



**Arbitration CAS 2016/A/4692 Kardemir Karabükspor Kulübü Derneği v. Union des Associations Européennes de Football (UEFA), award of 26 January 2017**

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

*Football*

*Disciplinary sanction due to the violation of the UEFA Club Licensing and Financial Fair Play Regulations*

*Suspension of disciplinary sanction*

*Force majeure*

*Proportionality of disciplinary sanction*

*Equal treatment of offenders*

1. The party requesting a suspension of the sanction decided against it carries the burden of proof. It is therefore required to present new cogent arguments in support of its request, failing which the modalities of the sanction encompassed in the challenged decision will not be amended.
2. The occurrence of *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 qualification of *force majeure* are to be narrowly interpreted since *force majeure* introduces an exception to the binding force of an obligation. In this context, one party's relegation to a lower division of competition does not constitute a *force majeure* situation and consequently bears no exonerating effect.
3. A CAS panel's review of a sanction is only possible provided the sanction is evidently and grossly disproportionate to the breach, which means, *inter alia*, that a CAS panel must show restraint when evaluating whether a sanction is appropriate. A discretionary choice of one sanction amongst a list of applicable sanctions does not automatically mean that the actual sanction imposed by the relevant adjudicatory body is disproportionate.
4. The fact that a sanction chosen by the adjudicatory body differs from the one suggested by the investigatory body does not automatically mean that such sanction is disproportionate or inconsistent with other similar cases. Likewise, the sole comparisons of sanctions having been imposed in other cases is insufficient to establish a disproportion or an inconsistency, the circumstances of each case having to be duly taken into consideration.

## 1. THE PARTIES

- 1.1 Kardemir Karabükspor Kulübü Derneği (the “Club” or the “Appellant”) is a Turkish professional football club affiliated with the Turkish Football Federation (“TFF”), which in turn is affiliated with UEFA.
- 1.2 Union des Associations Européennes de Football (“UEFA” or the “Respondent”) is the international association of European football federations and the governing body of European football, dealing with all matters relating thereto and exercising regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players affiliated with UEFA or participating in its competitions. UEFA is the organising authority of all UEFA football competitions for clubs at the European level, including the UEFA Champions League and the Europa League. UEFA has its headquarters in Nyon, Switzerland, and is a legal entity registered under Swiss law.

## 2. FACTUAL BACKGROUND

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Sole Arbitrator on the basis of the Decision rendered by the UEFA Club Financial Control Body Adjudicatory Chamber (the “Adjudicatory Chamber”) on 16 June 2016 (the “Decision”) and the written submissions of the Parties. Additional facts may be set out, where relevant, in the legal considerations of the present Award.
- 2.2 On 6 May 2015, the Appellant entered into a settlement agreement (the “Settlement Agreement”) with the CFCB Chief Investigator in accordance with the the Procedural rules governing the UEFA Club Financial Control Body, Edition 2015 (the “Procedural Rules”).
- 2.3 The Settlement Agreement was concluded after the CFCB Chief Investigator determined that the Appellant had failed to comply with the monitoring requirements set out in Articles 53 to 68 of the UEFA Club Licensing & Financial Fair Play Regulations, Edition 2015 (the “CL&FFP Regulations”) and, in particular, had failed to fulfil the break-even requirement set out in Articles 58 to 63 of the said regulations because it had an aggregate break-even deficit for the reporting periods ending in 2012, 2013 and 2014, which exceeded the relevant acceptable deviation by [X] million Euros. The breach was admitted by the Appellant.
- 2.4 The Settlement Agreement states, *inter alia*, as follows:

***“1. Subject and Purpose of this Settlement Agreement***

*1.1. This Settlement Agreement sets out the specific rules applicable to the Club for the duration of the period covered by the Settlement Agreement (the “Settlement Regime”). The Settlement Regime shall cover:*

- i. the sporting season 2015/16; and*
- ii. the Reporting Period ending in 2015.*

1.2. *The primary purpose of the Settlement Agreement is to ensure that the Club is break-even compliant within the meaning of the UEFA CLFFPR at the latest in the Monitoring Period 2015/16 (i.e. the Club's aggregate Break-Even Result of the Reporting Periods ending in 2013, 2014 and 2015 must be either a surplus or a deficit within the acceptable deviation, as required by Article 63 UEFA CLFFPR).*

## **2. Break-Even Status Today**

2.1. *The Club acknowledges that it has a Break-Even deficit of EUR [C] Mio for the Reporting Period T (2014), of EUR [B] Mio for the Reporting Period T-1 (2013) and of EUR [A] Mio for the Reporting Period T-2 (2012).*

2.2. *After taking into account the EUR 5 Mio acceptable deviation provided for in Article 61 (2) UEFA CLFFPR, the Club acknowledges that it has an aggregate Break-Even deficit for these Reporting Periods of EUR [X] Mio.*

2.3. *As at the date of this Settlement Agreement, it is acknowledged that the Club has not covered its Break-Even deficit for the Monitoring Period 2014/15 with contributions from equity participant and/or related parties, in the manner provided for in Article 61 UEFA CLFFPR.*

2.4. *The Club has therefore failed to fulfil the break-even requirement for the Monitoring Period 2014/15 as it has an aggregate Break-even deficit – in excess of the acceptable deviation – of EUR [X] Mio.*

## **3. Operational and Financial Measures**

3.1. *The Club shall comply with the following operational and financial measures:*

*i. If the Club reports an aggregate Break-even deficit for the reporting periods 2013, 2014 and 2015 that is above EUR [M] Mio but below EUR [N] Mio, the difference must be covered by contributions from equity participants and/or related parties, in accordance with Article 61 UEFA CLFFPR, by no later than 15 March 2016.*

*(...).*

## **7. Consequence of Coming into Compliance with the Break-even Requirement**

7.1. *This Settlement Agreement will be subject to regular monitoring with an in-depth annual review during which, depending on the achievement of the objectives and/or of all the measure set out in this Settlement Agreement, the provisions of Article 7.2 shall apply.*

7.2. *Consistent with the above, if the Club fulfils the primary objective of the Settlement Agreement as per Article 1.2 and becomes Break-even compliant, i.e. if the Club reaches and aggregate Break-even result in full compliance with the UEFA CLFFPR, the Club shall exit the Settlement Regime and all of the operational and financial and sporting measures provided for in Articles 3 and 5 shall cease to apply for the following sporting season.*

## **8. Consequences of Non-compliance with the Settlement Agreement**

8.1. *If the Club fails to comply with any provision of this Settlement Agreement, the Chief Investigator shall refer the case to the CFCB Adjudicatory Chamber in accordance with Article 15 (4) of the Procedural Rules.*

8.2. *The CFCB Adjudicatory Chamber may take any of the decisions and measures indicated in Article 27 of the Procedural Rules, including imposing disciplinary measures as foreseen in Article 29 (1) of the Procedural Rules”.*

2.5 Following the review of the Appellant’s completed monitoring documentation received by the TFF, comprising the Appellant’s break-even information for the reporting periods ending in 2013, 2014 and 2015, the CFCB Chief Investigator concluded that the Appellant had a break-even deficit of:

- a) [B] million Euros for the reporting period ending in 2013;
- b) [C] million Euros for the reporting period ending in 2014, and
- c) [D] million Euros for the reporting period ending in 2015,

leading to an aggregate break-even deficit for these reporting periods of [Y] million Euros.

2.6 Furthermore, the Appellant had failed to cover its break-even deficit with contributions from equity participants and/or related parties.

2.7 Based on his findings, the CFCB Chief Investigator concluded that the Appellant had breached the Settlement Agreement and, after having consulted with the other members of the CFCB Investigatory Chamber, and in accordance with Article 8.1 of the Settlement Agreement and Article 15(5) of the Procedural Rules, decided to refer the case to the UEFA Club Financial Control Body Adjudicatory Chamber.

2.8 Having taken the following factors into consideration;

- the Appellant’s relegation to the Turkish second division during the Settlement Regime;
- the relatively low scale of the breach which could have been eliminated if the aggregate break-even deficit above the acceptable deviation had been covered by a financial contribution; and
- the Appellant’s foreseen transformation into an incorporated company, which will facilitate the injection of equity in order to cover the aggregate break-even deficit and increase the acceptable deviation;

the CFCB Chief Investigator suggested that the Adjudicatory Chamber should impose on the Appellant:

- “*exclusion from the next UEFA club competition (UEFA Champions League or UEFA Europa League) for which [the Appellant] would otherwise qualify in a number of seasons to be determined by the CFCB Adjudicatory Chamber at its discretion, unless the [Appellant] is able to prove that it is break-even compliant within the meaning of the UEFA CLFFPR at the latest in the monitoring period 2016/2017 (i.e. the [Appellant] aggregate break-even result for the reporting periods ending in 2014, 2015 and 2016 must be either a surplus or a deficit within the acceptable deviation as required by Article 63 of the UEFA CLFFPR); and*
- *a fine, to be determined by the UEFA Club Financial Control Body Adjudicatory Chamber, at its discretion”.*

- 2.9 The Adjudicatory Chamber, after having confirmed its competence, initially referred to the applicable provisions of the CL&FFP Regulations and of the Procedural Rules.
- 2.10 The Adjudicatory Chamber then took note that the Appellant had an aggregate break-even deficit for the periods of [Y] millions Euros and had consequently clearly failed to comply with the Settlement Agreement, as the Appellant had also failed to cover its break-even deficit with contributions from equity participants and/or related parties in accordance with Article 61 of the CL&FFP Regulations.
- 2.11 Furthermore, the Adjudicatory Chamber noted that these breaches were never disputed by the Appellant.
- 2.12 Stressing the importance of the UEFA’s financial fair play rules, which aim to protect the integrity and smooth running of the UEFA club competitions and to achieve financial fair play in the UEFA competitions, the Adjudicatory Chamber then noted that the Appellant, by entering into the Settlement Agreement, was essentially given a second chance to bring itself into compliance with the UEFA’s financial fair play rules.
- 2.13 The principle of equal treatment within the scope of these rules carries particular importance in relation to the break-even requirement since a breach of this requirement may directly affect the competitive position of a club to the detriment of the vast majority of clubs which comply with the UEFA financial fair play requirements.
- 2.14 Even if the Adjudicatory Chamber, under Article 29 of the Procedural Rules, is given a wide range of disciplinary measures which may be imposed on a club as a result of the club’s failure to comply with the requirements, the disciplinary measures imposed on a club must, *inter alia*, be proportionate and consistent with other decisions on similar facts and circumstances.
- 2.15 On 16 June 2016, in light of the above and taking into consideration the factors mentioned under para 2.8 above, the Adjudicatory Chamber issued its Decision, ruling, *inter alia*, as follows:
1. “[*The Appellant*] has failed to comply with clauses 1.2 and 3 of the Settlement Agreement.
  2. To impose on [*the Appellant*] an exclusion from participating in the next UEFA club competition for which it would otherwise qualify on the next two (2) seasons (i.e. the 2016/2017 and 2017/2018 seasons).

3. *The Settlement Agreement shall cease to have effect as of the date of this Decision.*
4. *[The Appellant] is to pay three thousand Euros (EUR 3,000) towards the costs of these proceedings.*
5. (...).
6. (...)."

### **3. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS**

- 3.1 On 1 July 2016, the Appellant filed its Statement of Appeal and Appeal Brief in accordance with Articles R47, R48 and R51 of the Code of Sports-related Arbitration (the "CAS Code") against the Decision rendered by the UEFA Club Financial Control Body Adjudicatory Chamber on 16 June 2016.
- 3.2 On 28 July 2016, the Respondent filed its Answer in accordance with Article 55 para. 1 of the CAS Code.
- 3.3 On 10 October 2016, the Parties were informed by the CAS Court Office that Mr Lars Hilliger, attorney-at-law, Copenhagen, Denmark, had been appointed as Sole Arbitrator in the case.
- 3.4 By letter of 10 November 2016, and following the Parties' submissions on the same issue, the CAS Court Office informed the Parties that the Sole Arbitrator deemed himself sufficiently informed to render an award solely based on the written submissions received, without holding a hearing.
- 3.5 On 11 and, respectively, 25 November 2016, the Parties both duly signed and returned the Order of Procedure, by which they, *inter alia*, confirmed their agreement that the case should be decided based solely on the written submissions and that their right to be heard had been duly respected.
- 3.6 The Sole Arbitrator examined carefully and took into account in his deliberations all the evidence and arguments presented by the Parties, even if they have not been expressly summarised in the present Award.

### **4. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL**

- 4.1 Article R47 of the CAS Code states as follows: "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body*".
- 4.2 With respect to the Decision, the jurisdiction of the CAS derives from Articles 62 and 63 of the UEFA Statutes, which determine that "*Any decision taken by a UEFA organ may be disputed*

*exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration".* In addition, neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, which was furthermore confirmed by the Parties signing the Order of Procedure.

- 4.3 It is undisputed that the Appellant's Statement of Appeal and Appeal Brief was filed within the statutory time limit set forth in the UEFA Statutes. Furthermore, the Statement of Appeal and Appeal Brief complied with all the requirements of Articles R48 and R51 of the CAS Code.
- 4.4 It follows that the CAS has jurisdiction to decide on the Appeal and that the Appeal is admissible.

## **5. APPLICABLE LAW**

- 5.1 Article R58 of the Code states as follows: *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.
- 5.2 Article 63(3) of the UEFA Statutes states as follows: *"Proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS"*.
- 5.3 Based on the above, and in line with the Parties' submissions, the Sole Arbitrator is therefore satisfied to accept the application of the UEFA Statutes, rules and regulations, in particular the UEFA Club Licensing & Financial Fair Play Regulations, Edition 2015 (the "CL&FFP Regulations") and the Procedural rules governing the UEFA Club Financial Control Body, Edition 2015 (the "Procedural Rules") and, additionally, Swiss law.

## **6. THE PARTIES' REQUESTS FOR RELIEF AND POSITIONS**

- 6.1 The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator however, has carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submissions or evidence in the following summary.

### **6.2 The Appellant:**

- 6.2.1 In its Statement of Appeal and Appeal Brief of 1 July 2016, the Appellant requested the following from the CAS:

*"to annul the Decision and hold that:*

- i. any exclusion sanction be suspended for a sufficient period and annulled depending on the results of the future monitoring periods,*
- ii. no financial penalty be imposed,*
- iii. the costs of proceedings before CAS be born (sic) by the Respondent”.*

6.2.2 In support of its requests for relief, the Appellant submitted as follows:

- a) The Appellant was playing in the Turkish 1<sup>st</sup> division, “*Spor Toto Super Lig*”, at the time of entering into the Settlement Agreement.
- b) The revenue projections provided during the negotiations of the Settlement Agreement were to a large extent prepared in accordance with the estimated revenues to be earned while participating in this division.
- c) After the signing of the Settlement Agreement, the Appellant was relegated to the “*PTT 1 LIG*”, which is a lower division, in which connection the revenues of the Appellant decreased significantly.
- d) However, the Appellant has recently been promoted back to the “*Spor Toto Super Lig*”, and the revenues for the Appellant for the 2016/2017 season will therefore increase accordingly and enable the Appellant to limit the deficit to an acceptable level.
- e) Furthermore, the current legal status of the Appellant as an “*association*” makes it difficult for the Appellant to attract economic contributions since such contributions can only be made in the form of grants.
- f) In order to avoid such difficulties in the future, the Appellant is planning to transform into an incorporated company, which will facilitate the future injection of capital in the form of equity to cover the aggregate break-even deficit.
- g) However, the planned transformation requires a decision by the general assembly of the Appellant, which, due to the relegation, had to be postponed.
- h) The Adjudicatory Chamber failed to take these circumstances into consideration when issuing the Decision.
- i) Furthermore, it must be noted that the Appellant has always fulfilled its financial obligations towards other clubs and players despite its financial difficulties and, as such, has been granted a national licence by the TFF.
- j) Moreover, the CFCB Chief Investigator, in his decision of 13 May 2016, suggested to the Adjudicatory Chamber that any sanction in the form of exclusion from UEFA



competitions not be imposed until the end of the monitoring period 2016/2017 and, if the Appellant then fulfilled the financial criteria, no such sanction should be imposed.

- k) The Adjudicatory Chamber did not follow this recommendation even if the Appellant's relegation after the signing of the Settlement Agreement *de facto* made it impossible to meet the terms of the rescue plan as agreed in the Settlement Agreement.
- l) Finally, the Appellant never breached the Settlement Agreement intentionally, but mostly as a result of other factors such as the relegation. As such, the sanction imposed on the Appellant is disproportionate and inconsistent with similar cases.

### 6.3 The Respondent:

6.3.1 In its Answer to the Appeal Brief of 28 July 2016, the Respondent requested the CAS to issue an award on the merits:

- “(a) rejecting the relief sought by the Appellant;*
- (b) confirming the Decision; and*
- (c) bearing in mind that UEFA has more financial resources than the Club, respondent honestly considers that no contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings must be paid by the Appellant”.*

6.3.2 In support of its requests for relief, the Respondent submitted as follows:

- a) First of all, any analysis of a club's compliance with the CL&FFP Regulations is primarily based on the club's own financial submissions, willingly provided. Indeed, the whole financial fair play system relies on the corporation and good faith of the clubs participating in the UEFA club competitions. This is also true in the case of the Appellant, which not only entered into the Settlement Agreement, but also accepted the accuracy of its own monitoring information that proves its breach of the Settlement Agreement.
- b) The Appellant never disputed its breach of the break-even requirement in 2014, which led to the conclusion of the Settlement Agreement, nor does the Appellant dispute that its monitoring documentation shows that it subsequently breached the Settlement Agreement.
- c) The Appellant's arguments only target the proportionality of the sanctions which have been imposed by the Adjudicatory Chamber and seek to mitigate the breaches of the Settlement Agreement which, however, is unsubstantiated.

- d) The Respondent introduced the settlement regime in order to give clubs which had breached its financial fair play rules the opportunity to enter into settlement agreements to establish a roadmap for their future compliance, thus granting the clubs a second chance.
- e) Granting clubs a second chance represents a significant show of good faith from the Club Financial Control Body/UEFA and is in line with the FFP Objectives. Accordingly, where a club fails to comply with a settlement agreement, this must reasonably be considered to be a particularly serious breach as it represents a consistent and sustained attitude of non-compliance.
- f) The fact that the Appellant has incurred significant losses due to its relegation to the Turkish second division must not be considered as a possible excuse or as a mitigating circumstance, which might justify the Appellant's breach of the Settlement Agreement and its break-even requirements.
- g) Furthermore, it must be noted that the said relegation cannot be considered as *force majeure*, which would have entitled the Adjudicatory Chamber to come to a different conclusion as regards the sanctions imposed on the Appellant. Even if the Adjudicatory Chamber under the CL&FFP Regulations 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*", according to CAS jurisprudence *force majeure* "*implies an objective, rather than 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*".
- h) With regard to the Appellant's submission that its status as an association has made contributions to the Appellant very difficult, it must be noted that it was clear already at the time when the Settlement Agreement was concluded that the Appellant might have to have its break-even deficit covered by the contributions from equity participants and/or related parties.
- i) As such, the Appellant was fully aware of the requirement and importance of collecting financial contributions, and the Appellant had plenty of time to make the necessary arrangements and structural changes to its legal entity in order to comply with the relevant provisions of the Settlement Agreement.
- j) The Appellant's argument that it did not find sufficient time to organise the necessary general assembly in order to amend the legal status of the Appellant obviously has to be rejected, and the only party to blame for the alleged difficulties is the Appellant itself.

- k) The submission by the Appellant that it has always settled its debt towards other clubs and players despite its financial constraints has no legal meaning in regard to the Appellant's admitted non-compliance with the break-even requirements of the Settlement Agreement.
- l) Moreover, it must be noted that the absence of aggravating circumstances must not be regarded as a mitigating factor.
- m) Neither does it have any legal relevance in this case that the Appellant submits that it did not breach the Settlement Agreement intentionally, but mostly as a result of other factors. No reference to intent was included in the Settlement Agreement.
- n) With regard to the alleged disproportionality of the sanctions imposed on the Appellant in the Decision, it must be stressed that, pursuant to CAS jurisprudence, the review of a sanction is only possible when the sanction is evidently and grossly disproportionate to the offence, which means, *inter alia*, that the CAS must show restraint when evaluating whether a sanction is appropriate.
- o) The sanctions imposed on the Appellant were, with due regard to the circumstances of the case, entirely reasonable and appropriate, and the Appellant has failed to provide any statements or other evidence that would prove that the imposed sanctions are evidently and grossly disproportionate.
- p) As already recognised by the CAS, the Respondent's financial fair play rules do not provide for standard sanctions, and the sanctions regime in respect of club licensing/financial fair play is established within the discretionary powers of the Respondent, based on the assessment of the facts and circumstances of each case.
- q) The Appellant has failed to submit any mitigating factors to its breach of the Settlement Agreement.
- r) The sanctions imposed on the Appellant by the Adjudicatory Chamber do not constitute a breach of the principle of equal treatment, which was indeed respected by the Adjudicatory Chamber in its Decision, and the Appellant failed to prove differently.
- s) Consequently, there is no basis upon which the Decision should be annulled or amended.

## 7. MERITS

- 7.1 Initially, the Sole Arbitrator notes that the Appellant does not dispute the consideration behind or validity of the UEFA Financial Fair Play regime, and it is also undisputed by the Parties that, on 6 May 2015, and following the Appellant's significant break-even deficit for the monitoring

periods 2012, 2013 and 2014, the Parties signed the Settlement Agreement, which, *inter alia*, stated as follows:

**“1. Subject and Purpose of this Settlement Agreement**

1.1. *This Settlement Agreement sets out the specific rules applicable to the Club for the duration of the period covered by the Settlement Agreement (the “Settlement Regime”). The Settlement Regime shall cover:*

- i. the sporting season 2015/16; and*
- ii. the Reporting Period ending in 2015.*

1.2. *The primary purpose of the Settlement Agreement is to ensure that the Club is break-even compliant within the meaning of the UEFA CLFFPR at the latest in the Monitoring Period 2015/16 (i.e. the Club’s aggregate Break-Even Result of the Reporting Periods ending in 2013, 2014 and 2015 must be either a surplus or a deficit within the acceptable deviation, as required by Article 63 UEFA CLFFPR).*

**2. Break-Even Status Today**

2.1. *The Club acknowledges that it has a Break-Even deficit of EUR [C] Mio for the Reporting Period T (2014), of EUR [B] Mio for the Reporting Period T-1 (2013) and of EUR [A] Mio for the Reporting Period T-2 (2012).*

2.2. *After taking into account the EUR 5 Mio acceptable deviation provided for in Article 61 (2) UEFA CLFFPR, the Club acknowledges that it has an aggregate Break-Even deficit for these Reporting Periods of EUR [X] Mio.*

2.3. *As at the date of this Settlement Agreement, it is acknowledged that the Club has not covered its Break-Even deficit for the Monitoring Period 2014/15 with contributions from equity participant and/or related parties, in the manner provided for in Article 61 UEFA CLFFPR.*

2.4. *The Club has therefore failed to fulfil the break-even requirement for the Monitoring Period 2014/15 as it has an aggregate Break-even deficit – in excess of the acceptable deviation – of EUR [X] Mio.*

**3. Operational and Financial Measures**

3.1. *The Club shall comply with the following operational and financial measures:*

*i. If the Club reports an aggregate Break-even deficit for the reporting periods 2013, 2014 and 2015 that is above EUR [M] Mio but below EUR [N] Mio, the difference must be covered by contributions from equity participants and/or related parties, in accordance with Article 61 UEFA CLFFPR, by no later than 15 March 2016.*

*(...).*

## **7. Consequence of Coming into Compliance with the Break-even Requirement**

7.1. *This Settlement Agreement will be subject to regular monitoring with an in-depth annual review during which, depending on the achievement of the objectives and/or of all the measure set out in this Settlement Agreement, the provisions of Article 7.2 shall apply.*

7.2. *Consistent with the above, if the Club fulfils the primary objective of the Settlement Agreement as per Article 1.2 and becomes Break-even compliant, i.e. if the Club reaches and aggregate Break-even result in full compliance with the UEFA CLFFPR, the Club shall exit the Settlement Regime and all of the operational and financial and sporting measures provided for in Articles 3 and 5 shall cease to apply for the following sporting season.*

## **8. Consequences of Non-compliance with the Settlement Agreement**

8.1. *If the Club fails to comply with any provision of this Settlement Agreement, the Chief Investigator shall refer the case to the CFCB Adjudicatory Chamber in accordance with Article 15 (4) of the Procedural Rules.*

8.2. *The CFCB Adjudicatory Chamber may take any of the decisions and measures indicated in Article 27 of the Procedural Rules, including imposing disciplinary measures as foreseen in Article 29 (1) of the Procedural Rules”.*

7.2 It is further undisputed that the Appellant was playing in the Turkish 1<sup>st</sup> division “Spor Toto Super Lig” at the time of entering into the Settlement Agreement but, after the signing of the Settlement Agreement, the Appellant was relegated to the “PTT 1 LIG” which is a lower division, in which connection the revenues of the Appellant decreased significantly. The Appellant is currently (2016/2017 season) playing in the Spor Toto Super Lig after having been promoted.

7.3 Following the review of the Appellant’s completed monitoring documentation received by the TFF, comprising the Appellant’s break-even information for the reporting periods ending in 2013, 2014 and 2015, the CFCB Chief Investigator concluded that the Appellant had a break-even deficit of:

- a) [B] million Euros for the reporting period ending in 2013;
- b) [C] million Euros for the reporting period ending in 2014; and
- c) [D] million Euros for the reporting period ending in 2015;

leading to an aggregate break-even deficit for these reporting periods of [Y] million Euros.

7.4 The Appellant does not dispute the correctness of these findings, nor does it dispute that it failed to cover its break-even deficit with contributions from equity participants and/or related parties.

7.5 Based on the above, on 16 June 2016, and after the receipt of the suggestion of the CFCB Chief Investigator, the Adjudicatory Chamber decided, *inter alia*, to impose on the Appellant an exclusion from participating in the next UEFA club competition, for which it would otherwise qualify in the next two (2) seasons (*i.e.* the 2016/2017 and 2017/2018 seasons).

7.6 However, the Parties are, *inter alia*, in dispute over whether the sanctions imposed on the Appellant are proportionate and in consistency with the legal principle of equal treatment, and the Appellant further submits that any sanction on the Appellant should not be imposed until the end of the monitoring period 2016/2017, and if the Appellant then fulfilled the financial criteria, no such sanction should be imposed.

7.7 Thus, the main issues to be resolved by the Sole Arbitrator are:

a) Should any sanction on the Appellant not be imposed until the end of the monitoring period 2016/2017, and if the Appellant then fulfilled the financial criteria, should no such sanction be imposed?

b) Is the sanction imposed on the Appellant to be considered disproportionate and/or in conflict with the legal principle of equal treatment?

**a) Should any sanction on the Appellant not be imposed until the end of the monitoring period 2016/2017, and if the Appellant then fulfilled the financial criteria, should no such sanction be imposed?**

7.8 To reach a decision on this issue, the Sole Arbitrator has conducted an in-depth analysis of the facts of the case and the information and evidence gathered during the proceedings.

7.9 Initially, the Sole Arbitrator notes that Article 2 of the CL&FFP Regulations states that the aim of the Financial Fair Play regime (the “FFP Objectives”) is, *inter alia*:

- a. *to further promote and continuously improve the standard of all aspects of football in Europe and to give continued priority to the training and care of young players in every club;*
- b. (...),
- c. (...),
- d. *to protect the integrity and smooth running of the UEFA club competitions;*
- e. *to allow the development of benchmarking for clubs in financial, sporting, legal, personnel, administrative and infrastructure-related criteria throughout Europe.*

*Furthermore, they aim to achieve financial fair play in UEFA club competitions and in particular:*

- f. *to improve the economic and financial capability of the clubs, increasing their transparency and credibility;*
- g. *to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with employees, social/tax authorities and other clubs punctually;*
- h. *to introduce more discipline and rationality in club football finances;*
- i. *to encourage clubs to operate on the basis of their own revenues;*

- j. to encourage responsible spending for the long-term benefit of football;*
- k. to protect the long-term viability and sustainability of European club football.*

- 7.10 In line with Article 50(1bis) of the UEFA Statutes, the CL&FFP Regulations define a club licensing system which sets out, *inter alia*, the minimum criteria to be fulfilled by clubs to qualify for admission to UEFA competitions.
- 7.11 Pursuant to the CL&FFP Regulations and the Procedural Rules, the UEFA Club Financial Control Body, via its Adjudicatory Chamber, may impose disciplinary measures on clubs in case of non-fulfilment of the requirements of the CL&FFP Regulations. However, in carrying out its responsibilities, it must ensure the equal treatment of all licensees and bear in mind the FFP Objectives at all times.
- 7.12 Following the Appellant's undisputed breach of the break-even requirement pursuant to the CL&FFP Regulations, in May 2015, the Appellant and the CFCB Chief Investigator entered into the Settlement Agreement in accordance with Articles 14 and 15 of the Procedural Rules, thus establishing a roadmap for the Appellant's future compliance with the requirements of the CL&FFP Regulations.
- 7.13 By entering into the Settlement Agreement, the Appellant was in fact given a "second chance" to fulfil the said requirements and, thus, avoid having any further sanctions imposed on it subject to its fulfilment of the requirements set out in the Settlement Agreement.
- 7.14 The Sole Arbitrator notes that the Appellant submits that its failure to fulfil these requirements was primarily caused by the fact that the Appellant, after the signing of the Settlement Agreement, was relegated to the "PTT 1 LIG", causing the revenues of the Appellant to decrease significantly and, consequently, making its possibilities to fulfil the break-even requirements as set out in the Settlement Agreement illusory.
- 7.15 The Sole Arbitrator does not dispute that the Appellant's relegation in fact caused the Appellant's revenues to decrease significantly and consequently, at least in the first instance, impeded the fulfilment of the break-even requirement pursuant to the Settlement Agreement.
- 7.16 However, the Sole Arbitrator refers to the FFP Objectives, which, *inter alia*, aim to introduce more discipline and rationality in club football finances and to encourage clubs to operate on the basis of their own revenues.
- 7.17 The ability of a football club to operate on the basis of its own revenues applies not only to clubs playing in the best national league, but also to clubs which, either for a brief temporary period or on a more permanent basis, play in a lower division and, accordingly, are forced to adjust their financial obligations to the lower revenues that are typically earned by a lower-division club.
- 7.18 In this connection, the Sole Arbitrator agrees with the Respondent that the risk of relegation to a lower division is an aspect that any club should reasonably take into account at all times when

making its financial planning decisions to be able to adjust its future expenditure to any changes in revenues resulting from its relegation to a lower division.

- 7.19 The Sole Arbitrator notes that the Adjudicatory Chamber under the CL&FFP Regulations is to take into account extraordinary events and notes that Annex XI to the CL&FFP Regulations states, *inter alia*, as follows:

*“Annex XI: Other factors to be considered in respect of the monitoring requirements  
Other factors within the meaning of Article 68 to be considered by the UEFA Club Financial Control Body include, but are not limited to, the following:*

*(...)*

*e. Force majeure*

*As a part of its considerations, the UEFA Club Financial Contract Body may also take into account extraordinary event or circumstances beyond the control of the club which are considered as a case of force majeure. (...).”*

- 7.20 However, in accordance with CAS jurisprudence, *force majeure* “*implies an objective, rather than 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*” (see CAS 2006/A/1110).
- 7.21 Based on these circumstances, the Sole Arbitrator finds that the Appellant’s relegation to the “PTT 1 LIG” does not constitute *force majeure* and, moreover, the Sole Arbitrator finds no other grounds for considering the relegation as a possible excuse or as a mitigating circumstance which might justify the Appellant’s breach of the Settlement Agreement and its break-even requirements.
- 7.22 The Sole Arbitrator also finds that neither the argument that the current legal status of the Appellant as an “association” allegedly makes it difficult for the Appellant to attract financial contributions since such contributions can only be made in the form of grants to the Appellant, nor the argument that the Appellant has always been granted a national licence by the TFF can be accorded any substantial weight in the assessment of the extent and timing of any sanction imposed on the Appellant due to its failure to fulfil the break-even requirement pursuant to the Settlement Agreement.
- 7.23 The Sole Arbitrator notes in this context that the Appellant itself will have to bear the risk involved in its failure, within the deadline, to have transformed into an incorporated company if this, in the Appellant’s own view, is necessary to be able to fulfil the Settlement Agreement. Furthermore, the circumstance that the Appellant has apparently fulfilled the conditions for being granted a national TFF licence has naturally no influence on the Appellant’s failure under the CL&FFP Regulations.
- 7.24 Finally, the Sole Arbitrator finds that the Appellant’s promotion back to the “*Spor Toto Super Lig*” does not constitute a sufficient basis for suspending the imposed sanction, in which



connection the Sole Arbitrator notes that the promotion is in itself no guarantee that the Appellant will be capable of fulfilling the break-even requirement.

7.25 Based on the foregoing, in view of the fact, that the Adjudicatory Chamber did take these circumstances, apart from the promotion, into consideration, the Sole Arbitrator finds no grounds for suspending the imposed sanction until the end of the monitoring period 2016/2017 as requested by the Appellant.

**b) Is the sanction imposed on the Appellant to be considered disproportionate and/or in conflict with the legal principle of equal treatment?**

7.26 The Appellant submits that it never breached the Settlement Agreement intentionally, but mostly as a result of other factors, which is why the imposed sanction is disproportionate and inconsistent with other similar cases.

7.27 The Respondent, on the other hand, submits, *inter alia*, that the review of a sanction is only possible when the sanction is evidently and grossly disproportionate to the offence, which means, *inter alia*, that the CAS must show restraint when evaluating whether a sanction is appropriate. The sanction imposed on the Appellant is, bearing in mind all the circumstances of the case, entirely reasonable and appropriate, and the Appellant has failed to provide any statements or other evidence that would prove that the imposed sanctions are evidently and grossly disproportionate.

7.28 Initially, the Sole Arbitrator notes that Article 53(2) of the CL&FFP Regulations provides as follows: *“In carrying out these responsibilities, the UEFA Club Financial Control Body ensures equal treatment of all licensees and guarantees full confidentiality of all information provided”*.

7.29 Based on the facts of the case and the Parties’ submissions, the Sole Arbitrator finds that it is up to the Appellant to discharge the burden of proof to establish that the sanction imposed on it is evidently disproportionate and inconsistent with other similar cases.

7.30 In doing so, the Sole Arbitrator adheres to the principle established by CAS jurisprudence that *“in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue, In other words, the party which asserts facts to support its rights has the burden of establishing them (..) The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence”* (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810&1811, para. 46 and CAS 2009/A/1975, paras. 71ff).

7.31 However, the Sole Arbitrator finds that the Appellant has not adequately discharged the burden of proof to establish that the sanction imposed is evidently disproportionate and/or constitutes a breach of its right to equal treatment.

7.32 In doing so, the Sole Arbitrator first of all agrees with the Respondent that, pursuant to CAS jurisprudence, the review of a sanction is only possible when the sanction is evidently and grossly disproportionate to the breach, with means, *inter alia*, that the CAS must show restraint when evaluating whether a sanction is appropriate (see CAS 2012/A/2762 and CAS 2009/A/1844).

7.33 Articles 28 and 29 of the Procedural Rules state as follows:

*“Article 28 – Fixing of disciplinary measures*

*The adjudicatory chamber determines the type and extent of the disciplinary measures to be imposed according to the circumstances of the case.*

*Article 29(1) – List of disciplinary measures*

*The following disciplinary measures may be imposed against any defendant other than an individual:*

- a. warning,*
- b. reprimand,*
- c. fine,*
- d. deduction of points,*
- e. withholding of revenues from a UEFA competition,*
- f. prohibition on registering new players in UEFA competitions,*
- g. restriction on the number of players that a club may register for participation in UEFA competitions, including a financial limit on the overall aggregate cost of the employee benefits expenses of players registered on the A-list for the purposes of UEFA club competitions,*
- h. disqualification from competitions in progress and/or exclusion from future competitions,*
- i. withdrawal of a title or award”.*

7.34 The Sole Arbitrator notes that the Adjudicatory Chamber thus is granted a discretionary power to decide on the appropriate sanction to impose, taking into consideration the circumstances of each case, subject to the principles of proportionality and the right to equal treatment.

7.35 However, the Sole Arbitrator agrees with the Respondent that just because a different measure could have been imposed on the Appellant, this does not automatically mean that the actual sanction imposed on the Appellant is disproportionate.

7.36 Neither does the fact that the imposed sanction is different from the sanctions suggested by the CFCB Chief Investigator automatically mean that the sanction is disproportionate and/or inconsistent with other similar cases.

7.37 The Sole Arbitrator notes that two cases are rarely entirely similar to each other, and it is therefore very difficult to compare the sanction imposed in one case to a sanction imposed in another case without taking the circumstances of each case into consideration.

7.38 In the present matter, taking into consideration, *inter alia*, the Appellant’s failure to fulfil its requirement pursuant to the Settlement Agreement, which opportunity was granted to the Appellant as a second chance, the fact that the failure to fulfil the break-even requirement can

directly affect the competitive position of a club and, thus, adversely affect other clubs participating in UEFA's competitions in full compliance with the CL&FFP Regulations, and after having reviewed the CAS jurisprudence referred to, the Sole Arbitrator finds no sufficient grounds for concluding that the sanction imposed on the Appellant is either disproportionate or constitutes a breach of the right to equal treatment.

7.39 Based on that, the Sole Arbitrator finds no grounds for the annulment or amendment of the sanction imposed on the Appellant pursuant to the Decision.

## **8. SUMMARY**

8.1 Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Sole Arbitrator finds no grounds for suspending the imposed sanction until the end of the monitoring period 2016/2017 as requested by the Appellant. Nor does the Sole Arbitrator find grounds for concluding that the sanction imposed on the Appellant is either disproportionate or constitutes a breach of the right to equal treatment.

8.2 The Appeal filed against the Decision is therefore dismissed.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The Appeal filed on 1 July 2016 by Kardemir Karabükspor Kulübü Derneği against the decision issued by the UEFA Club Financial Control Body Adjudicatory Chamber on 16 June 2016 is dismissed.
2. The decision rendered by the UEFA Club Financial Control Body Adjudicatory Chamber on 16 June 2016 is confirmed.

(...).