# GAME-CHANGER: WHY THE *SARACENS* DECISION WILL TRANSFORM THE GOVERNANCE OF SPORT

BY BENOÎT KEANE[1]

1 Benoît Keane, Solicitor & Avocat in Brussels specialising in EU sports law (www.keanelegal.com). The author is also an external consultant to Northridge LLP, which represented Premiership Rugby Limited in the *Saracens* case. All views are strictly personal

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# I. INTRODUCTION

Sport is known for its game-changing moments, a point when the entire flow of a game shifts in a new decisive direction. However, there are also moments in law when a decision is delivered that changes the legal landscape. The judgment of the European Court of Justice concerning Jean-Marc Bosman's challenge to the football transfer system was one such case. A game-changer: the principles of EU freedom of movement became enshrined into the governance of football and sport. In November 2019, a panel led by the former UK Supreme Court judge Lord Dyson delivered its decision in the *Saracens* case that may likewise come to be seen as a game-changer in the regulation of sport. The Panel not only rejected a claim that the salary cap operated by the Premiership rugby league infringed EU and UK competition law but also recognized it as being beneficial to the sport. This article analyzes the *Saracens* decision,[2] explaining how it has busted a number of myths relating to salary caps in a way that could transform the governance of sport.

# II. BACKGROUND TO THE *SARACENS* CASE

Saracens is a rugby club with an illustrious history. It competes in the most important rugby club competition in England, run by Premiership Rugby Limited ("PRL"), and has won numerous domestic as well as European titles. In 1999, the PRL adopted a salary cap following a series of high-profile club collapses arising from wage inflation in the early years of the professional rugby era. The objectives of the salary cap are: "(i) ensuring the financial viability of all Clubs and of the [...] Premiership competition; (ii) controlling inflationary pressures on Clubs' costs; (iii) providing a level playing field for Clubs; (iv) ensuring a competitive [...] Premiership competition; and (v) enabling Clubs to compete in European Competitions."[3]

The Premiership Rugby Salary Regulations (the "Salary Regulations") limited the total salaries each club is permitted to pay in each salary cap year (referred to as the "Senior Ceiling").[4] In the 2016/17 salary cap year, the Senior Ceiling was set at GBP £6 million.[5] According to the charge sheet brought by PRL, Saracens had undeclared salary of GBP £1.4 million and exceeded the Senior Ceiling by GBP £1.1 million. In the 2018/19 salary cap year, PRL alleged Saracens exceeded the Senior Ceiling of GBP £6.4 million by GBP £0.9 million.[6] The case centered around the question whether property co-investments made by connected parties of Saracens with a number of players constituted salary for the purpose of the Salary Regulations.

2 *Saracens Limited v. Premier Rugby Limited*, Decision of the Disciplinary Panel, November 4, 2019 (the "*Saracens* decision").

3 Salary Regulations 2.2. See also https://www.premiershiprugby.com/about-premiership-rugby/about-us/salary-cap/.

4 Each Salary Cap Year runs from July 1 in one year until June 30 in the following year. There are a number of exceptions to the salary cap, in particular for two marquee players whose salaries are excluded from the cap.

5 Salary Regulations 3(1)(a) in the Salary Cap Year 2016/17.

6 *Saracens* decision, Appendix 1 – The Charge.

In accordance with the relevant procedural rules, an independent disciplinary panel (the "Panel") was appointed to consider the charges brought by PRL against Saracens. In addition to Lord Dyson, the Panel consisted of two senior lawyers with considerable competition and sports law experience. Before examining the merits of the charges, the Panel first addressed the claim by Saracens that the salary cap regime infringed EU and UK competition law as otherwise PRL's charges could not be validly maintained.[7] It is this competition analysis which forms the focus of the present article.

## III. NO "BY OBJECT" INFRINGEMENT

The competition challenge to the salary cap was based principally upon Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which states that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[8]

Saracens concentrated their attack on the salary cap being a "by object" infringement of EU competition law. Experience shows that certain collusive behavior, such as price-fixing by cartels, are so likely to have negative effects upon competition – in particular on the price, quantity or quality of goods and services – that it is not necessary to conduct an analysis of the actual effects upon the market. In general, any decision by an association of undertakings which infringes competition "by object" will not satisfy the conditions to qualify for an exemption pursuant to Article 101(3) TFEU as a hardcore restriction of competition and will be "*automatically void*" in accordance with Article 101(2) TFEU.[9]

Saracens sought to have the salary cap declared void by arguing that it is by nature harmful to the proper functioning of normal competition between clubs for the services of players. To support its claim, Saracens quoted an authoritative sports law text book on the subject of salary caps and competition law: "Obviously salary caps restrict the ability of clubs to compete with each other for the services of players, and would therefore appear to be anti-competitive."[10]

Rather than accepting the assertion that a salary cap infringes competition "by object," the Panel went back to basics by examining what constitutes a "by object" infringement citing in particular the legal test set out in *Cartes Bancaires*, where the European Court of Justice held that "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part."[11] In addition, the Panel noted that regard may also be had to the intention of the parties. It applied this test to the PRL's salary cap.

By contrast to the experience of dealing with price fixing cartels and other classic "by object" infringements, the Panel stated that there has been "no judgment of a court or decision of an EU competition authority in which a regulation akin to a salary cap was held to be an object infringement."[12] Moreover, the Panel observed that a similar "by object" competition law claim against financial fair play ("FFP") rules in *Queens Park Rangers v. English Football League*[13] was likewise rejected: "the decision [...], while concerning rules on FFP (limiting the amount of investment owners may make in clubs) rather than a salary cap, strongly indicates that rules of this nature aimed at promoting financial stability are not of such a nature as to reveal a sufficient degree of harm to competition absent an examination of their effects."[14]

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7 The Panel considered that there was no substantive difference between EU and UK competition law for the purpose of the case.

8 Although arguments were also raised under Article 102 TFEU, these did not differ substantively. See *Saracens* decision, paragraph 110.

9 See European Commission, Guidelines on the application of Article 81(3) [now Article 101(3) TFEU] (2004) OJ C 101, at paragraph 46: "*[S]evere restrictions of competition are unlikely to fulfil the conditions of Article [101(3) TFEU]. Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article [101(3) TFEU]. They neither create objective economic benefits nor do they benefit consumers. [...] these types of agreements generally also fail the indispensability test under the third condition.*"

10 Lewis & Taylor, *Sports Law & Practice*, § F.2.206 - § 2.212.

11 Case C-67/13 P, *Cartes Bancaires*, EU:C:2014:2204 at paragraphs 53 and 54. *Saracens* decision, paragraph 23.

12 *Saracens* decision, paragraph 32.

13 *Queens Park Rangers v. English Football League* [2017] ("QPR"). The Football Disciplinary Commission in that case was led by a former UK Supreme Court judge Lord Collins of Mapesbury and senior competition lawyers Mr James Flynn QC and Mr Thomas de la Mare QC.

14 *Saracens* decision, paragraph 33.

In the Panel's view, none of the objectives of the Salary Regulations implementing the salary cap "can reasonably be described as having the purpose of restricting competition." To the contrary, the Panel found that the objectives were "*consistent with EU law*": the objective of protecting financial stability had been recognized in the *QPR* case while the objective of competitive balance had been endorsed by the European Court of Justice in the *Bosman* judgment[15] as well as by the European Commission.[16]

Interestingly, Saracens argued that the salary cap would only be permissible as a "by object" infringement if adopted pursuant to a collective bargaining agreement (i.e. an agreement between representatives of trade unions and players). This is indeed considered to be the traditional route to ensuring the legality of salary caps. It is a particular feature of U.S. sports – and is the oft-cited reason as to why salary caps are legal as a matter of U.S. antitrust law.[17] Although the Panel accepted that a collective bargaining agreement would fall outside the scope of EU competition law, it dismissed the notion that a collective bargaining agreement is the only way to ensure the legality of a salary cap: "However, it does not follow that other types of agreements concerning wages and salaries are therefore to be categorised as restrictive by object, and, as with the previous point, no authority to that effect was cited to us. What authority there is indicates that agreements impacting on wages and salaries are not restrictive by object."[18]

The Panel rejected the view that other less restrictive alternatives may be available or even that a test of strict necessity ought to be applied in terms of assessing the proportionality of the salary cap. Citing the rulings of the European Court of Justice relating to the regulation of professions and sport in particular[19], the Panel found that "organisers of sports competitions have a margin of appreciation to identify appropriate measures to achieve legitimate objectives."[20]

The Panel examined the intention behind the salary cap, finding nothing in the history of the salary cap to suggest an intention to restrict competition. In evidence, Saracens' owner and CEO had even accepted the necessity of a salary cap.[21] "That candid acceptance of the desirability of a salary cap in some form," the Panel stated, "puts the final nail in the coffin of Saracens' case on object."[22]

The Panel concluded that there was no "by object" infringement.

## IV. NO "BY EFFECT" INFRINGEMENT

In assessing the effect of the salary cap upon competition, the Panel stressed that market definition is "an essential element in determining actual or potential anti-competitive effects."[23] The Panel found that Saracens had failed to conduct such a market assessment of its proposed market for the services of English qualified elite players which is geographically limited to England and wider worldwide market for the services of non-English-qualified elite players. It was particularly critical of the "*unsatisfactory*" economic evidence provided by Saracens which failed to define the market or analyze the impact of the salary cap upon the specific situation of rugby.[24]

15 Case C-415/93 *Bosman* EU:C:1995:463. The Panel cited paragraph 106 of the judgment where the European Court of Justice stated: "In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate."

16 *Saracens* decision, paragraphs 34–37.

17 The leading professional sports league case in the evolution of the non-statutory labour exemption was *Mackay v. NFL*, 543 F.2d 606 (8th Cir. 1976) where the U.S. Court of Appeals (Eighth Circuit) held that a collective bargaining agreement is exempted from antitrust attack provided three conditions are met: (1) the terms of the agreement primarily impacted only the parties to the collective bargaining relationship; (2) the terms were mandatory subjects of bargaining; and (3) the agreement was the result of good-faith, arm's-length negotiations.

18 *Saracens* decision, paragraph 40.

19 Notably Case C-309/99 *Wouters* EU:C:2002:98 and Case C-519/04 *Meca Medina* EU:C:2006:492.

20 *Saracens* decision, paragraphs 44 and 45.

21 Mr Wray, Saracens' owner, stated that "I think there's a lot of things going wrong with the current salary cap, but I think you asked me if I think there should be a salary cap, and the answer is yes." The Panel expressed their surprise at these statements which in their view revealed "such a disconnect between the case on object advanced by Saracens' legal team before the Panel and this evidence, as it emerged in cross-examination, from both Saracens' owner and its CEO." See *Saracens* decision, paragraph 50.

22 *Saracens* decision, paragraph 50.

23 *Saracens* decision, paragraph 59.

24 *Saracens* decision, notably paragraphs 64, 67 and 80.

Having reviewed the economic evidence presented by the PRL, the Panel found that "there is simply no evidence ... as to any adverse impact caused by the salary cap on the ability of elite rugby clubs to recruit players on the global market." To the contrary, the large number of non-English players in the PRL indicated that the salary cap was not a constraint on recruitment.[25] As for the claim that the salary cap hindered the ability of English clubs to compete in European club competitions, this was found to be "at odds with Saracens' tremendous success on the pitch in recent years, being a European Champions Cup semi-finalist every year but one since 2012/13 and winning three of the last four European Champions Cup finals."[26]

The Panel also observed that it is necessary to conduct "*a realistic counterfactual*" in the assessment of the effect upon competition.[27] In particular, the effect of the salary cap has to be compared with that which would have prevailed had it not been entered into, an exercise requiring an assessment of the competitive landscape that would exist in its absence. The Panel considered that it was not realistic that no form of financial regulation would have been in place or that clubs would compete on an unfettered basis for players' services, as Saracens contended. The alternative of no regulation, as proposed by Saracens, was not realistic because it "has led to financial ruin for some clubs in the past and is too big a risk for the PRL and clubs, including Saracens, to accept."[28] Moreover, as the Players Association representative testified, "it is not a risk that the players ... wish to run either because players are left financially high and dry when a club folds."[29]

Having reviewed the genesis of the salary cap, the history of financial problems as well as Saracens' own support for the cap at the time, the Panel concluded that "the counterfactual to the present salary cap would in all likelihood be some other form of financial self-discipline imposed by clubs on themselves through the PRL."[30] This financial regulation, whether it was a form of financial fair play or other measure, would have sought to achieve the same objectives as the salary cap. Moreover, the pressures on clubs had "*not obviously diminished*"[31] since the introduction of the salary cap. It is against such a realistic counterfactual that any effects analysis of the impact of the salary cap should have been conducted.

## V. BENEFITS OF A SALARY CAP

Having dismissed the arguments against the salary cap, the Panel ruled that the salary cap was, in fact, beneficial to competition: (i) the clubs and the Premiership have remained financially viable with none folding despite generally being loss-making; (ii) the salary cap and salary costs are under constant review; (iii) the Premiership competition benefits from competitive balance (a variety of clubs are successful, not just the one with the biggest financial backer), which leads to a competition which is more attractive to spectators and television audiences; (iv) clubs benefit from a level playing field so far as fixed salary cap is concerned; and (v) clubs have competed successfully in European club competitions.[32]

Accordingly, the Panel dismissed the competition challenge to the charges brought by PRL. It went on to uphold the charges brought against Saracens, finding that the PRL had a margin of discretion to find that the co-investments constituted undeclared salaries. The Panel upheld the financial penalties and imposed points deductions upon Saracens in view of its "*flagrant and reckless failure to comply*" with the salary cap.[33] As has been widely reported, Saracens subsequently entered into a voluntary agreement to accept an additional 70 points deduction following its failure to adhere to the disclosure of its accounts for the current salary cap year, resulting in its relegation for the next season (2020/21).[34]

25 *Saracens* decision, paragraph 85.

26 *Saracens* decision, paragraph 86.

27 *Saracens* decision, paragraphs 55 and 89.

28 *Saracens* decision, paragraphs 102–104.

29 *Saracens* decision, paragraph 99.

30 *Saracens* decision, paragraph 101.

31 *Saracens* decision, paragraph 97.

32 *Saracens* decision, paragraph 107.

33 *Saracens* decision, paragraphs 301 *et seq.* in particular paragraph 318.

34 Premiership Rugby Press Release, "Update on Saracens Rugby Club, dated January 28, 2020, available at https://www.premiershiprugby.com/news/update-on-saracens-rugby-club. See also *The Guardian*, "Saracens docked a further 70 points and chief executive resigns," dated January 28, 2020, available at https://www.theguardian.com/sport/2020/jan/28/saracens-docked-70-points-chief-executive-resigns.

## VI. COMMENTARY

The reason why the *Saracens* decision is a game changer is that it busts many of the myths hindering sports organizations from adopting salary caps and greater forms of financial regulation.

The first myth to go is the claim that salary caps can only be adopted if there is some form of collective bargaining agreement in place. What the decision articulates clearly is that a collective bargaining agreement is just one possible route to antitrust compliance. It certainly provides possible immunity from an antitrust challenge. However, this does not necessarily mean that a salary cap would infringe EU or UK competition law in the absence of a collective bargaining agreement. This finding is important because in many sports it is simply not realistic for a collective bargaining agreement to be put in place (e.g. due to the lack of credible social partners). This decision shows that sports organizations are not necessarily blocked from proceeding with financial controls, such as salary caps, as a matter of EU competition law. That being said, the support of the Players Association for the salary cap in *Saracens* underlines the importance of having buy-in for such salary control measures from players.

The second myth-busting element of the decision relates to the claim a salary cap or indeed other forms of financial regulation infringe competition "by object." The strength of this myth was evident from Saracens' claims which, as the Panel observed, raised the "by object" plea as its principal argument with the "by effect"' analysis only being a fallback consideration that was supported by very limited economic evidence.[35] However, the *Saracens* decision shows precisely why the "by object" claim is unsustainable in view of the *Cartes Bancaires* doctrine: where a measure pursues a legitimate objective it cannot be generally viewed as infringing competition by object. The rationale in *Saracens* follows similar decisions relating to financial fair play rules. In addition to the *QPR* case referenced by the Panel in *Saracens*, the Court of Arbitration for Sport held in the *Galatasaray* decision concerning the UEFA financial fair play rules[36] "do not have as their object the restriction or distortion of competition: their object is the financial conduct of clubs wishing to participate in UEFA competitions."[37] These cases confirm that financial stability is a legitimate feature of professional sport, and cannot be equated in any way with classic "by object" infringements of competition.

The third myth-busting element of the decision is that sports regulations, in particular financial regulations, can only be viewed in a negative light from a competition law perspective. The *Saracens* decision is illuminating as it stated that the objectives are not just legitimate in justifying any possible restriction to competition but are actually beneficial to competition. The decision recognizes that sport, given its specific characteristics, requires financially stable teams in order to foster strong competition between clubs. This was a point also made by the Court of Arbitration for Sport ("CAS") in *Galatasaray*, in which it recognized that financial rules in sport simply ensured that clubs acted along market economy principles.

There is no doubt that of all the forms of financial regulation, salary caps are the most controversial. This is ultimately why the *Saracens* decision may come to be viewed as a game-changer. That the decision was delivered by a heavyweight panel following a thorough competition analysis means that its authority is not in question. In many sports, financial fair play rules were viewed as the legally safe alternative way to secure the financial health of sport – but these measures are not necessarily as effective as a cap in addressing certain market failures. The recent demise of English football club, Bury FC, is an example of the financial ruin that can arise in the absence of adequate regulation.[38]

The case is also a warning shot to clubs seeking to game the system. The Panel was clearly unimpressed that Saracens was a repeat offender and had threatened a competition claim in the past. The devastating manner in which the support for the salary cap from senior officials within Saracens came to light and the criticism of the lack of proper evidence to support central planks of the competition claims may give others pause for thought before running speculative competition claims to simply avoid a disciplinary sanction. The *Saracens* decision shows that no club, however illustrious, is above the laws of the game.

35 *Saracens* decision, paragraph 21. The Panel stated at paragraph 69: "We were left with the impression that Saracens' competition case had originally nailed its colours to the anti-competitive object infringement mast, and that the case on appreciable anti-competitive effect was advanced as a somewhat secondary line of attack, being more reliant on what could be gleaned from PRL's factual and expert evidence than on the very limited evidence led by Saracens."

36 The Union of European Football Associations ("UEFA") applies detailed financial fair play rules for its European club competitions, the UEFA Champions League and the UEFA Europa League. The break-even requirement set out in the UEFA Club Licensing and Financial Fair Play Regulations requires a club to break-even over a period of three years or, put differently, the football related expenses of a club must not exceed its football related income, subject to an acceptable deviation of EUR 5 million over the assessment period.

37 CAS/2016/A/4492 *Galatasaray v. UEFA*, paragraph 63.

38 Jonathan Taylor QC, *The Bury Review – Report to English Football League Board*, February 20, 2020. See also *The Guardian*, "Bury's demise shows Football League must tighten FFP rules, review says," available at https://www.theguardian.com/football/2020/mar/12/bury-demise-shows-football-league-must-tighten-ffp-rules-review.

The *Saracens* decision provides sports organizations with much greater legal clarity as to why caps on salary and other forms of remuneration in sport are not necessarily prohibited under EU competition law and, if correctly designed, can actually be beneficial to competition. The emphasis of the Panel upon the margin of discretion available to sports organizations to address such challenges in sport is particularly welcome. It opens up a range of new tools to sports organizations to ensure that sport is not put at risk by speculative and exploitative practices. That is why Saracens rugby club is now joining Jean-Marc Bosman as a game-changer for the governance of sport.

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