

**UEFA CLUB FINANCIAL CONTROL BODY**

**Adjudicatory Chamber**

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**DECISION (WITH GROUNDS)**

**in case**

**AC-01/2017**

**RASENBALLSPORT LEIPZIG GMBH**

**FC RED BULL SALZBURG GMBH**

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**Composition of the chamber:**

- **J. N. Cunha Rodrigues, Chairman**
- **L. Peila, Vice-chairman**
- **C. Flint QC, Member**
- **A. Giersz, Member**

**Nyon, 16 June 2017**

## **PART I – Introduction**

1. On 26 May 2017, the Chief Investigator of the UEFA Club Financial Control Body (the “**CFCB**”) referred the case of RasenBallsport Leipzig GmbH (“**RBL**”) and FC Red Bull Salzburg GmbH (“**FCS**” and, together with RBL, the “**Clubs**”) to the CFCB Adjudicatory Chamber.
2. In the present Decision, the CFCB Adjudicatory Chamber examines whether or not the Clubs satisfy the criteria set out in Article 5.01(c)(iv) of the *UEFA Champions League Regulations 2015-18 Cycle, 2017/18 Season* (the “**UCLR**”).

## **PART II – Reference by the CFCB Chief Investigator**

3. During May 2017, both Clubs qualified on sporting merit for the 2017/18 edition of the UEFA Champions League (the “**UCL**”). RBL qualified by finishing second in the German top division championship and FCS qualified by finishing first in the Austrian top division championship.
4. Both Clubs were subsequently granted the licence necessary to enter UEFA’s club competitions in the 2017/18 season by their respective licensor (i.e. the German Football League and the Austrian Football League).
5. On 15 May 2017, the UEFA General Secretary referred the Clubs’ case to the CFCB in accordance with Article 4.06 of the UCLR. In his referral letter, the UEFA General Secretary explained that he was concerned that the Clubs might not satisfy the criteria aimed at ensuring the integrity of the UCL which are set out in Article 5 of the UCLR.
6. On 16 May 2017, the CFCB Chief Investigator informed the Clubs that an investigation had been opened in accordance with the *Procedural rules governing the UEFA Club Financial Control Body – Edition 2015* (the “**Procedural Rules**”). The aim of the investigation was to enable the CFCB to decide on whether both Clubs were eligible to participate in the 2017/18 edition of the UCL. The investigation included on-site compliance audits which had been performed in advance by independent auditors from PricewaterhouseCoopers (with the consent of the Clubs).
7. Also on 16 May 2017, PricewaterhouseCoopers submitted its compliance reports to the UEFA Administration (the “**Compliance Reports**”). These reports were provided to the Clubs by the UEFA Administration and the Clubs were given until 22 May 2017 to submit any observations. The Clubs provided the CFCB Investigatory Chamber with their observations in accordance with this deadline.
8. On 23 May 2017, the CFCB Investigatory Chamber met in order to assess the case and decided to request additional information from FCS. Such additional information was provided by FCS on 24 May 2017.
9. Also on 24 May 2017, the CFCB Investigatory Chamber convened to make a decision on the case in accordance with Article 14(1) of the Procedural Rules. The CFCB Chief Investigator, following consultation with the other members of the CFCB Investigatory Chamber, concluded that the Clubs had failed to satisfy the criteria aimed at ensuring the integrity of the UCL which are set out in Article 5 of the UCLR and that, consequently, FCS and RBL could not participate in the 2017/18 edition of the UCL at the same time.
10. Based on the above findings, on 26 May 2017, the CFCB Chief Investigator decided to refer the case to the CFCB Adjudicatory Chamber in accordance with Article 14(1)(d) of the Procedural Rules and suggested that, in application of Article 5.02(b) of the UCLR,

FCS should be admitted to the 2017/2018 edition of the UCL and RBL should be denied admission to the 2017/2018 edition of the UCL (the “**IC Decision**”).

11. Specifically, in the IC Decision, the CFCB Chief Investigator alleges that the Compliance Reports show the existence of several links between the legal entity Red Bull GmbH (“**Red Bull**”) and the Clubs (as well as between the Clubs themselves) which point to Red Bull having “*decisive influence*” over each of FCS and RBL in contravention of Article 5.01(c)(iv) of the UCLR. In particular, the CFCB Chief Investigator highlighted the following issues:
  - (a) with regard to FCS, the CFCB Chief Investigator states that Red Bull has the ability to control access to the ordinary membership of the General Assembly of the association FC Red Bull Salzburg e.V. which wholly owns FCS (the “**FCS Association**”), that FCS garners an unusually high level of income from Red Bull via sponsorship agreements and that FCS rents its stadium (and offices) from a subsidiary of Red Bull;
  - (b) with regard to RBL, the CFCB Chief Investigator states that Red Bull has the ability to exercise decisive influence over the association RasenBallsport Leipzig e.V. which holds the majority of the voting rights in RBL, that RBL garners an unusually high level of income from Red Bull via sponsorship agreements and that considerable loan financing is given to RBL by Red Bull on favourable terms; and
  - (c) with regard to the relationship between the Clubs, the CFCB Chief Investigator draws attention to the formal cooperation agreement entered into by the Clubs, the unusually high level of player loans/transfers which have taken place between the Clubs in past seasons, the past involvement of certain individuals who are allegedly connected to Red Bull in the operation of both Clubs and the common visual identity/similar branding of the Clubs, as well as noting certain public statements regarding the Clubs made by the CEO of Red Bull.

### **PART III – Jurisdiction of and procedure before the CFCB Adjudicatory Chamber**

12. The jurisdiction of the CFCB Adjudicatory Chamber is derived from Articles 3(1)(e) and 19(1) of the Procedural Rules, which provide that the CFCB is competent to decide on cases relating to club eligibility for UEFA’s club competitions and that the CFCB Adjudicatory Chamber has competence to decide on cases referred to it by the CFCB Chief Investigator.
13. On 26 May 2017, the CFCB Chairman informed the Clubs of the opening of the judgment stage in accordance with Article 19(3) of the Procedural Rules.
14. Pursuant to Article 20(1) of the Procedural Rules, the Clubs were invited to submit their written observations by no later than 9 June 2017.
15. The Clubs made their written submissions in accordance with this deadline and these documents were accepted into the case file by the CFCB Chairman.
16. Following these submissions, the Clubs also submitted various other documents to the CFCB Adjudicatory Chamber and requested that these be added to the case file. Such requests were accepted by the CFCB Chairman in accordance with Article 20(2) of the Procedural Rules.

17. For the purposes of this Decision, all of the Clubs' arguments, documents and evidence accepted into the case file by the CFCB Chairman shall be referred to as the "**Observations**".
18. On 12 June 2017, the CFCB Chief Investigator submitted a letter to the CFCB Chairman with his reaction to the Observations (the "**CI Letter**"). This letter was also accepted into the case file by the CFCB Chairman and provided to the Clubs.
19. On the initiative of the Chairman under Article 21 of the Procedural Rules, an oral hearing was convened on 16 June 2017 in Nyon, Switzerland.
20. The following members of the CFCB Adjudicatory Chamber were present to consider the case: J. N. Cunha Rodrigues (Chairman), L. Peila (Vice-chairman), C. Flint QC (Member) and A. Giersz (Member).
21. The hearing was attended by the following representatives of the CFCB Investigatory Chamber: Y. Leterme (the CFCB Chief Investigator, acting in the capacity of Reporting Investigator under Article 18 of the Procedural Rules), D. Neven (Member of the CFCB Investigatory Chamber) and P. Mavroidis (Member of the CFCB Investigatory Chamber).
22. The hearing was attended by the following FCS representatives: S. Reiter (CEO) and C. Keidel (legal counsel).
23. The hearing was attended by the following RBL representatives: O. Mintzlaff (CEO), J. Plenge (legal counsel), J. Rain (legal counsel) and C. Schickhardt (legal counsel).
24. The quorum of judges required by Article 25(1) of the Procedural Rules being attained, the members of the CFCB Adjudicatory Chamber conducted their confidential deliberations following the hearing in accordance with Article 24(1) of the Procedural Rules.
25. The operative part of this Decision was issued to the Clubs on 20 June 2017 and, on the same day, a press release was issued to the public.

#### **PART IV – Applicable rules and regulations**

26. The present case concerns the requirements of Article 5 (Integrity of the Competition) of the UCLR:

*"5.01 To ensure the integrity of the UEFA club competitions, the following criteria apply:*

- (a) no club participating in a UEFA club competition may, either directly or indirectly:*
  - i. hold or deal in the securities or shares of any other club participating in a UEFA club competition,*
  - ii. be a member of any other club participating in a UEFA club competition,*
  - iii. be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition, or*

iv. *have any power whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition;*

(b) *no one may simultaneously be involved, either directly or indirectly, in an capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in a UEFA club competition;*

(c) *no individual or legal entity may have control or influence over more than one club participating in a UEFA club competition, such control or influence being defined in this context as:*

i. *holding a majority of the shareholders' voting rights;*

ii. *having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the club;*

iii. *being a shareholder and alone controlling a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club; or*

iv. *being able to exercise by any means a decisive influence in the decision-making of the club.*

5.02 *If two or more clubs fail to meet the criteria aimed at ensuring the integrity of the competition, only one of them may be admitted to a UEFA club competition, in accordance with the following criteria (applicable in descending order):*

(a) *the club which qualifies on sporting merit for the more prestigious UEFA club competition (i.e., in descending order: UEFA Champions League and UEFA Europa League);*

(b) *the club which was best-ranked in the domestic championship giving access to the relevant UEFA club competition;*

(c) *the club whose association has the highest association coefficient ranking, drawn up in accordance with Annex D.*

5.03 *Clubs that are not admitted are replaced in accordance with Paragraph 4.08."*

27. Under Article 27 of the Procedural Rules:

*"The adjudicatory chamber may take the following final decisions:*

a) *to dismiss the case; or*

b) *to accept or reject the club's admission to the UEFA club competition in question;*  
*or*

c) *to impose disciplinary measures in accordance with the present rules; or*

d) *to uphold, reject, or modify a decision of the CFCB chief investigator."*

## **PART V – Factual and legal appreciation by the CFCB Adjudicatory Chamber**

28. Having examined the evidence (in particular, the Observations, the CI Letter and the statement of the CFCB Chief Investigator at the hearing), the CFCB Adjudicatory Chamber determines that Article 5.01 of the UCLR has not been breached in the present case. The CFCB Adjudicatory Chamber’s reasoning for this conclusion is set out in the following Paragraphs.

### Background

29. When assessing Article 5.01 of the UCLR, the importance of protecting the integrity of UEFA’s club competitions must be remembered. In this regard, the Court of Arbitration for Sport (the “**CAS**”) decision in *CAS 98/200 AEK Athens and SK Slavia Prague v UEFA* dated 20 August 1999 is of particular significance (the “**ENIC Case**”).
30. In its deliberations in the ENIC Case, the CAS considered various ways in which the integrity of a competition may be threatened by the common ownership of football clubs. For example, the CAS considered the interest of clubs which find themselves sharing a qualification group with two commonly-owned clubs and observed that there would be a possibility that the commonly-owned clubs could conspire to obtain results that were mutually beneficial to them, at the expense of other teams.
31. Overall, the CAS stressed the need for transparency and legitimacy in all UEFA competitions, noting that the supporters’ perception of a particular game could be damaged by the differing business aims of two clubs in the same competition in which the same person or company has an interest.
32. Although the ENIC Case does not consider the decisive influence test set out in Article 5.01(c)(iv) of the UCLR (since this test was not introduced by UEFA until many years after the case was decided), it nevertheless reinforces the importance of protecting the integrity of UEFA’s club competitions.
33. Further, the impact of an adverse CFCB Adjudicatory Chamber admission decision on a club must be considered. To be denied admission to a UEFA competition is clearly a serious outcome for any club, financially and competitively.
34. It is clear then that the consequences for both UEFA and clubs in connection with Article 5.01 of the UCLR are of the utmost importance. Accordingly, against this background, the CFCB Adjudicatory Chamber acknowledges the need for a comprehensive analysis of the Clubs’ situation in the present case.

### Key legal criteria and the concept of decisive influence

35. Applying Article 5.01(c)(iv) of the UCLR to the present case, the key question for the CFCB Adjudicatory Chamber to examine is whether the legal entity, Red Bull, has the ability to exercise (by any means) decisive influence in the decision making of both RBL and FCS.
36. As the Clubs point out in the Observations, there is no definition of “*decisive influence*” in the UCLR. Accordingly, as can be expected in judicial proceedings, this leaves the interpretation of the phrase to the CFCB Adjudicatory Chamber having regard to the wording of and the intention behind the provision, as well as the specific circumstances of the case.

37. In this respect, the aim of Article 5.01 of the UCLR is to “ensure the integrity of the UEFA club competitions” with regard to “the decision making of the club” and so the CFCB Adjudicatory Chamber considers that it is necessary to limit the nature of the decision making under scrutiny to decisions that impact on the integrity of a competition. It is implicit therefore that such decisions must necessarily relate to matters that affect the performance of a club in a competition and not simply generic corporate, commercial, financial or other business activities which do not directly affect sporting performance. Since Article 5.01 of the UCLR aims to protect the integrity of the UEFA club competitions (including, applying the ENIC Case, the risk of collusion between clubs) and not to regulate the commercial transactions or financing of clubs, the words of the provision must be interpreted in this context.
38. Further, regard should be had to Articles 5.01(c)(i), (ii) and (iii) of the UCLR which set out the mechanisms by which more formal legal control over a club is established (i.e. in effect, these provisions require majority control of the decision making organs of a club). To set the bar at this level indicates that this is a strict test. Indeed, nothing short of a legal power to control decision making is required under these provisions. Against this background, it must reasonably be considered that, although drafted in more flexible terms, the benchmark for satisfying Article 5.01(c)(iv) of the UCLR should be interpreted just as strictly. The intention of Article 5.01(c)(iv) of the UCLR is to capture attempts to circumvent the integrity rules by alternative means to those formal mechanisms set out in the earlier provisions (i.e. decisive influence by any means), but not to dilute the strictness of the criteria.
39. The idea that the test of decisive influence is a difficult test to satisfy is also supported by guidance in the area of European law. For example, under the *EU Merger Regulation (EC 139/2004)*, decisive influence arises where a party acquires the ability to determine an undertaking’s commercial strategy. There is no defined shareholding level at which decisive influence arises in this context and, depending on the circumstances (including the size of other shareholdings and the existence of veto rights and other powers granted to shareholders), the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence (in particular, if the minority shareholder acquires the ability to block strategic commercial decisions or the appointment of key management). Of course, such guidance is not binding on the CFCB Adjudicatory Chamber, but it is very much in line with the strict requirements of Articles 5.01(c) of the UCLR.
40. In this regard, the CFCB Adjudicatory Chamber notes that any consideration of “significant influence” (a term used in the *UEFA Club Licensing and Financial Fair Play Regulations – 2015 Edition*) is not relevant here, since this threshold is clearly set at a lower level and applies to a different set of rules.
41. In light of the foregoing, the CFCB Adjudicatory Chamber concludes that the benchmark for establishing decisive influence is a high one, requiring the ability to direct the decision making of both Clubs by any means.

#### Basis of the CFCB Adjudicatory Chamber’s analysis

42. The CFCB Adjudicatory Chamber wishes to clarify that the basis of an assessment regarding the admission of a club to UEFA’s club competitions must be based on an assessment of the situation that exists as at the date when all of the evidence and facts in the case have finally been submitted (and admitted to the case file) thereby allowing a final decision to be taken on the question of admission (i.e. in the present case, on the closing of the oral hearing).

43. Accordingly, the CFCB Adjudicatory Chamber's analysis of the facts of the present case cannot be merely *ex ante* or prospective since the issue is whether the Clubs comply with Article 5.01 of the UCLR as at the date of admission. A consideration of how the present situation at a club might affect its behaviour in the future can be important, but the analysis itself must be firmly linked to the present and cannot be based on predictions.
44. Similarly, past facts and behaviour cannot be dismissed out of hand. It is possible that such facts might assist in interpreting the present situation and therefore there is some value in considering the historical situation.

#### Burden of proof

45. Having analysed the wording of Article 5.01(c)(iv) UCLR, it is clear that the burden is on the CFCB Investigatory Chamber to prove that Red Bull has decisive influence over both Clubs.
46. In this regard, it should again be noted that Article 5.01(c)(iv) of the UCLR requires an examination of whether decisive influence exists over more than one club. Therefore, from a practical point of view, although it might be argued that a club should be required to prove that a third party does not have decisive influence over itself, it would be impossible for a club to perform an assessment of such third party's relationship with another club given that it would lack any access to evidence.
47. This is an examination that can only be carried out by the UEFA Administration and CFCB Chief Investigator (as appropriate) once it is clear that two or more clubs, who are under suspicion, have qualified on sporting merit for UEFA's club competitions and been granted licences to compete.

#### Standard of proof

48. Having considered the standing practice in UEFA disciplinary matters (as set out in Article 18 of the *UEFA Disciplinary Regulations – Edition 2016*), the CFCB Adjudicatory Chamber agrees with the Clubs that the appropriate test is that of 'comfortable satisfaction'.
49. As regards the definition of this standard of proof, guidance can be found in various precedents from the CAS, notably the following passage from the CAS award in *CAS 2004/A/607 B. v. International Weightlifting Federation (IWF)* dated 6 December 2004:

*"This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt."*

#### Analysis of FCS and Red Bull

50. In the Compliance Reports, the independent auditors provide the following details on the changes made by FCS in an attempt to address the possibility of Red Bull's decisive influence:
  - (a) FCS had removed certain individuals who were allegedly linked to Red Bull (and who were also simultaneously involved with RBL) from the General Assembly of the FCS Association;
  - (b) an individual who was allegedly linked to Red Bull had resigned from his position as Chairman of the Board of the FCS Association; and



- (c) certain loan agreements between FCS and Red Bull had been terminated.
51. In its Observations, FCS provided documentary evidence to prove that it had made the following additional changes to address some of the issues raised in the IC Decision (as referred to in Paragraph 11 of this Decision):
- (a) the cooperation agreement between the Clubs had been terminated;
  - (b) the statutes of the FCS Association had been amended to deal with the CFCB Investigatory Chamber's concern regarding the lack of a quorum for resolutions of the General Assembly;
  - (c) the sponsorship agreement between FCS and Red Bull had been amended (reducing the rights granted to Red Bull and the amounts paid by Red Bull); and
  - (d) Red Bull's membership in the General Assembly of the FCS Association had been terminated.
52. In the CI Letter, the CFCB Chief Investigator also makes reference to these additional changes and states that, on this basis, he withdraws his objection to the admission of both Clubs to the 2017/18 edition of the UCL. This was restated by the CFCB Chief Investigator at the hearing.
53. For completeness, the CFCB Adjudicatory Chamber also notes that, in its Observations, FCS unequivocally commits to making the following further changes:
- (a) to address the situation regarding the lease of its stadium from a Red Bull-related entity; and
  - (b) to address the issue of branding and visual identity in cooperation with its kit manufacturer, Nike.
54. In light of the factors discussed in Paragraphs 29 to 49 above regarding the basis and extent of the CFCB Adjudicatory Chamber's analysis, the CFCB Adjudicatory Chamber has taken due regard of all of the changes made by FCS and concludes that Red Bull does not have decisive influence over FCS.
55. As of today, the CFCB Adjudicatory Chamber concludes that the Red Bull and FCS relationship resembles only a standard sponsorship relationship.
56. In this regard, the CFCB Chief Investigator's remarks in the CI Letter and at the hearing are clearly persuasive and the CFCB Adjudicatory Chamber is respectful of his expertise in such matters.

#### Analysis of RBL and Red Bull

57. Having determined that Red Bull does not have decisive influence over the relevant decision making of FCS, the CFCB Adjudicatory Chamber considers that there is no need to consider RBL's relationship with Red Bull.

#### Analysis of the FCS and RBL relationship

58. The CFCB Adjudicatory Chamber notes that it is possible for a club to be the entity exercising decisive influence under Article 5.01(c)(iv) of the UCLR. Applying this scenario to the present facts, this would involve FCS exercising decisive influence over

itself and RBL (or *vice versa*). Against this background, certain factors like the cooperation agreement between the Clubs and the transfer activity between the Clubs deserved attention. However, based on a detailed analysis (in particular, of the changes effected by the Clubs), the CFCB Adjudicatory Chamber concludes that there is insufficient evidence in the present case to justify a conclusion that one of the Clubs exercises decisive influence over the other.

### Conclusions

59. In the present case, for Article 5.01(c)(iv) to be breached, this would require either Red Bull to have the ability to exercise decisive influence in the relevant decision making of both Clubs or for one of the Clubs to have the ability to exercise decisive influence in the relevant decision making of itself and the other Club. Neither possibility has been proven to the comfortable satisfaction of the CFCB Adjudicatory Chamber.

### **PART VI – Admission matters**

60. In light of the foregoing, the CFCB Adjudicatory Chamber considers that both RBL and FCS shall be admitted to the 2017/18 edition of the UCL.
61. For the avoidance of doubt, investigations may be carried out at any time to ensure that the admission criteria in Article 5 of the UCLR have been met (as per Article 4.06 of the UCLR). In this regard, the CFCB Adjudicatory Chamber wishes to underline that the Clubs have a continuing duty to comply with Article 5 of the UCLR and to stress that it also expects the Clubs to comply with the various commitments made as to future conduct in the Observations and at the hearing (including, in respect of FCS, those matters set out in Paragraph 53 of this Decision).

## **PART VII – Operative part**

62. The CFCB Adjudicatory Chamber hereby decides:

- 1. To accept the admission of FCS to the 2017/18 edition of the UCL.**
- 2. To accept the admission of RBL to the 2017/18 edition of the UCL.**
- 3. This Decision is final.**
- 4. This Decision shall be notified to:**
  - a) each of the Clubs;**
  - b) the German Football Association and the Austrian Football Association;**
  - c) the CFCB Chief Investigator; and**
  - d) the UEFA Administration.**

63. This Decision may be appealed in writing before the CAS in accordance with Article 34(2) of the Procedural Rules, as well as Articles 62 and 63 of the UEFA Statutes.

64. According to Article 62(3) of the *UEFA Statutes*, the time limit for appeal to CAS is ten (10) days from the receipt of this Decision (with grounds).



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J. N. Cunha Rodrigues

CFCB Chairman