



Arbitration CAS 2008/A/1579 Fudbalski Klub Zemun v. Union des Associations Européennes de Football (UEFA), award of 26 November 2008

Panel: Mr Patrick Lafranchi (Switzerland), President; Mr Lucas Anderes (Switzerland); Mr Bernhard Welten (Switzerland)

Football

UEFA licence to participate in a competition

Need for a club to respect the deadlines set in the regulations for providing documents

Pursuant to the applicable UEFA Licensing Manual, a license is necessary to participate in the UEFA Cup. Specific requirements for the clubs are to be fulfilled in a fixed time limit in order to enable UEFA to grant respectively refuse the appropriate license. Therefore the clubs do not only have to fulfill the material requirements set in the regulations, but they need to meet these conditions on a certain date. A firm position regarding the deadlines set by UEFA is necessary. In this respect, where the deadlines have been extended several times in favour of a club, the refusal of the license is a logical consequence when the deadlines to provide documents necessary for UEFA to assess the financial situation of the club were not met. The matter of the deadlines has to be considered under the principle of equality of treatment; it is a must to treat all the clubs and national football associations the same way. It is the clubs' duty of diligence to respect the deadlines set by the UEFA Rules.

Fudbalski Klub Zemun (the “Appellant”, “the Club” or “FK Zemun”) is a Serbian football club and a member of the Serbian Football Association (SFA). It competes in the First League of Serbia.

Union des Associations Européennes de Football (UEFA or the “Respondent”) is an association under Swiss law which is the administrative and controlling body for the European football. It represents the national football associations of Europe and the SFA is a member of UEFA.

On 20 March 2008, the SFA notified UEFA about the possibility that the FK Zemun initiates an extraordinary application procedure pursuant to the UEFA Club Licensing Manual. As reminded in the template for extraordinary application (checklist) given by UEFA to all national football associations on 31 August 2007, the clubs had to provide the necessary document in order for the national association to assess the club and submit to UEFA the following documents by 2 May 2008 at the latest:

- the duly completed extraordinary application checklist;
- the recommendation to UEFA whether to grant the special permission or not based on the national associations' executed assessment;

- the documents described in the checklist and any further documents requested by UEFA in a UEFA official language.

On 31 April 2008, the SFA requested an extension of the above mentioned deadline until 6 May 2008 due to the time necessary to translate all documents into English. This extension has been granted by UEFA.

On 5 May 2008, the SFA submitted to UEFA the extraordinary application checklist together with the recommendation to UEFA whether to grant or not the special permission to FK Zemun and related documents. SFA clearly stated that the financial conditions required by UEFA (Criterion F.01 to F.04 of the check list) are not met by the Appellant.

Within the period from 6 to 21 May 2008, UEFA reviewed the submitted documents. The main issues arising from the review of the extraordinary application were as follows: some of the requested documents were missing;

- the audited F/S provided for 2007 showed a negative equity of Dinars 235M (CHF 5M) out of liabilities of Dinars 322M (CHF 6.4M);
- the auditor's opinion dated 12 May 2008 including among others an emphasis of matters on the continuation of the Appellant's operations in the near future (going concern) and on the potential issues arising from the repayment of the main creditor, the company "Astra Simit", for a total amount of 271M Dinars (CHF 5.4M);
- the financial statements revealed liabilities relating to employees' salaries of 19M Dinars (CHF 0.4M) for the years 2006 and 2007, including liabilities towards social and tax authorities;
- the FSA indicated in the checklist that the financial criteria were not met.

On 21 May 2008, UEFA sent a fax to the SFA requesting clarification with regard to the non-fulfilled criteria and listing all missing information to be provided by 23 May 2008 at the latest. Among other, UEFA requested the following documents:

- budgeted cash flow statement or income statement covering the football season in question (given the auditor's emphasis of matters on the going concern, the Club must demonstrate its ability to be financially able to finish at least the next sporting season);
- the list of employees of the Club (given the significant amount payable related to employees' salaries);
- the auditor's assessment with regard to the non-existence of overdue payables towards employees and social/tax authorities as at 31 December 2007 (given the significant amount payable related to employees' salaries).

On 23 May 2008, the SFA submitted the following information:

- the Club's management declaration that the Club will continue as a going concern given the different revenues (donation, transfer of players, solidarity contribution, ticketing,

sponsoring) to be recognised for the season 2008/09. The Club submitted several agreements to support its declaration;

- a list of employees (75) from January until March 2008. In addition, the Club's management declared that the employees of the Club agreed to the postponement of the payment of their overdue salary for the year 2006 up to 30 June 2008 and for the year 2007 up to 31 August 2008. The date at which the agreement was concluded was not disclosed; the total of unpaid salaries amounted to 19M Dinars (CHF 0.4M).

However, the SFA and the Club did not submit:

- the Club's budgeted cash flow statement or income statement covering the football season in question;
- the auditor's confirmation with regard to the non-existence of overdue payables towards employees and social/tax authorities as at 31 December 2007;
- the FSA revised checklist stating the results of their assessment taking into account additional documents provided by the Club.

On the same day, UEFA sent a fax to the SFA requesting the submission of the missing information listed above by 26 May 2008 at the latest.

On 26 and 27 May 2008, the Club submitted via the SFA a declaration from the auditor confirming the existence of agreements with the Club's employees to defer the payment of the salaries for 2006 and 2007 until June and August 2008 respectively. The date at which the agreement was concluded was not disclosed. No indication was provided whether a similar agreement was concluded with the social/tax authorities. The SFA submitted a revised checklist stating the fulfilment of all financial criteria. However, the Club did not submit any budgeted cash flow statement or income statement or any auditor's additional assessment with regard to the Club's capacity to continue as a going concern for the next season.

On 27 May 2008, UEFA sent a final fax to the SFA pointing out that the information submitted was still not satisfactory and that the missing information had to be submitted by 28 May 2008 at the latest in order to make the appropriate decision.

In particular, the budgeted cash flow statement or income statement had still to be submitted as a part of the future financial information requested by UEFA, as well as the following:

- the future revenues generated from existing contracts (e.g. revenues from transfer of players could only be considered if there were finalised contracts);
- the proof of the Club's capability to cover the general and administrative expenses for the period in question (season 2008/09) including the extraordinary payment of 19M Dinars (CHF 0.4M) related to unpaid salaries to be made in 2008.

On 28 and 29 May 2008, the Club submitted various documents without answering the main query of UEFA with regard to the financial outlook of the Club for the next sporting season.

On 2 June 2008, the licensors had to submit the list of licensed clubs to UEFA in order for UEFA to get a full picture of the clubs that have undergone the licensing system in a satisfactory way. However, UEFA could only state that the SFA, despite numerous requests, did not provide the list with the requested documents. Considering the above, UEFA decided on the same day to refuse the Appellant a special permission to participate in the UEFA Cup 2008/09 (“the Decision”) on the following grounds:

“The club did not fulfil criterion “F.01 – Annual Financial Statements audited” and criterion “F.04 No payables overdue towards employees and social tax authorities”.

With regard to criterion F.01 the auditor’s report contained an emphasis of matter in respect of going concern. In this respect the club did not submit a clear financial projection for the period 2008 and 2009 which covers the sporting season under review allowing UEFA to conclude at its satisfaction on the

- a) club’s capacity to continue as a going concern until the end of the next sporting season, and*
- b) club’s authority to face its obligations towards its employees and social/ tax authorities. In particular its capacity to pay overdue salaries from 2006 and 2007 in June and August 2008 in accordance with the agreement concluded with its employees.*

In respect of criterion F.04 the club showed overdue payables towards employees and social tax authorities related to unpaid salaries of the years 2006 and 2007. The club concluded an agreement for the postponement of the debt with the employees. However it was not possible to determine whether this agreement was concluded before 31 March 2008 (as requested by the criterion) and whether a similar agreement was concluded with the social/ tax authorities”.

On the 18 June 2008, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS). It challenged the above-mentioned Decision and requested that the Decision be dismissed and that the Appellant be granted a special permission to participate in the UEFA Cup 2008/09. Within its statement of appeal, the Appellant filed an objection to the Decision and a request to admit FK Zemun on a provisional basis in the UEFA Cup 2008/09 until the CAS award is issued.

On 23 June 2008, the Appellant lodged its Appeal Brief.

On 27 June 2008, the Respondent submitted to the CAS an answer.

A hearing was held in this matter on 30 June 2008 at the CAS headquarters in Lausanne, Switzerland.

LAW

CAS Jurisdiction

1. The jurisdiction in the present procedure derives from article R57 of the Code of Sports-related Arbitration (the “Code”) in conjunction with article 62 of the UEFA Statutes and articles 2.2.6.7 and following of the UEFA Club Licensing System. It is further confirmed by the order of procedure duly signed by the parties. It follows that CAS has jurisdiction to decide on the present dispute.
2. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable law

3. Article R58 of the Code provides:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
4. In the present matter, there was no agreement among the parties regarding the application of any particular law. In their respective submissions, the parties refer to article 64 para. 1 of the UEFA Statutes, which provides:
“These Statutes shall be governed in all respects by Swiss law”.
5. As a result, subject to the primacy of the UEFA Regulations, Swiss law shall apply complementarily.

Admissibility

6. Based on article 62 para. 2 of the UEFA Statutes, Zemun has the right to file an appeal before the CAS against the Decision.
7. The appeal was filed within the deadline set forth in article 62 para. 3 of the UEFA Statutes. Furthermore, it complied with all other requirements of article R48 of the Code.
8. It follows that the appeal is admissible.

Provisional measures

9. The provisional measures requested by the Appellant to grant the appeal a suspending effect and include the Appellant in the UEFA drawing of the UEFA Cup on 1 July 2008 are consummated by the dispositive of the decision sent to the parties on 30 June 2008. As the appeal is dismissed there is no need to enter into any further details regarding the requested provisional measures.

Merits

10. The present procedure concerns a dispute between FK Zemun and UEFA with respect to the fulfilment of the requirements provided under the Rules of the UEFA Club Licensing System for participating in the UEFA Cup 2008/09 by way of the extraordinary application procedure.

11. The Rules force the clubs to comply with specific requirements, in particular with respect to the financial health of the clubs.

11. The main rules to which the Panel revert to for the present matter are the following:

Art. 4.6.1.1 of the Licensing Manual:

“If a club qualifies for a UEFA competition based on its sporting results, but has not undergone at all a national licensing process or has undergone a licensing process which is lower/ not equivalent to the one applicable for top division clubs because it belongs to a division other than the top division, the national association of the club concerned may – on behalf of such a club – request the extraordinary application of the club licensing system”.

Art. 4.6.1.2 of the Licensing Manual:

“In practice, such a club could for example be the winner or the runner-up of the main domestic cup or league cup playing in a division other than the top division”.

Art. 4.6.2.1 of the Licensing Manual:

“The UEFA CEO or Deputy CEO defines the minimum criteria for the extraordinary procedure and communicates these criteria to the national associations via Extranet by August 31 of the year preceding the season to be licensed at the latest”.

Art. 4.6.2.6 of the Licensing Manual:

“The UEFA CEO or Deputy CEO bases his decision on the received documentation and grants special permission to enter club competitions if all the set criteria are fulfilled and if the club(s) ultimately qualifies on the basis of its sporting results”.

12. The Panel states that the parties did not contest that a licence is necessary to participate in the UEFA Cup pursuant to the applicable UEFA Rules. The above mentioned Rules provide specific requirements for the clubs to be fulfilled in a fixed time limit in order to enable UEFA to grant respectively refuse the appropriate license. According to Art. 4.6.2.1 of the Licensing

Manual, UEFA defined the minimum criteria for the extraordinary procedure and communicated these criteria to the national associations via Extranet by August 31, 2007.

13. In the present case, the conditions required by the UEFA Rules to get the license were not met by the Appellant in time, despite UEFA granting the Appellant several extensions of the time limit to file all necessary documents. The Panel is of the opinion that for the (good) organisation of any competition, deadlines are inevitable and such deadlines need to be met by all clubs requesting a licence to compete in e.g. the UEFA Cup. Therefore the clubs do not only have to fulfil the material requirements set in the regulations, but they need to meet these conditions on a certain date.
14. In the case at hand UEFA set a deadline to comply with the conditions on 2 May 2008. Such deadline was more than once extended on the Appellant's requests, however the required documents were not completed by 2 June 2008, which was set by UEFA as really last date to comply with the requests. For organisational reasons this deadline of 2 June 2008 does make sense and it is in no way arbitrary. Further the Appellant who was not able to send all requested documents to UEFA, knew already in March 2008 that it would possibly have to file such an extraordinary application; therefore it is his sole fault, not having complied with UEFA's requests. It certainly is not UEFA's task to go and get the required documents from the clubs through the corresponding national football associations; it is the club's task to fulfil the requests within the timeline set by UEFA.
15. The documents which were requested from the Appellant were necessary for UEFA to assess the financial situation of the Appellant. The Appellant knew exactly which documents were to be presented to UEFA and nevertheless has failed submitting them in due time. The Panel is of the view that a firm position regarding the deadlines set by UEFA is necessary and considering that the deadlines have been extended several times in favour of the Appellant, the refusal of the license is a logical consequence when the deadlines to provide important documents were not met. The matter of the deadlines has to be considered under the principle of equality of treatment; it is a must to treat all the clubs and national football associations the same way. As mentioned before it is the Clubs' duty of diligence to respect the deadlines set by the UEFA Rules.
16. The Panel for those reasons comes to the conclusion that the challenged decision was correctly made in accordance to the UEFA Rules and in no way arbitrary. Therefore the appeal is dismissed and it is not necessary to examine whether the Appellant's financial conditions have been fulfilled after the deadline of 2 June 2008. As reasoned before there is also no need to further examine the Appellant's allegation with respect to article 2 of the Swiss Civil Code.

The Court of Arbitration for Sport rules:

1. The appeal filed by Fudbalski Klub Zemun on 10 June 2008 is admissible;
2. The appeal filed by Fudbalski Klub Zemun on 10 June 2008 is dismissed;
3. The UEFA decision dated 2 June 2008 is confirmed;
- (...)
6. All other petitions for relief are dismissed.