

UEFA CLUB FINANCIAL CONTROL BODY

Adjudicatory Chamber

DECISION

in case

AC-02/2014

FC DNIPRO

Composition of the chamber:

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

Nyon, 7th July 2014

I – Introduction

1. On 13 June 2014, the acting Chief Investigator of the UEFA Club Financial Control Body (the “CFCB”) referred the case of FC Dnipro to the CFCB Adjudicatory Chamber.
2. The case concerns whether FC Dnipro fulfilled the financial criteria necessary to be awarded a UEFA licence to compete in the UEFA Champions League during the 2014/15 season.
3. The operative part of this Decision was issued to FC Dnipro on 19 June 2014.

II – Reference by the acting CFCB Chief Investigator

4. On 22 October 2013, the Court of Arbitration for Sport (“CAS”) rendered its final decision in respect of the dispute between FC Dnipro and Derek Boateng (a professional football player and former employee of FC Dnipro). In this decision, the club was ordered to pay five hundred and fifty five thousand Euros (€555,000), net of taxes, to Derek Boateng in respect of unpaid wages and compensation for unfair breach of contract (the “Relevant Amount”). It should be underlined that the CAS Decision required payment of the Relevant Amount to be made in Euros, not in Ukrainian currency.
5. FC Dnipro did not exercise its right to appeal this CAS decision, which thus became final and binding.
6. On 28 May 2014, the Football Federation of Ukraine (“FFU”) informed the UEFA Administration that FC Dnipro had paid the Relevant Amount to Derek Boateng.
7. On 30 May 2014, the FFU granted FC Dnipro the licence necessary to enter the UEFA Champions League in the 2014/15 season.
8. On 2 June 2014, the FFU provided the UEFA Administration with proof that FC Dnipro had paid the Relevant Amount. This evidence showed that payment had been made on 27 May 2014.
9. On 3 June 2014, the UEFA General Secretary referred the case of FC Dnipro to the CFCB to decide on FC Dnipro’s admission to the UEFA Champions League during the 2014/15 season.
10. On 4 June 2014, the acting CFCB Chief Investigator opened the investigation and gave FC Dnipro the opportunity to submit its observations and/or additional evidence by 11 June 2014.
11. On 11 June 2014, FC Dnipro provided its observations and evidence (the “Initial Observations”).
12. On 13 June 2014, the CFCB Investigatory Chamber met in order to review and assess the case file and to make a decision in accordance with Article 14(1) of the *Procedural rules governing the UEFA Club Financial Control Body – Edition 2014* (the “Procedural Rules”). In particular, the CFCB Investigatory Chamber examined the club’s compliance with the requirements of Article 50 of the *UEFA Club Licensing and Financial Fair Play regulations – Edition 2012* (the “CL&FFP Regulations”) with regard to the existence of overdue payables towards employees as at 31 March 2014.

13. Accordingly, the acting CFCB Chief Investigator concluded that:
- (a) Derek Boateng was an employee of FC Dnipro from 25 June 2011 to 20 November 2012;
 - (b) FC Dnipro's obligation to pay the Relevant Amount to Derek Boateng arose pursuant to the employment contract between the club and the player and the club's breach of its obligations under such contract;
 - (c) the Relevant Amount represented unpaid wages (from the period August to November 2012) and compensation for breach of contract;
 - (d) based on the foregoing, the Relevant Amount was a payable for the purposes of Article 50 of the CL&FFP Regulations since it was an amount due to an employee as a result of contractual obligations that arose prior to 31 December 2013;
 - (e) payment of the Relevant Amount was clearly overdue as at 31 March 2014 since, by the club's own admission and evidence, payment did not take place until 27 May 2014;
 - (f) payment of the Relevant Amount had not been deferred until after 31 March 2014 pursuant to a valid written agreement or otherwise; and
 - (g) payment of the Relevant Amount was not in dispute before any competent body or otherwise as at 31 March 2014 (in particular, as referred to in Paragraph 5 of this Decision, the CAS decision had become full and final at the end of November 2013 and no further rights of appeal were available to the club after that time).
14. The acting CFCB Chief Investigator also determined that FC Dnipro had not provided sufficient reasons in its Initial Observations to justify the late payment of the Relevant Amount. In particular, although FC Dnipro had understandably argued that the economic and political situation in Ukraine constituted a case of *force majeure* which led to it being late in paying the Relevant Amount, no specific evidence of *force majeure* was actually provided by the club and so the acting CFCB Chief Investigator was unable to accept the club's explanation at this stage of the proceedings.
15. Based on the above findings, the acting CFCB Chief Investigator concluded that:
- (a) the club had breached Article 50(1) of the CL&FFP Regulations because it had an overdue payable towards an employee (i.e. the Relevant Amount owed to former employee Derek Boateng) as at 30 March 2014;
 - (b) that being the case, the licence for 2014/15 UEFA club competitions which was granted by the FFU to FC Dnipro on 30 May 2014 is invalid; and
 - (c) accordingly, FC Dnipro does not fulfil the requirements of Article 2.04(c) of the *Regulations of the UEFA Champions League – 2014/15 Season* (the "UCL Regulations") and is not eligible to participate in the competition.
16. On 13 June 2014, the acting CFCB Chief Investigator decided to refer the case to the CFCB Adjudicatory Chamber in accordance with Article 14(1)(d) of the Procedural Rules. The acting CFCB Chief Investigator recommended that FC Dnipro be declared

ineligible to participate in the UEFA Champions League during the 2014/15 season because it had breached Article 50(1) of the CL&FFP Regulations as a result of having overdue payables towards employees as at 31 March 2014 (as described in Paragraphs 13 and 15 of this Decision).

III – Jurisdiction of and procedure before the CFCB Adjudicatory Chamber

17. The jurisdiction of the CFCB Adjudicatory Chamber derives from Article 19(1) of the Procedural Rules, which provides that the CFCB Adjudicatory Chamber has competence to decide on the case referred to it by the CFCB Chief Investigator.
18. On 13 June 2014, the CFCB Chairman informed FC Dnipro of the opening of the judgment stage, in accordance with Article 19(3) of the Procedural Rules. Pursuant to Article 20(1) of the Procedural Rules, the club was invited to submit its written observations by 17 June 2014.
19. The club submitted its written observations in accordance with this deadline, together with supplementary evidence (the “Additional Observations”).
20. The members of the CFCB Adjudicatory Chamber convened on Thursday 19 June 2014 at the headquarters of UEFA in Nyon, Switzerland.
21. The members took note of the report prepared by Mr Jacobo Beltran (member of the CFCB Investigatory Chamber, acting as reporting investigator in the present case pursuant to Article 18(1) of the Procedural Rules).
22. At the initiative of the CFCB Adjudicatory Chamber, Mr Stetsenko (CEO of FC Dnipro) and Mr Isenegger (legal counsel of FC Dnipro) were also in attendance in order to provide further evidence to the CFCB Adjudicatory Chamber in connection with the *force majeure* explanation raised by FC Dnipro and to answer questions on this matter (the “FM Evidence”).
23. The quorum of judges required by Article 25(1) of the Procedural Rules being attained, the members of the CFCB Adjudicatory Chamber conducted its confidential deliberations in accordance with Article 24(1) of the Procedural Rules.
24. In its discussion and subsequent deliberations, the CFCB Adjudicatory Chamber took into account all the evidence and arguments presented by the club (including the Initial Observations, Additional Observations and FM Evidence).

IV – Applicable Rules

25. The case concerns FC Dnipro’s eligibility to take part in the 2014/15 UEFA Champions League for alleged contraventions of the CL&FFP Regulations.
26. The UCL Regulations establish a procedure under which a club eligible to participate in the competition must meet a number of admission criteria. Under Article 2.04c) of the UCL Regulations, to be eligible to participate in the competition, a club must:

“ (...) have obtained a licence issued by the competent national body in accordance with the UEFA Club Licensing and Financial Fair Play Regulations (2012 edition) and be included in the list of licensing decisions to be submitted by this body to the UEFA administration by the given deadline.”

27. Under Article 2.09 of the UCL Regulations:

“If there is any doubt as to whether a club fulfills the admission criteria defined in paragraph 2.07c) (...), the UEFA General Secretary refers the case to the UEFA Club Financial Control Body, which decides without delay upon the admission in accordance with the Procedural rules governing the UEFA Club Financial Control Body.”

28. Article 3(1)(e) of the Procedural Rules provides that the CFCB is competent to:

“decide on cases relating to club eligibility for the UEFA club competitions to the extent provided for by the regulations governing the competitions in question.”

29. The CL&FFP Regulations establish a club licensing system and are intended to achieve the objectives set forth in Article 2(2) of the CL&FFP Regulations, i.e.:

“a) to improve the economic and financial capability of the clubs, increasing their transparency and credibility;

b) to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social tax/authorities and other clubs punctually;

c) to introduce more discipline and rationality in club football finances;

d) to encourage clubs to operate on the basis of their own revenues;

e) to encourage responsible spending for the long term-benefit of football;

f) to protect the long-term viability and sustainability of European club football.”

30. According to Article 5(1) of the CL&FFP Regulations:

“[t]he licensor is a UEFA member association and governs the club licensing system”.

31. Article 5(4)(e) further stipulates that:

“the licensor must [...] assess the documentation submitted by the clubs, consider whether this is appropriate and determine whether each criterion has been met and what further information, if any, is needed (...).”

32. Article 5(4)(g) reads as follows:

“the licensor must [...] determine whether a licence can be granted.”

33. Under Article 10 of the CL&FFP Regulations:

“The Licensor defines the assessment methods, except those used to verify compliance with the financial criteria for which specific assessment processes must be followed as set out in Annex IX.”

34. Article 14(1) of the CL&FFP Regulations provides that:

“Clubs which qualify for the UEFA club competitions on sporting merit or through the UEFA fair play rankings must obtain a licence issued by their licensor according to the national licensing regulations (...).”

35. Article 50 of the CL&FFP Regulations provides that:

“¹ The licence applicant must prove that as at 31 March preceding the licence season it has no overdue payables (as defined in Annex VIII) towards its employees as well as social/tax

authorities as a result of contractual and legal obligations towards its employees that arose prior to the previous 31 December.

² Payables are those amounts due to employees or social/tax authorities as a result of contractual or legal obligations towards employees. Amounts payable to people who, for various reasons, are no longer employed by the applicant fall within the scope of this criterion and must be settled within the period stipulated in the contract and/or defined by law, regardless of how such payables are accounted for in the financial statements.

³ The term “employees” includes the following persons:

- a) All professional players according to the applicable FIFA Regulations on the Status and Transfer of Players; and
- b) The administrative, technical, medical and security staff specified in Articles 28 to 33 and 35 to 39.

⁴ The licence applicant must prepare a table showing all employees who were employed at any time during the year up to the 31 December preceding the licence season; i.e. not just those who remain at year end. This table must be submitted to the licensor.

⁵ The following information must be given, as a minimum, in respect of each employee:

- a) Name of the employee;
- b) Position/function of the employee;
- c) Start date;
- d) End date (if applicable);
- e) The balance payable as at 31 December, including the due date for each unpaid element; and
- f) Any payable as at 31 March (rolled forward from 31 December), including the due date for each unpaid element, together with explanatory comment.

⁶ The licence applicant must reconcile the total liability as per the employee schedule to the figure in the financial statements balance sheet for ‘Accounts payable towards employees’ (if applicable) or to the underlying accounting records.

⁷ The licence applicant must submit to the auditor and/or the licensor a social/tax table showing the amount payable (if any), as at 31 December of the year preceding the licence season, to the competent social/tax authorities as a result of contractual and legal obligations towards its employees.

⁸ The following information must be given, as a minimum, in respect of each payable towards social/tax authorities, together with explanatory comment:

- a) Name of the creditor;
- b) Any payable as at 31 December, including the due date for each unpaid element;
- c) Any payable as at 31 March (rolled forward from 31 December), including the due date for each unpaid element;
- d) All supporting evidence in respect of the above payables

⁹ *The licence applicant must reconcile the total liability as per the social/tax table to the figure in the financial statements balance sheet for 'Accounts payable to social/tax authorities' or to the underlying accounting records.*

¹⁰ *The employees table as well as the social/tax table must be approved by management and this must be evidenced by way of a brief statement and signature on behalf of the executive body of the licence applicant."*

36. Annex VIII of the CL&FFP Regulations defines the notion of "overdue payables" as follows:

"1. Payables are considered as overdue if they are not paid according to the agreed terms.

2. Payables are not considered as overdue, within the meaning of these regulations, if the licence applicant/licensee (i.e. debtor club) is able to prove by 31 March (in respect of Articles 49 and 50) and by 30 June and 30 September (in respect of Articles 65 and 66) respectively that:

a) it has paid the relevant amount in full; or

b) it has concluded an agreement which has been accepted in writing by the creditor to extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline); or

c) it has brought a legal claim which has been deemed admissible by the competent authority under national law or has opened proceedings with the national or international football authorities or relevant arbitration tribunal contesting liability in relation to the overdue payables; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider that such claim has been brought or such proceedings have been opened for the sole purpose of avoiding the applicable deadlines set out in these regulations (i.e. in order to buy time), the relevant amount will still be considered as an overdue payable; or

d) it has contested to the competent authority under national law, the national or international football authorities or the relevant arbitration tribunal, a claim which has been brought or proceedings which have been opened against it by a creditor in respect of overdue payables and is able to demonstrate to the reasonable satisfaction of the relevant decision-making bodies (licensor and/or UEFA Club Financial Control Body) that it has established reasons for contesting the claim or proceedings which have been opened; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider the reasons for contesting the claim or proceedings which have been opened as manifestly unfounded the amount will still be considered as an overdue payable."

37. Under Annex XI(1)(f) of the CL&FFP Regulations:

"As part of its considerations, the UEFA Club Financial Control Body may also take into account extraordinary events or circumstances beyond the control of the club which are considered as a case of force majeure."

38. Article 27 of the Procedural Rules provides that the CFCB Adjudicatory Chamber may take the following 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.”

In the circumstances of the case, the CFCB Adjudicatory Chamber has to rule on whether to grant or refuse the admission of the club to the 2014/15 UEFA Champions League.

V – Factual and legal appreciation by the CFCB Adjudicatory Chamber

39. To be eligible to participate in the UEFA Champions League in the 2014/15 season, a club must fulfil certain criteria. In particular, it must have obtained a licence issued by the competent national body in accordance with the CL&FFP Regulations, as provided by Article 2.04(c) of the UCL Regulations. If a club is in breach of Article 50(1) of the CL&FFP Regulations because it has overdue payables towards employees as at 31 March 2014, then such club should not be granted a licence.
40. Having examined the evidence, in particular the findings of the acting CFCB Chief Investigator, the Initial Observations, the Additional Observations and the FM Evidence, the CFCB Adjudicatory Chamber finds that FC Dnipro breached Article 50(1) of the CL&FFP Regulations. However, such breach was attributable to a *force majeure* event.

Breach of Article 50(1) of the CL&FFP Regulations

41. The CFCB Adjudicatory Chamber agrees with the findings of the acting CFCB Chief Investigator with regard to the existence of overdue payables as at 31 March 2014 (as set out in Paragraph 15(a) of this Decision). These findings are also supported by the evidence provided by the club in its Initial Observations, Additional Observations and FM Evidence. There is no doubt that the Relevant Amount was owed to Derek Boateng, as established by the CAS decision dated 22 October 2013. Accordingly, the Relevant Amount was clearly a payable for the purposes of Article 50 of the CL&FFP Regulations, since it was an amount due to an employee as a result of contractual obligations that arose prior to 31 December 2013. Further, the Relevant Amount was clearly owed to Derek Boateng as at 31 March 2014, since payment was not made until 27 May 2014.
42. For these reasons, the CFCB Adjudicatory Chamber finds that FC Dnipro did in fact breach Article 50(1) of the CL&FFP Regulations. It is therefore open to the CFCB Adjudicatory Chamber to find that the licence granted to FC Dnipro was incorrectly granted by the FFU because the club had failed to meet a fundamental obligation laid down in the CL&FFP Regulations in respect of the existence of overdue payables towards employees.

Force majeure

43. However, notwithstanding the foregoing, in this case the CFCB Adjudicatory Chamber has decided to accept FC Dnipro's argument that it only breached Article 50(1) of the CL&FFP Regulations because of a *force majeure* event.
44. Under Annex XI(1)(f) of the CL&FFP Regulations, the CFCB Adjudicatory Chamber is entitled to "*take into account extraordinary events or circumstances beyond the control of the club which are considered as a case of force majeure*". Whilst this provision relates to the UEFA club monitoring process and not UEFA club licensing, the CFCB Adjudicatory Chamber is of the opinion that the principle of *force majeure* and the concepts of "*extraordinary events*" and "*beyond the control of the club*" have a general

application when assessing a club's compliance with the provisions of the CL&FFP Regulations. Accordingly, in the present case, the CFCB Adjudicatory Chamber was prepared to assess whether the breach of Article 50(1) of the CL&FFP Regulations was due to an "extraordinary" event which was "beyond the control of the club".

45. In this regard, the CFCB Adjudicatory Chamber stresses that according to CAS, *force majeure* "implies an objective, rather than a personal, impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible. In addition, the conditions for the occurrence of *force majeure* are to be narrowly interpreted, since *force majeure* introduces an exception to the binding force of an obligation" (CAS 2006/A/1110 *PAOK FC v. UEFA*, paragraph 41).
46. Further, as CAS has also stated, "the mere reference to a general situation of troubles in a concrete place is not enough to justify a breach on the basis of exceptional circumstances as the *force majeure*. The party asking for its application shall duly identify and accredit which specific and *précis* fact prevented it to perform a certain activity. And in this case, the IFA has not alleged any concrete fact occurred in a concrete moment that prevented it from making the transfer of the appeal fee to FIFA within the time limits prescribed in the *FIFA Disciplinary Code*" (CAS 2008/A/1621 *Iraqi Football Association v. FIFA & Qatar Football Association*, paragraph 22).
47. The benchmark for successfully asserting a *force majeure* defence to a breach of the CL&FFP Regulations is therefore a high one and the burden is on the club to provide specific evidence of the impact of the relevant event(s) and/or circumstance(s) on its performance of the relevant obligation(s).
48. Having considered the Additional Observations and the FM Evidence, the CFCB Adjudicatory Chamber observes that:
 - (a) on 22 January 2014, FC Dnipro requested certain original documents from Derek Boateng's lawyer in order to enable the club to request a foreign currency transfer from the club's bank account at PrivAtBank (which is the largest commercial bank in Ukraine) to the lawyer's bank account;
 - (b) on 28 January 2014, these original documents were provided to FC Dnipro (receipt of which was acknowledged by the club in an email dated 6 February 2014);
 - (c) FC Dnipro submitted evidence that it had sent these original documents to PrivAtBank soon after they were received on 28 January 2014;
 - (d) FC Dnipro subsequently made a number of requests to PrivAtBank for the foreign currency transfer to be effected;
 - (e) FC Dnipro at all times had sufficient credit balances in its PrivAtBank accounts to cover a payment of the Relevant Amount at all material times after 7 February 2014;
 - (f) it is clear from a letter from PrivAtBank dated 25 March 2014 that the bank was not prepared to make the payment requested by the club at that time, purportedly on the grounds that the beneficiary of the payment (i.e. Derek Boateng's lawyer) was not a party to the relevant employment contract;
 - (g) notwithstanding the reasons stated by PrivAtBank in their letter of 25 March 2014, it is open to the CFCB Adjudicatory Chamber to take account of the evident fact that

the situation in the Ukraine at that time may well have posed considerable problems for banks who wished to make foreign currency transfers; and

- (h) since the evidence provided by the club demonstrates that it had a credit balance sufficient to cover a payment of the Relevant Amount at all materials times after 7 February 2014, and that the bank was able to make the transfer on 27 May on the basis of the same documents which had been submitted earlier by the club, it would appear that PrivAtBank's refusal to effect the transfer prior to 27 May 2014 must be explained by circumstances beyond the control of the club or the bank. Those circumstances are most likely to have been related to the financial crisis which prevailed in the Ukraine prior to the announcement by the IMF on 1 May 2014 of the approval of a bailout package to enable Ukraine to meet its foreign currency obligations.
49. The CFCB Adjudicatory Chamber acknowledges that *force majeure* is a strict concept and that it must be established that there is an impossibility which is beyond the control of the club. That said, there is no doubt that it was PrivAtBank which refused to make the payment on more than one occasion, at a time when the club had sufficient funds to support the payment, as evidenced by the letter dated 25 March 2014. Despite repeated efforts by FC Dnipro, the bank consistently stated that it was unable to proceed with the transfer of foreign currency. The club was therefore active and timely in securing in good time the relevant documents requested by PrivAtBank and also requested the bank to effect such transfer on several occasions. It is clear, therefore, that it was the bank which impeded the payment of the Relevant Amount. As referred to in Paragraph 48(h) of this Decision, this is most likely related to the political and financial instability which applied at that time in Ukraine.
50. Taking all of the above circumstances into account, the CFCB Adjudicatory Chamber is able to accept that the bank was prevented from making the foreign currency transfer requested by the club in good time before 31 March 2014 because of "*extraordinary*" circumstances applying in Ukraine which were beyond the control of the club or the bank. Accordingly, the conditions required for FC Dnipro to plead a *force majeure* argument have been satisfied.

Overall position of the CFCB Adjudicatory Chamber

51. To conclude, FC Dnipro had an overdue payable towards a former employee totalling five hundred and fifty five thousand Euros (€555,000), net of taxes, as at 31 March 2014. However, the CFCB Adjudicatory Chamber is able to accept that there were "*extraordinary*" circumstances which were "*beyond the control of the club*" preventing payment of the Relevant Amount prior to 31 March 2014.
52. Accordingly, although the CFCB Adjudicatory Chamber determines that FC Dnipro did in fact breach Article 50(1) of the CL&FFP Regulations, this breach was due to *force majeure*. On this basis, the CFCB Adjudicatory Chamber considers that the licence granted by the FFU should not be revoked and the club can therefore be admitted to the UEFA Champions League taking place in the 2014/15 season.

VI – Operative part

53. The Adjudicatory Chamber of the UEFA Club Financial Control Body hereby decides:
- 1. To dismiss the case.**
 - 2. This decision is final.**

3. It is notified to:

- a) FC Dnipro;**
- b) the Football Federation of Ukraine;**
- c) the CFCB Investigatory Chamber;**
- d) the UEFA Administration.**

54. The present Decision may be appealed in writing before CAS, in accordance with Article 34(2) of the Procedural Rules, as well as Articles 62 and 63 of the *UEFA Statutes*. According to Article 62(3) of the *UEFA Statutes*, the time limit for appeal CAS is ten days from the receipt of the reasoned Decision.



J. N. Cunha Rodrigues
Chairman of the CFCB

UEFA bank details:
Union Bank of Switzerland
CH-3001 Bern
Acc. n° 235-90 186'44.6
Bank code 235
Swift: UBS WCH ZH 80A
IBAN CH30 00235235901864446