

ADDITIONAL COMMENTS ON FFP:

ROSS:

Prof Weatherill seems far more sanguine that the “sport is special” argument applies to solvency. To me, sport IS special in this context, in that we want fans to build up loyalty to clubs while we don’t care if pizza restaurants open and close, but I don’t see any harm to consumers from insolvency. What makes sports special – fan loyalty – is why the brand and IP rights associated with a club remain valuable to any new investor, so the only ones victimized by insolvency are investors and creditors who are NOT special in sport.

At the same time, what UEFA is surprisingly underplaying with regard to what makes sport “special” in this regard is the sense of “fair play” that is offended when someone who has spent years supporting a club owned by members or a financially prudent owner sees his team come up short in competition with a rival club whose owner happens to be a sugar daddy.

WEATHERILL:

I've got a lot of sympathy for what you argue. The point I'm making, though, is a rather narrower one - I'm suggesting that there is enough room for argument here about what is and what should be at stake that a COURT is likely to be reticent in finding sporting choices to be unlawful. That is, I am with you in thinking we can go to town in finding reasons why FFP (and related devices) is a bit daft, weirdly selective, driven by a mix of maybe contradictory impulses but all of that may not be enough to go so far as have it condemned as unlawful. Strategically UEFA doesn't need to persuade a judge that FFP is rock solid sensible, it needs only to persuade her that (roughly, I simplify) it lies within the zone of legitimate choices allowed to sports governing bodies. I think.

ROSS:

Steve, your analysis is narrower, but quite provocative. If the sporting exemption is not to swallow up all the prior precedents, it seems to me that whatever margin of appreciation is extended to UEFA, it needs to tailor its justification to what UEFA declares to be unique about sport in a way that makes sense to the court. As I read your analysis, FFP has both the intent and effect of simply holding down wages, which is not unique to sport and is blatantly anti-competitive. On the other side of the ledger, UEFA offers up solvency, but with no serious explanation of why solvency is a unique problem to sports that warrants deference. If, faced with some evidence of anti-competitive pretext, the ECJ is prepared to accept a proffered justification that does not hold up to serious analysis, which seems to be all we have on the table that you have set, then a ruling in favour of UEFA has broad and disturbing consequences.

There is another unstated problem afoot in European football. Although, unlike the US, we have an express statement (from the Commission, in the Euro Model of Sport paper) endorsing the principle of solidarity, there seems to be a cultural and general acknowledgement that regulations that require enormously wealthy clubs to share some of the revenue that they receive on their own is not a practical alternative to solving problems that exist in sport, even though, as you know, these regulations are quite common in the United States. Thus, national governing boards feel themselves unable to tax wealthy clubs directly to support the grass roots, so instead adopt the highly inefficient indirect subsidy of mandating free releases of players for representative service, which further skews the NGBs’ regulatory power in favour of scheduling representative contests regardless of the harm to the club competition

(even a bigger problem in rugby and cricket). Thus, competition tribunals are far more willing to tolerate output-reducing collective sales of broadcast rights because it is so much easier to share collectively-obtained revenue than redistribute. Thus, to the extent that players or others who may be unable to protect themselves meaningfully against insolvency are victims, NGBs cannot tax all clubs to provide a support fund.

This is particularly paradoxical in light of the general attitudes of Europe and the US to taxation for redistributive purposes.

WEATHERILL:

UEFA is certainly going to have to come up with something more solid than it has so far, even allowing for a generous margin of appreciation. My sense is that they will try to focus on FFP as a means to stop clubs spending money they don't have (a phrase that seems to crop up increasingly frequently in the media), which will be presented as an evil both because it triggers an arms race that will tip clubs into bankruptcy and because it leads to (in short, simplified) money not ability deciding who wins. How persuasive is that? Not very? Not at all? That'll be the choice. Not very, and maybe UEFA - legally - gets away with it Not at all, they don't.

You're right, I think, that (in short) taxing clubs is a more coherent way to achieve the claimed objectives of solidarity, and definitely one can be critical of the legally permissive attitude to other less effective means to get to the stated end. Probably collective selling getting a green light under competition law is an instance of "not very."