza. It still remains to be seen whether clubs will as a result start making profits.

By Daniel Geey

My Top Ten Tips for Understanding Football League Financial Fair Play

Number 1: FL FFP regulations only apply to clubs participating in the FL Championship. Clubs in the FL Leagues 1 and 2 have to adhere to separate regulations called the Salary Cap Management Protocol (SCMP) which ties cost to a percentage of turnover.

Number 2: The overall aim of the rules is to ensure Championship clubs balance their books and do not spend more than they earn so that they become self-sustainable. In the context of the Championship clubs, this is to be achieved through:

- some losses being acceptable in the first years of implementation;
- sanctions (fines and a transfer ban) being brought in from the 2014/15 season; and
- clubs being incentivised to comply with the rules by receiving a share of the non-compliant club's fines.

Number 3: Football League Financial Fair Play (FLFFP) came into play for the 2012-13 Championship season. There are no sanctions for breaching the regulations in the 12/13 and 13/14 seasons. A club can be fined (if the club is in the Premier League at the time of the decision) or be subject to a transfer ban (if the club remains in the Championship at the time of the decision). The table shown below at fig. 1 sets out the different permutations.

Number 4: The table shown on page 10 at fig. 2 sets out the acceptable permitted losses Championship clubs can make.

Number 5: By way of practical example, for the 14/15 season, a club's Fair Play Result (for the purposes of this example before calculating any acceptable deviation) is minus £6m. A club for the 13/14 reporting period can make a £3m loss and not fall foul of the regulations. However, as the club has made a £6m loss, an owner would have to inject £3m of equity into the club. If the owner does not, the club, all other things being equal, will be in breach of the FFP regulations. Note that an owner, in that season, can only inject up to £5m into the club. Any more and the club would be in breach of the regulations because it made losses over the combined £8m total acceptable deviation limit.

(Fig. 1)

Clubs Promoted to the PL	**Clubs Relegated From the PL**
Clubs promoted to the PL must provide FFP information for their promotion season by December 1 (i.e. for the season they were in the FL Championship). If a PL club has breached the regulations, they will be fined according to the sanctions table set out below.	Clubs relegated from the PL will not be subject to sanctions in their first season in the Championship as long as they have complied with all relevant PL regulations. The club would however be fined if it achieved promotion in its first season in the Championship whilst not complying with the FFP regulations.
Clubs that Remain in the Championship	**Clubs Relegated From the Championship**
Clubs that fail to comply with the FFP regulations will be subject to a transfer embargo. The first embargo can be enforced by the FL from the beginning of January 2015.	Clubs relegated from the Championship will not receive any Fair Play Tax pay out but will be required to comply with the SCMP.

Number 6: Come the 14/15 season, a club that is in breach of the regulations will face sanctions. Failure to stay within the defined limits (leading to a negative Fair Play Result) will lead to the imposition of sanctions. The sanctions will vary depending on whether the club is promoted to the PL, remained in the Championship or was relegated to League 1.

Number 7: A calculation table of fines (fig. 3) has been published to enable clubs to understand the potential size of the penalty. Clubs promoted to the PL will have to pay a 'Fair Play Tax' on the excess by which they failed to fulfil the Fair Play requirement ranging from 1% on the first £100,000 to 100% on anything over £10m. Clubs who comply with the regulations will receive a share of any fines imposed on non-compliant clubs. Any proceeds will be distributed equally amongst those clubs

(Fig. 2)

Reporting Period	**Date of Accounts Submission**	**Reporting Period Equity Contributions**	**Reporting Period Acceptable Deviation**	**Total Acceptable Deviation**	**FL Sanction Available**
2012-13	Dec.'12 for 2011-12 season	£8m	£4m	£12m	No
2013-14	Dec.'13 for the 2012/13 season	£6m	£4m	£10m	No
2014-15	Dec.'14 for the 2013/14	£5m	£3m	£8m	Yes
2015-16	Dec.'15 for the 2014/15	£3m	£3m	£6m	Yes
2016-17	Dec.'16 for the 2015/16	£3m	£2m	£5m	Yes
2017-18	Dec.'17 for the 2016/17	£3m or lower	£2m or lower	>£5m	Yes

(Fig. 3)

Percentage of the Excess	**Excess**	**Calculation (rounded up)**
1% of the Excess between	£1 & £100,000	£1,000
20% of the Excess between	£100,001 & £500,000	A maximum of £80,000
40% of the Excess between	£500,001 & £1m	A maximum of £200,000
60% of the Excess between	£1,000,001 & £5m	A maximum of £2.4m
80% of the Excess between	£5,000,001 & £10m	A maximum of £4m
100% of the Excess over	£10,000,001 +	No Maximum

that complied with the FFP regulations for the season in question. Clubs that remain in the Championship, who breach the FL FFP regulations will have a transfer embargo imposed. Whilst clubs who are relegated out of the Championship will not be entitled to any Fair Play Tax payout, they will also not be sanctioned.

Number 8: The following is an example for a club that is promoted to the Premier League but is in breach of the FLFFP for the year they were in the FL. If a club's accounts (after available FLFFP reliefs have been discounted) show that it is exactly £10m over acceptable deviation parameters, the fine will be £6,681,000 (i.e. £1,000 + £80,000 + £200,000 + £2.4m + £4m). As explained, all fine proceeds will be distributed equally amongst FFP compliant clubs. It is not however expressly set out whether a fine could be part of a club's costs or a distribution of a fine for a compliant club could be used as revenues for future Fair Play Result calculations.

Number 9: The new rules require clubs by December 1 of each season to provide annual accounts to the FL, setting out details relating to the previous playing season. The FL will use the financial information received to determine whether a club has complied with the regulations. As will be shown below, it is possible for a club to make a loss and still pass the FL FFP regulations. The FL will establish a Financial Fair Play Panel to hear challenges brought by clubs in relation to the initial Fair Play Result.

Number 10: There are also certain cost exclusions which can be removed from a club's cost base. This is in relation to "specific areas of club infrastructure or losses in certain extraordinary circumstances". Such categories of cost exclusion include investment in youth development, sale and depreciation of fixed assets (e.g. a club's stadium or training ground), investment in a club's community scheme, promotion related bonus payments, career ending injury costs, bad debts from other clubs and losses sustained from a defaulting major sponsor.

By Daniel Geey

My Top Ten Tips for Understanding UEFA Financial Fair Play

I thought it would be useful with Financial Fair Play (FFP) entering into mainstream football discussion to briefly set out my top ten tips to help interested parties to understand its key concepts.

1. The FFP regulations not only ensure that clubs break-even. They cover a wide range of licensing conditions which are overseen initially by national football associations. Such requirements include ensuring clubs pay their debts in a timely manner.

2. UEFA FFP relates only to Champions League and Europa League club participation, and not to domestic league participation. A wide variety of clubs (through the European Club Association) were consulted by UEFA over many months. The regulations have been drafted and implemented with the consent of the clubs. The Football League (FL) has just implemented its own version of FFP for the Championship and the Premier League (PL) is currently discussing various cost saving measures.

3. All clubs wanting to play in UEFA competition must submit the required licensing documentation to the relevant national football association (and for break-even purposes to UEFA). UEFA, through its newly constituted Club Financial Control Body (CFCB), has the power to conduct club audits and ask further questions to ensure FFP compliance. If the Panel believes that the FFP rules have not been correctly followed, it has the disciplinary power to sanction clubs in breach. It should be noted that FFP is already in action and has allowed UEFA to sanction a number of clubs including Malaga.

4. The FFP break-even rules are intended to ensure a club, more or less, has to balance its books. From the 2013-14 season, the UEFA licence requirements will include adherence to the FFP break-even rules. Until the 2013-14 season, there are no sanctions for breaching the FFP break-even rules.

5. The FFP break-even rules will start to bite from the 2013-14 season. The rules need to be borne in mind however from the 2011-12 season onwards because the 2011-12 and 2012-13 season accounts are used to determine a club's licence application in the 2013-14 season.

Explanation Table for Acceptable Deviation

Acceptable Deviation Levels						
Monitoring Period	**Number of Years**	**Years Included**			**Acceptable Deviation (€m)**	
		T-2	**T-1**	**T**	**Equity Investment**	**Non Equity Investment**
2013-14	2	N/A	2011-12	2012-13	45	5
2014-15	3	2011-12	2012-13	2013-14	45	5
2015-16	3	2012-13	2013-14	2014-15	30	5
2016-17	3	2013-14	2014-15	2015-16	30	5
2017-18	3	2014-15	2015-16	2016-17	30	5
2018-19	3	2015-16	2016-17	2017-18	<30	5

6. Acceptable deviation is the term used to describe break-even. Acceptable deviation allows clubs to pass the FFP break-even test without actually breaking even. The acceptable deviation provisions allow a club with some losses over a certain number of seasons to ‘break even’ and therefore pass the FFP regulations.

7. The table below shows that the acceptable deviations (i.e. losses) vary quite considerably. The first point to stress is that if an owner does not put any money into a club by way of cash for shares, each club’s acceptable deviation (loss), by reference to the last column in the table, is a mere €5m over three years (i.e. €1.3m per season).

8. For the 2013/14 season when the FFP rules come into force, an owner can inject up to €45m over two seasons to cover the losses of the club. After the 2013-14 season an owner can on average exchange only €15m worth of cash for shares each year to spend on transfers and wages. That figure is reduced to €10m per season (€30m over three seasons) for the 2015-16 season. Should a club wish to pass the FFP break-even requirement, and it makes for example a €35m combined loss for the first monitoring period (13-14), the owners will have to inject €35m worth of equity into the club. If they do not, that club will breach the rules.

9. The FFP rules promote investment in a club’s stadium, training facility infrastructure and youth development schemes by excluding such costs from the break-even calculation.

10. The CFCB has the power to sanction clubs for breaches of the FFP rules. Such sanctions include a reprimand, a fine, withholding of prize monies, points deductions, refusal to register players for UEFA competition, reducing a club’s permitted squad size, disqualification from competitions in progress and/or exclusion from future competitions. Recently, UEFA has taken the ultimate sanction and banned Malaga (because of their overdue payables breach) from future competition should they qualify for UEFA club competition in the next four seasons.

By Daniel Geey

A Good Year for Sky and its Football Coverage

Introduction

When football and broadcasting come up in conversation, BSkyB's (Sky) live coverage of the Premier League (PL) since 1992 is never far from many peoples' lips. It was Sky's strategic initiative that, along with first run movies, was the subscriber driver. It also had the consequence of bringing large amounts of Pay-TV revenue into the hands of PL chairmen. The mutually beneficial relationship, after twenty years, continues apace. The aim of this article is to trace the broadcasting victories in the football sphere that threatened to derail Sky's grip on PL football. The pub decoder case, the Ofcom appeal in the Competition Appeal Tribunal and the recent successful retendering of the domestic PL rights have all ended on an extremely positive note for Sky. A year previously, there were serious doubts about how the PL sold its rights across the EU which could have left Sky (and ESPN) without exclusive rights to market in the UK, Ofcom had insisted that Sky provide a must-offer wholesale price to competitors like BT Vision, Top-up TV and Virgin for its Sky Sports 1 and 2 channels and it was rumoured that new competitors like Google, Apple and Al-Jazeera were planning to usurp Sky's premier position as the pre-eminent PL broadcaster. From the depths of regulatory and judicial intervention, and the significant risks to its business model (including the investigation into its first run movies), Sky has had an incredibly successful last few years. This article will take you through three of the highlights.

The Premier League and the Publican

Karen Murphy is a pub landlord. She was prosecuted after purchasing a Greek decoder and decoder card in order to broadcast live PL matches in her pub. She argued that as a Member State citizen she should not be prevented from finding the cheapest subscription in the European Union to broadcast the live matches. The PL alleged that Murphy's actions, among other things, breached its IP rights. The PL argued that the way they sold their rights was backed up by European Court precedent supporting the notion of exclusive territorial licensing.

Mrs Murphy's case was joined with a supplier of the decoder cards QC Leisure, in a reference to the Court of Justice of the European Union (CJEU). At the end of 2011, the European Courts (the CJEU) and the English High Court ruled on EU law questions of free movement, competition law and copyright.

The Outcome

In summary, the Courts held that restricting the importation of a Greek satellite decoder and decoder card to view the live PL games and clauses prohibiting an authorised PL broadcaster selling its service to a Member States citizen outside of its allocated territory were contrary to EU law. However, the CJEU did conclude that the PL owned copyrighted works such as the anthem and the logo which were embedded in the broadcast. As Mrs Murphy was deemed to be making a further communication to the public under the Copyright Directive (by broadcasting the pictures), Murphy required authorisation from the PL to show the copyrighted works in order to broadcast the live pictures.

The extremely tricky balancing act for the CJEU involved the need to safeguard the fundamental EU free movement freedoms whilst giving a degree of intellectual property protection to the PL as a rights holder. Many have suggested that the judgment is actually unbalanced; on one hand it extols the virtues of free movement whilst, on the other hand, it curtails the very same freedoms through protection granted to ancillary copyrighted materials.

The decision is set in the context of Mrs Murphy using a Greek domestic, residential subscription for commercial use. The CJEU appears to have said that even if free movement principles and competition law apply, Mrs Murphy still needs authorisation because it was not granted by the PL in Greece to enable the communication of a domestic subscription broadcast to a wider public in a commercial setting. Thus the CJEU has taken the specific facts of Mrs Murphy's case and narrowly construed them.

The CJEU's rationale is that the PL authorised the Greek broadcaster to sell live PL matches to residential premises and whilst such residential subscriptions appear to be legitimately available to domestic UK subscribers, the PL did not authorise the Greek broadcaster to sell the subscription to a commercial subscriber. Therefore Murphy is using the wrong decoder subscription and appears to be in breach of the domestic copyright laws by showing the pictures.

Based on the current Murphy facts, it appears the High Court interpreted the answers given by the CJEU in relation to the Copyright Directive in such a way that would not permit Murphy to screen matches without PL authorisation.

What happens however if Mrs Murphy argues that she would have purchased a commercial decoder subscription, but was restricted by the Greek national broadcaster who was following the apparently anti-competitive contractual stipulations imposed by the PL? Whereas the CJEU appears satisfied that broadcast of a private, domestic subscription to a public venue in another Member State country is a further communication to the public, would the same apply if Murphy had bought a commercial Greek subscription?

An unanswered question is whether Murphy may argue in the future that she was prevented from purchasing a Greek commercial subscription and therefore the CJEU needs to consider whether such a subscription would be a further communication to the public under the Copyright Directive. Murphy would no doubt argue that the PL authorised the Greek broadcaster to sell the commercial subscription in Greece and therefore no further communication to the public would occur when that broadcast was shown in the UK.

Another conundrum that appears to remain unsolved after the High Court hearing last year relates to the contractual prohibitions within the PL contract that the CJEU ruled contrary to EU law. The High Court has the ability to strike out the anti-competitive restrictive clauses. If, after removing the clause, the remainder of the agreement can reasonably be carried out, it can be enforced. There has been little word since the High Court judgment about how this process will be carried out.

The Next Premier League Tender

Against the Murphy backdrop, a question arose as to how the next PL auction would work in practice. The PL announced in May 2012 the details of its next three year UK broadcasting tender document starting from the 2013/14 season. The PL were selling 154 live matches split into seven packages. Sixteen more matches have been made available per season. The live rights packages will consist of five packages with 26 matches and two packages with 12 matches. In the last auction one hundred and thirty eight matches, spread over six packages, were marketed to interested broadcasters with Sky winning five of the six available. ESPN won the one remaining package. There is also a highlights package and various near live, internet and mobile packages available too.

From a domestic viewing perspective, it appears that a Member State citizen in the UK can subscribe to the authorised Greek broadcaster for live PL matches. Practically, whether this will have a cooling effect on the price UK broadcasters are willing to pay remains uncertain. This is because the likelihood of consumers buying two domestic decoders and subscriptions to view a game (possibly only available in another language) for a similar price for Sky Sports 1-5 may make this avenue rather limited. Many believe the larger price differential is the subscription for commercial broadcasts. Broadcasters may be insulated from such commercial switch-over because at present it appears that Mrs Murphy requires PL authorisation.

It has been reported that the PL has remodelled its non-UK, European tender offering by limiting the number of 3pm games. This would theoretically make it less attractive for UK publicans to subscribe to non-Sky feeds because there would be fewer games on offer.

Conclusion

While there appear to be some outstanding legal points in order to conclude the decoder cases, it appears that Sky, along with the PL, has been one of the major beneficiaries of the decision. Sky can still sell the exclusive rights to live PL football (with ESPN) in the UK for this current season. That is the case, even though the CJEU, ruled against the PL in relation to free movement and competition law principles. It is unclear whether Mrs Murphy is still showing PL matches with her Greek decoder. If she is, the PL believe they have strong grounds to sue for copyright infringement.

Ofcom and the Must Offer Remedy

An Ofcom decision requiring Sky to sell its Sky Sports 1 and 2 channels to its competitors at a regulated price was overturned giving Sky an important victory against its pay-TV rivals. For some time Ofcom had been investigating the way that PL football was distributed to consumers in the UK. Its main concerns were that Sky (as a wholesaler and retailer of PL football through its Sky Sports channels) could have had an interest in limiting the distribution of premium content, and that it could set its prices at a level as to make selling its Sky Sports channels uneconomical for its competitors like Virgin and BT Vision.

In December 2007, Ofcom launched an investigation into the pay TV market in the UK. Ofcom had competition concerns about the way premium content is distributed by Sky. It issued a number of consultations and in March 2010 published a Decision imposing an obligation for Sky to sell its Sky Sports 1 and 2 channels to its platform competitors (Virgin, BT Vision and Top Up TV) at a regulated price.

Ofcom's main concerns were that:

- Sky had an interest in limiting distribution of premium content, possibly as a result of a 'desire to limit the growth of potential competitors'; and

- Sky could, in theory, set their wholesale prices at a level above the competitive framework making it uneconomical for other broadcast retailers to compete with Sky.

Both these outcomes were beneficial to Sky as it would mean that subscribers, for example, to BT Vision, would not be able to subscribe to Sky Sports because such channels were only available on Sky. (Note: Sky Sports channels have been available on Virgin for a number of years but Virgin had argued at a price which made selling them unprofitable).

The Ofcom Decision

The Ofcom decision in March 2010 required Sky to offer at a wholesale level its Sky Sports 1 and 2 channels at a price determined by Ofcom. This would have provided a mechanism for other platform providers to gain access to Sky Sports 1 and 2 on fair and reasonable terms. The decision would have meant the wholesale price Sky charged for Sky Sports 1 and 2, to platforms such as Virgin Media or BT, would have been reduced by around 10%.

Sky appealed the Ofcom Decision on a number of grounds including the fact that Ofcom's evidence that it used to show that Sky did not constructively negotiate in good faith with other platforms for the provision of Sky Sports 1 and 2 was flawed. The Competition Appeal Tribunal (the CAT), where the appeal was heard, ultimately accepted that Ofcom misinterpreted the evidence of the negotiations and as a result, Ofcom's conclusions were inconsistent with the evidence. As such, the CAT decided for this, and other reasons, that Ofcom's Decision should be overturned. At the time of writing, it is rumoured, that BT may appeal this CAT decision.

The Significance of the Decision

As Sky does not have to provide Sky Sports 1 and 2 to platforms like BT through an Ofcom regulated price, Sky are free to charge what they believe is appropriate to other platforms like BT Vision to show its Sky Sports channels. Platforms like BT Vision and Top-TV (possibly along with Virgin) will have to individually negotiate a price with Sky for Sky Sports 1 and 2. Presumably, if Sky does not like the offer their competitors propose, they can refuse to supply the channels.

BT Vision has somewhat safeguarded its position through winning two packages in the latest PL auction process. BT's desire to win the latest PL rights at source in the latest auction may have also been to ensure they did not have to rely on Sky to show live PL matches. It means regardless of an agreement with Sky over Sky Sports 1 and 2 on its platform, BT Vision will have a number of games from the 2013-14 season to screen to its subscribers.

If commercial negotiations fail between BT Vision and Sky it may start a PL broadcasting war with BT potentially refusing to sell its PL channel (from 2013) on the Sky platform. This could leave both Sky and BT customers without a full set of PL matches to watch on their own platform.

There is little doubt that this is a crushing blow for the regulator Ofcom after over 3 years of investigations and consultations into the provision of live PL matches. Although further Ofcom action cannot be ruled out against Sky, they will have to go back to the drawing board.

The Sky is the Limit

The PL announced in June 2012 that Sky and BT had won the latest domestic live PL broadcasting tender, providing the PL with a record £3bn in revenue. It has been reported that such a figure is a 71% increase on the previous deal with Sky and ESPN.

The average overall price per match paid by the broadcasters has risen from £4.7m to £6.6m. Sky secured five of the seven packages on offer (116 matches per season from the 2013-14 season for three seasons) after paying £2.3bn. BT won two packages worth 38 games per season for three years from the 2013-14 season, after bidding £738m.

BT have been active for some time in trying to source PL rights. Previously, it had been part of a number of broadcasters battling with Sky in the Ofcom investigation into the wholesaling of live PL matches. Initially, they were aiming to get Sky Sports 1 and 2 which show live PL matches, onto its BT Vision platform. That conflict is still to be resolved before the Competition Appeal Tribunal. In a number of ways, BT's entry into the tender process was a natural extension of its need to get top premium content on its platforms. BT will hope that acquiring two packages will act as its own 'battering ram' to further its own cross-media, bundled internet offering.

ESPN will no doubt be thoroughly disappointed to miss out to BT. Like Setanta previously, ESPN had built its cross-platform channel on its PL offering. It still has the rights for one more season and will have contingency plans in place. They still possess the live FA Cup rights as well as a raft of live European football and US sports rights. Unlike Setanta, they are backed, to a degree, with the deep pockets of Disney and so may take a longer term view on building on a range of different sporting rights. The effective measure of whether losing the PL rights has had a major impact on its subscriber base will only come this time next year. The opportunity cost of not winning the PL rights may be more aggressive spending on other higher end sports rights.

It is fair to say the £1+bn increase on the domestic deal was an astonishing increase. The last domestic tender produced relatively flat growth which may have led analysts to believe modest growth would be achievable for the current tender. Ultimately, the degree of competition for the packages was significantly more fierce than in the previous tender with two deep-pocketed broadcasters ramping up the price. It would be as surprising as the current deal if the next tender produces such astronomical growth.

Many would argue that ESPN was very much the junior partner to Sky. With Sky having 5 of the 7 packages as well as assisting ESPN with its channel sales, it is less likely both companies would be classed as a duopoly. Rather, Sky has been the established broadcasting incumbent of the PL. Other successful broadcasters have to date not managed to successfully win a subsequent PL tender.

By Daniel Geey

Football Match Fixing: Are UEFA's Third Party Ownership Disclosure Regulations Strong Enough?

Introduction

I would like to highlight an important football integrity issue. The issue relates to third party ownership in football players (TPO). For an understanding about what TPO is and its advantages and drawbacks, click here. This piece however will examine an issue where the integrity of a football match could potentially be under threat. There have been many recent examples of football match manipulation and an extension of this very problem could well be happening right now in European (and world) football.

The Debate

Take the following scenario: "Football Club owner A" whose club plays in the Champions League owns 100% of the economic rights of a player playing against his club. Even taking away the perception that the player could be influenced, the football authorities and football fans should be aware at the very least of the potential conflict of interest. It begs the question of whether club owners or directors could also be third party owners and have multiple players playing in opposing teams and competing against each other? The simple (and worrying) answer is that nobody knows.

It has been reported recently that FIFA's Football Committee is recommending that TPO should be prohibited on a global level. Regardless of the merits of such a proposal, such a prohibition, if ever enacted, is not going to be a quick process. In the meantime, there are games taking place worldwide where individuals who have influence at a football club (owners, directors etc) also have shareholdings in an entity that owns economic interests in football players.

The current scenario means club owners may be playing against players they own and can potentially influence. What if two players owned by the same club owner are playing against each other? It is clear that conflicts of interest could arise where a third party owner of a player is unscrupulous. If the third party owner is involved in a football club, the player could be instructed to play badly against that owner's club. One might ask how much influence one player can have on the game but if, for instance, the player was to purposely get himself sent off, deliberately handle the ball, score an own goal, keep someone onside or give away a penalty or free kick, such actions can clearly have a major impact on the game. Further revelations in the press about betting and allegations of players wiping out debts by, for example, getting deliberately sent off, illustrate that a player can have a significant effect over a football match. If one starts to think that such a person could own several players in opposing teams throughout Europe, the collective impact could be much greater. There currently is no rule against a club owner, director or influencer owning one or more players.

The question remains whether a club owner or someone who has clout at a club can also own players in the same league/competition? I'm not sure too many people would argue against such a scenario being a significant integrity of competition issue. There is a threat to footballing integrity and as importantly there becomes a need for greater transparency through disclosure of relevant information. It begs the question as to whether a publicly available list of third party player owners who are involved with any UEFA club should be required by UEFA (as part of their licensing regulations) to avoid any perceived UEFA club competition conflict.

Does UEFA need to add measures to ensure the highest levels of transparency to fend off accusations of conflicts of interest?

To my knowledge, there is currently no UEFA-wide register highlighting such potential conflicts of interest. Just as the PL has stated that information on any person or company owning 10% or more in a Premier League club would be publicly available from the 2009/10 season, perhaps every club owner whose club plays in a UEFA tournament should be required to disclose their connections or affiliations with any entities that own directly or indirectly any type of economic interest in a football player playing in a UEFA club tournament.

Transparency was highlighted by the ENIC decision as a pre-requisite for ensuring fair competition, but there appear to be few safeguards in place to inform the general public and prevent conflicts between player and club ownership from occurring. Paragraph 129 of the ENIC decision stressed that:

> "among the myriad of rules needed in order to organize a football competition, rules bound to protect public confidence in the authenticity of results appear to be of the utmost importance. The need to preserve the reputation and quality of the football product may bring about restraints..."

The ENIC case only highlighted instances where a company could not own more than one club, and crucially not where a club owner had a third party player agreement in place. Whether there is such a substantive logical distinction between the two types of ownership is debatable. However, bearing in mind CAS's forceful words in needing to protect football fans from any potential conflict and the "need to preserve the reputation and quality of the football product" (CAS 98/200, para 129) perhaps UEFA should consider taking a lead in order to maintain confidence in European club competitions.

By Daniel Geey

Has Third Party Ownership of Players been Banned in Argentina?

Introduction

There have been reports that the Argentinean government has implemented a tax law that effectively prohibits third party ownership (TPO) of football players. After getting in touch with the esteemed football lawyer Ariel Reck in Argentina, we decided to write a short article about the consequences for the Argentinean football industry of this law coming into force and whether it has the teeth to actually stop TPO. Ariel comments on the recent developments in Argentina and I set out the basics and consequences for the global TPO market. For readers new to the concept of TPO, I set out a brief summary below.

The Basics: What is Third Party Player Ownership?

TPO in the football industry is where a football club does not own, or is not entitled to, 100% of the future transfer value of a player that is registered to play for that team. There are numerous models for third party player agreements but the basic premise is that companies, businesses and/or individuals provide football clubs or players with money in return for owning a percentage of a player's future transfer value. This transfer value is also commonly referred to as a player's economic rights. There are instances where entities will act as speculators by purchasing a percentage share in a player directly from a club in return for a lump sum that the club can then use as it wishes.

Developments in Argentina

It has been reported that Argentina has banned TPO. This is not quite an accurate reflection of the circumstances however. This is because the regulations only relate to taxation. The rationale for the additional legislation is because TPO owners in Argentina have been traditionally hard to identify and usually use offshore companies. In some cases, monies made cannot be taxed appropriately. As such the government passed in 2012 and in the beginning of 2013 a series of new regulations, which basically:

- obliges all clubs and the Argentinean Football Federation to disclose and regularly inform and update the authorities in relation to the TPO agreements clubs enter into with its registered players;
- imposes tougher obligations and more expensive rates in cases of transfers involving so called "straw-man clubs" including a list of "sporting fiscal paradises" (mainly Uruguayan and Chilean clubs that according to the taxman are regularly used for hiding the final destination of a player and therefore the real value of the transfer); and
- states that any transfer payment for a player (even in controversial cases like the direct payment to a player for his own economic rights as a free agent) must go to the former club and only afterwards (after a withholding of income tax ranging from 17.5% to 35% is applied) the TPO owner will get his share provided by the club. If the TPO is prompt with his payment, the withholding rate will be 17.5% rather than 35%.

In this context the head of Argentinean revenue has declared that his final intention is to abolish the differentiation between federative (i.e. the club registration of a player) and economic rights which would purport to re-establish the balance between the bargaining power of clubs and private third party investors. This implies that only clubs will be allowed in the future to own player rights. But in a practical sense, this is unlikely to happen as TPO is the main financial source for football clubs in Argentina. It is therefore believed that this statement is more geared towards demonstrating to the public that the government is willing to implement laws to fight against non-declaration of taxable income rather than actually outlawing TPO.

Wider Context

With the Premier League, Football League, Football Association and Ligue 1 in France all implementing regulations to prohibit TPO in their leagues, there appears to be a growing tide of opinion against TPO. As recently as late last year, UEFA's Executive Committee appeared to be moving towards some kind of ban too (see my December blog for the detail and listen to my latest podcast on this very topic). That combined with a FIFA communication stressing the need to more effectively deal with TPO in the global game, suggests that governing bodies are developing an approach to regulate TPO. Indeed, the European Club Association is very much sat on the fence at the moment with some clubs like Porto strongly in favour of TPO. The degree to which certain federations have an appetite to deal with TPO and how quickly relevant regulations could be put in place still, however, remains to be seen.

By Ariel Reck and Daniel Geey

Our recent sports experience

We advised **The Rangers Football Club** on a private equity fundraising in relation to the acquisition of the business and assets of Glasgow Rangers Football Club

We advised the **MCC** on the protection and enforcement of its valuable brands.

We have been appointed to the **RFU** Panel of solicitors for construction development and planning following an application for tender.

We advised on the acquisition of North One Sports which owns the commercial rights to the **World Rally Championships**.

For the last eight years we have advised **Sport England** on numerous matters including the development of certain tennis facilities at Bisham Abbey

We advised a **FIFA World Cup sponsor** on its multi-million Euros sponsorship arrangements for the 2010 and 2014 World Cups.

We advised **Red and White Securities Limited** on the acquisition of a 23.6% stake in Arsenal Holdings plc.

We provided brand development protection and advice in relation to a number of trademarks and brands of the **Beckhams / Beckham brand** including The David Beckham Academy.

We negotiated directly with the **UIM** on behalf of Powerboats GB Limited regarding the proposed acquisition of the commercial rights to the Class 1 Power Boat Championships.

We advised the new owners of **New York Cosmos FC** on exploitation and protection of its brand.

We advised a consortium on a potential takeover of **Silverstone** and land adjacent thereto.

We advised **Parallel Media Group** on the broadcast and funding arrangements for the Korean Ladies PGA golf tournament.

We advised **London Irish Holdings Limited**, the owners of London Irish RFC, on a £5 million equity fundraising.

We advised **Donington Ventures Leisure Limited** on a fundraising of circa £140 million by way of the issue of High Coupon Bonds.

We advised **M3 Rugby Limited** on a proposed licence agreement whereby a new Global Interactive Portal for Rugby would be provided to and managed for and on behalf of the IRB.

Field Fisher Waterhouse

About Field Fisher Waterhouse and Football Aid

Field Fisher Waterhouse and Football Aid have established a close working relationship over the past few years. Field Fisher Waterhouse's emphasis on corporate social responsibility and its ongoing commitment to work in the charity sector is matched with its strong and growing presence in the legal sports market. This makes Football Aid an ideal partner for Field Fisher Waterhouse to advise it on all its regulatory, licensing, technology and website issues to help Football Aid expand throughout Europe and maximise its revenues for its charitable causes.

About our Sports Group

Our Sports Group has established itself as one of the leading providers of legal advice to the sports industry. The Group acts for sports bodies and regulators, marketing agencies, sponsors, sports brand owners, broadcasters and professional clubs.

Our expertise in the sports sector ranges from advising on regulatory and disciplinary issues to advice on TV and media rights, sponsorship and sports marketing, the acquisition and funding of sports business, brand protection, betting and gaming, merchandising, ticketing, endorsement, litigation and stadia development.

About our Regulatory Group

Our Regulatory Group combines public and regulatory, competition & EU, public procurement and regulated industries expertise. We specialise in supporting a wide range of commercial organisations on regulatory matters and advise many of the regulators and relevant public bodies themselves.

Clients instruct us to audit their regulatory frameworks against best practice and advise on issues including the powers and duties of public bodies and officials, consultation processes and influencing decision-making, the implementation of new statutory and non-statutory schemes, the requirements of fairness and natural justice, human rights and legal challenges.

Our lawyers are closely allied to our public sector, commercial and privacy & information law teams, working with them on a daily basis to achieve the best overall business result.

About our Editor

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Daniel Geey is a solicitor at Field Fisher Waterhouse. Daniel advises entities wishing to invest in the football industry, specifically in relation to club transactions, the fit and proper person test, conflicts of interest, multiple club ownership, the Financial Fair Play Rules, football transfers and third party player ownership. Daniel also advises clients in relation to UK and European wide football broadcasting issues. He writes regularly for various journals and is the Editor of On The Ball.

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