The curious case of Daniel Striani (C-299/15): a missed opportunity

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Roughly two months ago, among the followers of the intriguing Striani saga there was great excitement. On June 19th, the *Tribunal de première instance de Bruxelles* referred three preliminary questions to the European Court of Justice (ECJ), aimed at letting the latter assess whether the UEFA Financial Fair-Play (FFP) complied with EU law. Such an important development came after Mr. Striani, a football players' agent registered in Belgium, unsuccessfully complained before the European Commission (and the European Ombudsman) that the FFP was restricting his freedom to provide services in the Union due to the relative budgetary cap imposed on football clubs. Following Mr. Striani's line of reasoning, if clubs were prevented from spending more than what they earned in the previous seasons – i.e. they had to break even, which is the core of the FFP – then they would not be able to fully invest in the players market, curbing the total amount of transfers and in this way diminishing the profit possibilities for players' agents. The case received much attention on the part of the media, not only because Mr. Striani is represented by the very same lawyer of the groundbreaking *Bosman* ruling, Jean Louis Dupont, but also because almost all European football stakeholders are to some extent affected by the FFP. Most notably, above and beyond the obstacles to free movement rights and the possible violation of antitrust law, the respect of fundamental rights and the principle of non-discrimination can be questioned.

On July 16th, the Ninth Chamber of the ECJ issued an order declaring the above-mentioned reference for a preliminary ruling "*manifestement irrecevable*", thus dampening the FFP's detractors' enthusiasm. In the remainder of this contribution I will firstly analyze the referral and the outcome of the procedure, then I shall tackle some of the most relevant issues at stake. Some final considerations will close this work.

As anticipated, the referral was rejected, but why? In the first part of this paragraph, I will summarize the questions referred, briefly focusing on their 'weaknesses' whilst in the second part I will concentrate on the substantive

questions raised by the case.

The questions referred are three, namely: 1) does the break-even requirement infringe Art. 101 or 102 TFEU; 2) does the break-even requirement violate the provisions on free movement of capitals, services and persons, as well as Arts. 15 and 16 of the Charter of Fundamental Rights of the European Union (the Charter); 3) are Arts. 65 and 66 of the FFP ("on overdue payables"), which distinguish categories of debts and creditors, disproportionate and/or discriminatory.

If the Striani saga were a war, the order of the ECJ would be a Waterloo. However, not because of Mr. Striani or his representatives. The referring Court bears the guilt of such debacle. Regarding the first question, the Belgian Court should have mentioned the anticompetitive effect of the FFP. In relation to the second question the national judge should have made reference to Art. 17 of the Charter. Finally, as to the third question, the non-discrimination argument is certainly viable, but not with respect to the FFP Articles singled out to demonstrate it. Although the latter are certainly linked with the profession of Mr. Striani, the discrimination problem involves the majority of football clubs, rather than only player's agent, who – as will be explained below – are not necessarily jeopardized by the FFP.

That being said, problems apparently arose in drafting the request itself, which, borrowing the ECJ's words, "*n'a pas atteint [...] le niveau de clarté et de précision suffisant pour permettre à la Cour de statuer*". In particular, the ECJ criticizes the lack of explanations regarding the premises, the arguments of the parties, the factual and regulatory contexts, the reasons why the *Tribunal* had doubts, why those particular norms of EU law were chosen and the link between the two.

The usefulness of any reply is seriously questioned since the Belgian Court declared itself "*compétente pour ordonner les mesures provisoires sollicitées par les requérants*" – claimants asked to prevent the FFP to enter in its second phase that lowered the acceptable deviation from € 45 mln. to € 30 mln. – but "*incompétente pour connaître du fond*", pursuant to Arts. 31 and 5(3) of the Lugano Convention 1988. What is the point in answering then? As a matter of fact, the national Court appears to have made the reference mainly because the FFP was "*âprement discutée entre les parties*". Moreover, neither the text, nor the content, nor the conditions for the application of Arts. 65 and 66 of the FFP were indicated in the request. In conclusion, it is not surprising that the reference was dismissed on grounds of inadmissibility.

Hence, why can the Striani case be considered to represent a missed opportunity?

Firstly, the FFP is at odds with the fundamental freedoms granted by the TFEU, namely the free circulation of capital, of workers and of services as far as – respectively – clubs, players and agents are concerned.

Regarding capitals, a restriction is conceivable as a consequence of the – albeit indirect – restriction on the margin of manoeuvre produced on the clubs by the FFP, i.e. by the break-even requirement. The lesser the clubs can spend, the fewer the capital (and the payments) will circulate in the Union. Although suggestive and fairly logical, such assumption might not work in practice. The *status quo* in this field of EU law does not admit a horizontal direct effect of Art. 63 TFEU. It is true that the UEFA holds a semi-governmental position in the European football landscape, but the autonomy of sport in the EU – which is a cornerstone of the so-called European model of sport – and the fact that the FFP should be regarded as a contract among privates – UEFA on the one side, national federations on the other – cannot endow Art. 63 TFEU with horizontal direct effect. Consequently, no restriction can be envisaged.

Regarding players – which are workers in the meaning developed by well established case law – there is room for arguing the existence of a restriction if one considers that a transfer becomes conditional not only on the wills of the player(s) and the club(s) involved but also on the financial restraints imposed via the FFP. In addition, Art. 45 TFEU is also directly applicable between private parties and regulations of sport organizations have already been challenged before the ECJ (*inter alia*, cases *Donà*, *Bosman*or *Bernard*). Now, one may maintain that clubs are addressees of the FFP, not players. This however is not a problem, as – at least from the *Bosman* ruling onwards – the ECJ reads in Art. 45 TFEU a general prohibition of restrictions, in the same manner as the *Dassonville* formula worked for goods. Therefore, the fact that clubs are the direct addressees of the FFP is not decisive as long as there is still a deterrent effect on the exercise of the free movement of players. The last question one is left to ask in order to correctly assess a restriction is just how far does the general prohibition of Art. 45 TFEU go: is the possibility described above not too uncertain and indirect? In *Graf* a restriction was deemed to be too remote because its actual perfection was depending on the future will of a subject, ontologically unforeseeable. In the scenario depicted above, there is no such unpredictability since the effects are rather straightforward. Thus, in this case, the broadening of the application of Art.

45 TFEU brought about by *Bosman*/*Dassonville* is not shrank by *Graf*, and the FFP can be said to restrict the free movement of players. Now, if Treaty-based justifications can be easily crossed out, the same cannot be said regarding the "overriding reasons of general interest" and, therefore, an analysis of legitimacy and proportionality is required. The legitimacy of the objectives pursued by the UEFA is crystal clear: the improvement of clubs' capability, the protection of creditors and the safeguard of the long-term viability of club football are all laudable – and legitimate – goals. Assessing proportionality is, on the contrary, more difficult: the break-even requirement is hardly suitable, definitely not necessary and questionably proportional *stricto sensu*. All in all, as far as football players are concerned, I believe the FFP to unlawfully restrict their right to freely circulate in the Union.

Regarding services, players' agents can be certainly considered service providers insofar as they act within the remit of the *Ghebard* case. Independently of the horizontal direct effect of Art. 56 TFEU, the latter can apply to players' agents, due to UEFA's organizational and working structure. It is true that the protection of the freedom to provide services has developed in a way somehow similar to other freedoms and, theoretically, every measure that would render the exercise of this freedom less attractive is caught by Art. 56 TFEU. Nevertheless, it is even more true that the restriction suffered by agents is likely too remote to be successfully argued before a Court: the negative effects of the FFP impact, first, on the clubs' behaviour on the market, then on the players' transfers and contracts, and finally on who profits from the latter, i.e. the agents. Consequently, there is a 'squared vagueness' regarding the effects of the break-even requirement on agents, even more so if one considers that not all clubs are in the first place affected by the FFP. In the light of the above, agents' freedom to provide services can hardly be considered restricted.

Secondly, serious breaches of the antitrust law cannot be excluded. On the one hand, the FFP can be qualified a decision by an association of undertakings with anticompetitive effects, on the other, the UEFA abuses of a (super) dominant position.

As far as Art. 101 TFEU is concerned, it is certainly possible to qualify the FFP as a decision by an association (UEFA) of undertakings (national federations) that can affect trade between Member States and distort competition within the internal market, due to the monopsonist position occupied by the UEFA. Regardless of its

object, the FFP has the effect of distorting competition within the internal market. In particular, the FFP amounts to an indirect price fixing agreement among buyers: given that clubs compete in the market of football's raw materials – i.e. players – tying the possible expenses to the incomes (because of the break-even requirement) clubs are restricting the competition that would otherwise take place without the FFP. Such decision cannot be justified by Art. 101(3) TFEU because the four-pronged requirement thereof is not satisfied. Indeed, the four sub-criteria enshrined therein have to be fulfilled cumulatively and the FFP is not at all indispensable because other less restrictive measures are imaginable in order to reach the very same objectives.

Regarding Art. 102 TFEU, UEFA itself is an undertaking, therefore it is necessary to delimit a relevant market where a dominant position can be assessed. In this regard, suffice it to consider the market for European-wide clubs competitions where the UEFA offers its product UEFA Champions League (UCL) to clubs, which are consumers thereof. The UCL is not interchangeable by consumers: the only other similar product is the UEFA Europa League (UEL), which is far less prestigious and profitable; the FFP applies to prospective participants of both the UCL and the UEL, therefore if one club could choose, it would go for the UCL straightaway. Plus, there is no rival product because the UEFA acts as monopolist. The geographic market being the whole EU territory, it is clear how the UEFA occupies a dominant position. So far so good, but: is there an abuse? I believe the answer to be yes. Indeed, a position such as UEFA's can be called of '[superdominance](#)', where the duties towards the competition process are not merely negative but also positive. Not only is there no trace of positive duties towards all the consumers and the competition process itself, but also – for how the FFP is tailored – bigger clubs benefit to the detriment of the smaller ones. Thus, there is room for claiming an abuse of such a 'superdominant' position in the abovementioned relevant market. Moreover, the abuse cannot be justified, lacking proportionality to whatever reason might be put forward.

Thirdly, the principle of non-discrimination is not fully respected, as the application of the FFP suffers no exception. In the first place, among European clubs there are huge differences concerning capability, which often depends on the history of success under their belts. Thus, forcing clubs to break-even is not fair as long as certain clubs can rely on hundreds of millions of income, while others only on tens of thousands, if any. From this point of view, the FFP represents a relative and

discriminatory budget cap. Moreover, there will be a fossilization in the rankings: success breeds success, namely in the form of (more) money. A situation exacerbated by how broadcast rights incomes are shared between members of the same league or federation, but this is another issue. In the second place, the FFP defines what ought to be considered a relevant income or expense for the purpose of the break-even requirement. This can lead to discrimination where national laws diverge on those same definitions because certain items in the UEFA definition are pretty broad categories; with the final result of unduly favouring clubs whose legislation is less strict in that regard. To conclude, not only the scenarios above amount to indirect discrimination, but also the "long-term viability and sustainability of European club football" – one of the main FFP's objectives – will never be reached, because certain clubs are doomed to go bankrupt.

Lastly, the application of the EU law in the above-mentioned situations triggers the application of the fundamental rights safeguarded by the Charter, in particular by Arts. 16 and 17 therein on the freedom to conduct a business and the right of property (Art. 15 is not enlisted as it would interest only agents – see above). These rights are hindered by the FFP insofar as it does not allow clubs to incur debts for more than € 30 mln., the so-called "acceptable deviation" – regardless of any warrant, even though with few exceptions. Therefore, clubs as legal persons (or their owners as natural persons) cannot usefully spend their money beyond a certain limit set by the UEFA or carry out operations such as recapitalizations. And limitations to fundamental rights are permitted only in the presence of a law that declares the general interest to be protected.

To sum up, the Striani case amounts to a missed opportunity: the issues are serious, the premises were great, the conclusion is totally unsatisfying. But this result could easily be predicted. On the one hand, pending the judgement, the UEFA has updated its FFP – the latest edition came into force on July 1st –, loosening certain restraints, although leaving untouched the major issues – the break-even requirement *in primis*. On the other, clubs themselves gave rise to the probably most expensive football market ever, thanks to the skyrocketing sums they are earning from the broadcast rights' sale that make them forget any rational limit. From a strictly legal prospective, the request for a preliminary ruling has been refused – making UEFA to release a triumphant statement where the lack of merits of the Striani case was boasted about, despite the fact that no proper judgement on the merits has been reached yet. Now the ball goes back to Brussels, where the

Tribunal has now to rule on the UEFA's appeal against the provisional measure that was granted – and immediately suspended. In the meantime, will the national Court try and draft another request? Time is running out and, having the first request been literally demolished, it is hard to imagine that a simple integration could do the job. Not to mention the problems with competence.

In conclusion, the Striani saga is getting closer to the end. It remains to be seen whether that will be the end of the book itself or just another chapter. Given the delicate issues at stake, I am inclined to believe that the end of this story is everything but near.