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EDITORIAL

by Alexandre DURAND and Ronan DAVID



On 15 December 1995, the Court of Justice of the European Union handed down a ruling that would irremediably change the regulation of the professional football market. The “*BOSMAN*” ruling initiated the liberalisation of trade in professional players between football clubs by declaring foreign players’ quotas per team and the system of transfer fees to be incompatible with European Law.

However, it also laid the foundations for consistent European case-law, which accepts that sporting rules may restrict the major freedoms guaranteed by the Treaty on European Union, provided that they pursue a legitimate objective and are proportionate. This last point, which is less clearly perceived by football stakeholders, is nevertheless just as important.

The football markets have seen constant inflation in the movements and amounts of player transfers from this historic date. Similarly, while most clubs have continued to pursue sporting objectives in this liberalisation process, others have gradually replaced this objective with pure profit motives.

In this context, at the beginning of the 2000s, new types of investors appeared on the football markets by investing simultaneously in several football clubs. These new practices, now grouped under the name of “*Multi-club Ownership*” (MCO), very quickly alerted international football bodies - UEFA in the lead with the “*ENIC*” case - to the risk this could pose to the integrity of football competitions.

25 years after the *BOSMAN* ruling, the issue of regulation of football markets is more topical than ever, and the development of MCO practices throughout the world is a perfect illustration of the complexity for international football bodies of enacting rules that respect the major freedoms recognised by the Treaty of the European Union (such as the free movement of capital or freedom of investment) but guarantee sporting integrity and equity.

This Special Report aims at describing the diversity and extent of this MCO phenomenon today and its impact on football competitions.

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— Perspectives —

What about the “*European sports model*”, 25 years after the *Bosman* ruling?



By Colin MIEGE
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→ **European Law - European Commission - Freedom of movement for workers - Player transfer - European Court of Justice (ECJ)**

The idea that there is a “European model of sport”, beyond the disparity of national organizations observed in different countries, was developed in a document published by the European Commission in 1998. This document is to be placed in the stream of reflection resulting from the *Bosman* ruling rendered in 1995, which had shaken the international sports movement and troubled multiple public sporting authorities. The *Bosman* ruling of 15 December 1995 undoubtedly contributed to liberalizing the exchange of professional players between football clubs by declaring quotas on foreign players per team and the system of transfer indemnities not in conformity with European Law. But it also laid the foundations for consistent case-law, which admits that sporting rules may place limitations on the major freedoms guaranteed by the Treaty, provided that they pursue a legitimate objective and are proportionate. Insofar as the famous ruling handed down by the European Court of Justice questioned the extent of the regulatory power of international sports federations, some also feared that it would undermine the traditional foundations of the organization of the sport in Europe. Hence the feeling that the European sports model needed to be identified to be better defended.

Which sport model in Europe?

The document edited by the Commission started from the observation that all sports are organized according to a pyramidal structure, the base of which is formed by the multiple sports associations rooted locally. Above them come the national federations, which federate not only clubs but also the departmental and/or regional levels, which are themselves affiliated to an international federation. As such, they are responsible for the organization and promotion of their discipline on the national territory, as well as its representation on the international level. They set up the national championships at the end of which official titles are awarded and exercise a regulatory role, with the power to impose disciplinary sanctions on their affiliated members. These federations are in a monopoly situation, as there is only one organization per country responsible for representing and managing a given

sport. At the top of the pyramid are the international sports federations, which are the governing and regulatory bodies for each discipline.

This picture is completed with the International Olympic Committee (IOC), the supreme body represented in each country by a National Olympic Committee (NOC), whose role can vary from being a simple vector of Olympism to being the national confederation for all sports disciplines. The NOCs of continental Europe are gathered within the association of the European Olympic Committees (EOC).

The pyramidal structure thus formed functions according to a double principle of hierarchy between the top and the bottom, and of participation, with members adhering to organizational rules and the possibility of electing the governing bodies.

¹ [The European Model of Sport, Consultation document of the DG X, 1998.](#)
² [ECJ, 15 December 1995, Case C-415/93, Union royale belge des sociétés de football association and others v. Bosman](#)

WHAT ABOUT THE “EUROPEAN SPORTS MODEL”, 25 YEARS AFTER THE BOSMAN RULING?

Promotion/relegation: a characteristic mode of operation

This system is justified by the need to organize competitions at all levels according to uniform rules and is based on the principle of the possible promotion of competitors (athletes or teams) to the higher level by successive qualifications or, conversely, their relegation to the lower level in case of failure. This mode of operation constitutes an essential characteristic, which distinguishes open competitions from closed championships, such as they exist in the United States in particular. In sports competitions, competitors represent the territory they come from. Their exploits and their defeats contribute to developing a sense of belonging to a community, which is still very present in Europe.

The system is also based on a principle of solidarity between professional and amateur sport, as well as between the richer and less well-endowed components.

Finally, the model works thanks to the omnipresent voluntary supervision, which can be expressed in a variable way according to the cultural traditions of each country, and which makes the sports club remains a privileged place for the initiation and the amateur sports practice of the greatest number.

Developments that affect the traditional model

” The European Commission already asked in 1998 the question “whether federations can be both regulatory bodies and commercial entities” “

The document published by the Commission in 1998 already pointed out that the traditional model of the organization of the sport in Europe underwent major changes starting in the 1980s, which led to the gradual annexation of its high-level component to commercial interests and its redefinition around show-sport. The first step in this evolution was taken with the IOC’s decision to abolish the distinction between amateur and professional sport at the Olympic Games and to allow the sponsorship of the Games by large commercial companies, which became indispensable “partners”. The next stage was marked by the upheaval in the audiovisual landscape, which led to fierce competition for the acquisition of broadcasting rights for the main sports competitions and a spectacular increase in their amounts, from which the international federations in the most high-profile sports benefited.

These federations, which traditionally exercise a regulatory function, have also become negotiators of television rights, now the main source of professional sports funding. In this respect, the European Commission already asked in 1998 the question “*whether federations can be both regulatory bodies and commercial entities*”.

Various threats which lead to the emergence of the specificity of sport

Some have perceived these evolutions as threats to the European sports model.

Thus, the expansion of commercial interests has repeatedly prompted certain representatives of professional sport to free themselves from the supervision of federations, which seem to be torn between the traditional supervision of amateur sport and professional sports management, which tends to assert its independence. We have also been able to link a certain erosion of voluntary work observed in most European countries to these developments and fear a weakening of the associative sports model.

The other threat seemed to come from European Law itself, particularly in the application of its rules of free movement of persons and goods and free competition, which initially seemed to be largely antinomic with the rules enacted by sports organizations.

In this somewhat anxiety-provoking context, and under pressure from part of the sports movement, the European Commission supported the notion of the “*specificity of sport*” to be taken into consideration in the application of common European policies. Thus, [the Declaration of December 2000 annexed to the Treaty of Nice](#) concerning the “*declaration on the specific characteristics of sport in Europe, of which account should be taken in implementing common policies*” were adopted “*with a view to safeguarding current sports structures and maintaining the social function of sport within the European Union.*” This [Declaration](#), which has a clear political scope, aims to preserve the European sports model and taking into account the specificities of sport were clearly associated.

According to the Commission, the specificity of sport lies in its social, educational, health and cultural functions. As is well known, this notion, whose exact contours have never really been clarified, was eventually incorporated into Article 165 of the [Treaty of Lisbon](#) of 2007, which provides in particular that the European Union should take into “*account of the specific nature*

of sport and the structures of sport based on voluntary activity and its social and educational function”. It shall aim at “*developing the European dimension in sport*”, and the notion of a European model of sport appears as a watermark.

A concept taken up by the Council of Europe

In 2008, the Parliamentary Assembly of the Council of Europe adopted [a Resolution](#) concerning “*the need to preserve the European Sport Model*”, which largely takes up the arguments deployed by the Commission, at the very moment when the latter seemed to distance itself from notions within its [White Paper on Sports](#), released in July 2007.

The Assembly thus affirms that “*the European sports model is neither homogeneous nor perfect. However, it is deeply rooted in European civil society and is an important expression of European culture and the European attitude towards sporting values. It is a democratic model that serves to ensure sport remains open to everyone.*” (point 2). It recognizes that it is based on the principles of “*financial solidarity and openness of competition (promotion and relegation, opportunity for all)*” (point 3), before making the link with the specific nature of sport, which « *has important social, educational and cultural function*”, highlighting “*solidarity between different levels in sport (in particular, between professional and amateur) is a fundamental aspect of the European sports model*” (point 4).

The doxa on the existence of the sport model and the need to preserve it was thus shared for a time by the two European authorities, based on a consensus on its contribution to the European identity and its multiple social functions. However, as early as 2007, the Union seemed to question the notion of the European model.

A contested notion

The concept of the “*European sports model*” seems to be questioned by the European Commission itself. The [Working Document](#) accompanying the White Paper on Sport published in July 2007 by the European Commission states that “*it must be recognized that any attempt at precisely defining the ‘European Sport Model’ quickly reaches its limits.*” Some of its features, such as the open competition system based on promotion and relegation, are actually limited to team

sports. Even for these sports, the licensing system often mitigates its effects. There are also partially or fully closed competition systems in Europe, reducing “*the specificity of the sports structure, including notably the autonomy and diversity of sports organizations, a pyramid structure of competitions from grassroots to elite level*”. The Commission also pointed out that some sports, such as golf and tennis, have their own organization. Finally, the constituent elements of a single European model are, in fact, found in many other regions of the world. To complete the demonstration, it added that the new trends common to the majority of Member States, such as increasing commercialization, stagnation in the number of volunteers or the emergence of new players, are not only a matter of concern for the European Union but also, for the Member States themselves, “*are challenging the traditional vision of a unified European Sport Model*”. These points have been taken up, for the most part, in the [communication of the European Commission on the social nature of sports of 2011](#). How can we still believe in it when many commentators, for their part, are skeptical about the notion?

Skepticism on the part of the doctrine

At the level of national structures, there is a great diversity of organizations. Each national system, consisting of a government administration and a sports confederation, has its own characteristics. This great heterogeneity makes any attempt to identify unity factors and establish a delicate typology of sports institutions in Europe. There is, however, a marked divide between the countries of Northern Europe, which are attached to a more liberal conception of society, and those of Southern Europe, which are distinguished by greater State intervention in the field of sport. The rate of sport participation also varies considerably between North and South, as established by Eurobarometer surveys supervised by the Commission. While the European model of sport exists and is a unifying factor, it is also characterized by its diversity and is broken down into a multiplicity of sub-models depending on the country. This observation, which applies to the European Union’s 27 Member States, also applies to all 47 countries grouped within the Council of Europe.³

Other experts have expressed multiple reservations about the concept of the European Sport Model. Only one of the most recent analyses is worth mentioning,

³ For a deeper understanding of this topic, please check C. MIEGE, ‘*Les organisations sportives et l’Europe*’, INSEP, 2000 et *Sport et droit européen*, l’Harmattan, 2017. Also, Sport et Citoyenneté, ‘*L’organisation du sport dans les États membres de l’Union européenne*’, 2013.

WHAT ABOUT THE “EUROPEAN SPORTS MODEL”, 25 YEARS AFTER THE BOSMAN RULING?

pointing out that the arrival of new commercial partners has made the model more complex, while the role of international sports federations has evolved considerably at the turn of the 20th century.⁴ Going further, the good governance of these federations, whose internal organization seems rigid, is questioned, as is the opacity of the executives and the lack of participation and democratic control.⁵ One of the recurring allegations is that some international federations use their regulatory powers to cover up the promotion of their commercial interests and deter potential competitors.⁶ As opposed to the closing of the North American model, the opening of the European model is also contested because of all kinds of restrictions discreetly put in place by the federations. Finally, the author emphasizes the low efficiency of the redistribution mechanisms supposed to justify the model.

” The arrival of new commercial partners has made the model more complex “

The European sports model: a myth that must endure?

At the end of this brief article, it seems quite clear that the notion of the European sports model has lost much of its consistency since its introduction at the end of the 1990s and that it is as much a myth as reality. The same is undoubtedly true for the notion of the specificity of sport, which is often associated with it, even if it has been consecrated with its inclusion in the Treaty.

Is this a sufficient reason to challenge/recuse these notions in the name of realism? The answer can only be measured. Indeed, Europe needs myths and credos in order to advance in its construction. It must also ensure that the discrepancies between the somewhat idealized vision of the European sports model and the reality of the behavior of international sports bodies are not too glaring. Hence the need to continue exercising its regulatory power with its own tools, as it has been able to do in the past while respecting the autonomy

of sports organizations.⁷ The European sports model must indeed respect the law and, in particular, the law of the European Union.

On the other hand, the notion of the European sports model includes an important immaterial component, attached to the humanist values of sport, which is eminently respectable and deserves to be reinforced. The pioneering work of the Council of Europe, which was the first body to contribute to the constitution of a European body of sports doctrine, based on openness, non-discrimination and integration, is to be commended here. This corpus is mainly included in the [European Sports Charter](#), which is currently under review and deserves to be better known and implemented. There undoubtedly lies an exportable European model or guidelines likely to remedy the many cases of abuse that our era inflicts on the sporting ideal.

4 A. CATTANEO and R. PARRISH, 'European Union', June 2020, Edge Hill University, p. 15 to 57.

5 This concern is widely shared by the Parliamentary Assembly of the Council of Europe, which expressed it very clearly in its resolution of January 2018, 'Towards a framework for modern sports governance', Resolution 2199 (2018).

6 Mention should be made in this respect of the decisions handed down by the Commission against the Fédération Internationale Automobile (FIA) in 1999-2000 for abuse of a dominant position, which forced the FIA to radically reconfigure its regulations and internal organization.

7 Following a period of contestation, the decisions of the *BOSMAN* ruling on the free movement of players were quickly integrated by football governing bodies. This power of regulation, which the European Union is the only one to be able to exercise with regard to international sports federations, has just been reaffirmed with the recent ruling of the Court of the Union in the case of International Skating Union ([ECJ, 16 December 2020, Case T-93/18 ISU v. Commission](#)).

American Soccer Stakeholders Reverse Course by Taking Active Stance on Social Justice Issues



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→ **United States Soccer Federation (USSF) – Major League Soccer (MLS) – Racism – Discrimination – Fundamental Rights – National Regulations – Womens' football**

The U.S. is often heralded as one of the most progressive countries in the world, but progress on social justice issues has evolved slowly and unevenly in the American sports landscape. This all changed in 2020 when U.S. sports organizations, especially those within the world of soccer, reconsidered long-entrenched policies amid the growing public outcry against social injustice issues. Deviating from prior practice, the U.S. Soccer Federation (USSF), its domestic leagues, and its professional soccer clubs all reversed course and chose to take an active role in supporting the fight against social injustice within the U.S.

United States Soccer Federation

The USSF was the first sports organization in the U.S. to pass legislation that prevented athletes from using sport as a platform to raise awareness for social injustice within the U.S.¹ However, in 2020, the USSF made an about-face and repealed its national anthem policy (Policy 604-1), which had been enacted in response to Megan RAPINOE's decision to kneel during the national anthem before U.S. national team matches. The USSF's decision was made in June 2020 in response to the growing outcry following the death of George FLOYD. In announcing its repeal, the USSF issued the following statement:

¹ In 2016, while representing the U.S. Women's National Team, Megan RAPINOE knelt on multiple occasions during the national anthem in solidarity with Colin Kaepernick, the then-San Francisco Forty-Niners quarterback who was the first prominent professional athlete to kneel during the national anthem. Although Ms RAPINOE admitted she had never experienced "over-policing, racial profiling, police brutality, or the sight of a family member's body lying dead in the street", she explained she was supporting Kaepernick because she could not "stand idly by while there are people in this country who have had to deal with that kind of heartache." See 'Megan Rapinoe: A profile of the US women's co-captain', BBC News, 27 June 2019, www.bbc.com. On 9 February 2017, the USSF's Board of Directors responded to Ms Rapinoe's kneeling by enacting a new policy requiring athletes to stand during the playing of the national anthem. See Associated Press, 'US Soccer New Policy: Players 'Shall Stand Respectfully' During National Anthem', NBC Sports, 5 March 2017 www.nbcsports.com. Policy 604-1 states: "All persons representing a Federation national team shall stand respectfully during the playing of national anthems at any event in which the Federation is represented." See, *id.*

"U.S. Soccer affirms Black Lives Matter, and we support the fight against racial injustices.

The U.S. Soccer Board of Directors voted yesterday afternoon to repeal Policy 604-1, which required our players to stand during the national anthem. The policy was put in place after Megan Rapinoe knelt in solidarity with the peaceful protest inspired by Colin Kaepernick, who was protesting police brutality, and the systemic oppression of Black people and people of color in America. It has become clear that this policy was wrong and detracted from the important message of Black Lives Matter [...]."²



² U.S. Soccer Board of Directors Votes to Repeal National Anthem Policy, U.S. Soccer, 10 June 2020 www.ussoccer.com

In addition, the new USSF President, *Cindy PARLOW CONE*, personally apologized to Ms *RAPINOE* for the USSF's initial decision to enact the policy. Ms *CONE* stated that the USSF had missed the point completely. Ms *RAPINOE*'s kneeling, Ms *CONE* said, was never about the flag.³ Importantly, the USSF promised that it would support its players in their “efforts to achieve social justice” moving forward.⁴ The USSF upheld its promise to its players in November when it allowed the U.S. Men's National Team to wear jackets during the national anthem that had “*Be the Change*” adorned on the front and a personalized message on the back, such as “*Black Lives Matter*” and “*End Police Brutality*,” during a match against Wales.⁵

National Women's Soccer League (NWSL)

As one of the more progressive professional leagues in the U.S., the NWSL has consistently supported its players' right to peacefully protest.⁶ Ahead of the 2020 Challenger Cup, the NWSL further supported its players by revising its rules to explicitly give players the option to remain in the locker room during the national anthem.⁷ Commissioner *Lisa BAIRD* said the NWSL's intention was to give players more “flexibility,” saying:

*“We're going to continue to play the national anthem, but with even more flexibility, and support each player's right to express their individual views or not. The NWSL stands behind every player, official and staff member. Kneel on the field. Stand with your hand over your heart. Honor your feelings in the privacy of the locker room or at midfield.”*⁸



Women's football league players and officials kneel during National Anthem, in the first game after the new policy was enacted.

Major League Soccer (MLS)

DON GARBER, the MLS commissioner, reaffirmed the MLS's long-standing national anthem policy in 2017 when he sent a league-wide memorandum to the various clubs, explaining that while the front office encouraged players to stand for the national anthem, they equally respected the players' right to peacefully protest.⁹ Although the policy remained in place during the 2020 season, the MLS took a more cautious approach to the national anthem issue when the league first returned to action in July 2020 by deciding that the national anthem would not be played before any match during the “*MLS is Back*” tournament because no fans were in attendance.¹⁰ Without the playing of the national anthem, teams chose to demonstrate in other ways. During the first game of the “*MLS is Back*” tournament, numerous black players from various clubs stood around the pitch with raised fists in complete silence while the starting eleven on both sides kneeled outside the center circle for eight minutes and forty-six seconds in tribute to *George FLOYD*.¹¹

Once MLS teams returned to their own stadiums to resume their regular season, the league decided that the national anthem would be played only if fans were in attendance.¹² The MLS maintained its support for its players to peacefully protest when the national anthem was played during the 2020 season but not all teams or their fans were in favor of the MLS's supportive stance.

3 Jayda EVANS, ‘U.S. Soccer Federation president apologizes to Megan Rapinoe, says anti-kneeling policy ‘missed the point completely’’, Seattle Times, 12 June 2020, [bit.ly](https://www.seattletimes.com/sports/soccer/us-soccer-federation-president-apologizes-to-megan-rapinoe/)

4 *Ibid.*

5 ‘USMNT Shares Important Social Justice Message Before Match Against Wales’, USSF, 12 Nov. 2020 [www.ussoccer.com](https://www.ussoccer.com/news/usmnt-shares-important-social-justice-message-before-match-against-wales/)

6 Brian STRAUS, ‘Club vs. Country Distinction Evidence in National Anthem Stance Across U.S. Soccer’, Sports Illustrated, 27 Sept. 2017 [www.si.com](https://www.si.com/soccer/2017/09/27/club-vs-country-distinction-evidence-in-national-anthem-stance-across-u-s-soccer/)

7 Stephen PIANOVICH, ‘NWSL Revises National Anthem Policy for 2020 Challenge Cup, Will Allow Players to Remain in Locker Room’, CBS Sports, 29 June 2020 [www.cbssports.com](https://www.cbssports.com/soccer/news/nwsl-revises-national-anthem-policy-for-2020-challenge-cup-will-allow-players-to-remain-in-locker-room/)

8 *Id.*

9 ‘Garber: MLS supports players’ right to protest anthem’, Goal, 27 Sept. 2020 [www.goal.com](https://www.goal.com/en/news/garber-mls-supports-players-right-to-protest-anthem)

10 “There’s not going to be any fans in the stands, so we didn’t see that it would be appropriate. And I feel today no different than I felt then, which is if a player is looking to express their right to kneel during the national anthem, they should have the right to do so. I would hope that they would stand, but if they opt not to, that’s their prerogative and we will support that.” See, Katherine ACQUAVELLA, ‘MLS won’t play national anthem during return-to-play tournament without fans’, CBS, 14 June 2020, <https://www.cbsportslive.com/news/mls-wont-play-national-anthem-during-return-to-play-tournament-without-fans/>

11 Luis Miguel ECHEGARAY, ‘MLS’s Black Players for Change Are Just Getting Started’, Sports Illustrated, 6 Aug. 2020 [www.si.com](https://www.si.com/soccer/2020/08/06/mls-black-players-for-change-are-just-getting-started/)

12 ‘MLS Commissioner Don Garber explains procedure for potential of supporters in stadiums’, Major League Soccer, 8 Aug. 2020 [www.mlssoccer.com](https://www.mlssoccer.com/news/mls-commissioner-don-garber-explains-procedure-for-potential-of-supporters-in-stadiums/)

For example, fans protested at an *FC Dallas* home match on 12 August 2020 when all the players from *FC Dallas* and its opponent *Nashville SC* knelt together in solidarity during the national anthem. Fans booed, chanted “USA, USA!” and even threw water bottles onto the field in protest.¹³ After the game, *Reggie CANNON*, an *FC Dallas* player¹⁴, criticized the fans who booed, calling their behavior “disgusting”.¹⁵ Mr *CANNON* further added that the booing fans clearly did not understand why the players were kneeling.¹⁶ In response to his comments, Mr *CANNON* received death threats and a barrage of hate posts on social media. Even Mr *CANNON*’s own club, *FC Dallas*, urged him to apologize for his comments. *FC Dallas* even went so far as to write out a statement of apology for Mr *CANNON*.¹⁷ But Mr *CANNON* refused to apologize.¹⁸



Players kneeling for anthem met with boos before Nashville SC/FC Dallas game

A few weeks later, the MLS encountered more controversy after it postponed five matches when players decided not to play as a way to protest the police shooting of *Jacob BLAKE*.¹⁹ In response, Mr *Dell Loy HANSEN*, the owner of *Real Salt Lake*, stated publicly that he disapproved of the decision to boycott games: “It’s like someone stabbed you and then you’re trying to figure out a way to pull the knife out and move forward. That’s what it feels like. The disrespect was profound to me, personally.”²⁰ The pushback on Mr *HANSEN* in the wake of his comments was strong. He was forced to backtrack and apologize for what he said amidst calls that he was a racist. Incredibly, Mr *HANSEN* then announced that he would sell his ownership stake

in the *Real Salt Lake* pro soccer franchise as well as in his NWSL and United Soccer League (USL) franchises.²¹

The recent wave of change that has taken place both on and off the field is providing the MLS with a renewed opportunity to address racial injustice. In June 2020, a group of over 170 Major League Soccer players, coaches and staff created an independent organization called Black Players for Change to work on bridging “the racial equality gap that exists in society” and combat systemic racism.²² Within months of its founding, Black Players for Change announced it would be part of MLS Unites to Vote, a league-wide “initiative to help players, staff, and fans register to vote” in the 2020 U.S. presidential election,²³ as well as oversee the creation of 12 community mini-pitches across the country over the next year that will provide black children a safe place to play soccer.²⁴



Black Players for Change

In October 2020, the MLS, in partnership with *Black Players for Change*, announced several initiatives to combat racism, advocate for social justice, and increase the representation of black athletes in the sport of soccer. The MLS’s new comprehensive programs involve:

- creating a Diversity Committee that will “work with the league to develop a strategy toward diversity, inclusion, opportunity and social justice”;
- using the League’s “resources to address issues of public concern among marginalized communities”;
- creating new opportunities to “develop talent from underrepresented groups [in order] to increase Black representation in executive and sporting positions at the league office, the member clubs and other North American soccer organizations”;

13 Drake HILLS, ‘Fans boo, chant ‘USA’ when Nashville FC, FC Dallas players kneel during national anthem’, Tennessean, 13 Aug. 2020 www.tennessean.com

14 CANNON was later transferred to Boavista FC in Portugal.

15 HILLS, supra.

16 Id.

17 Jeff CARLISLE, ‘FC Dallas wanted apology for hitting out at fans who booed – Reggie Cannon’, ESPN, 12 Oct. 2020 www.espn.com

18 Id.

19 Doug MCINTYRE, ‘Five MLS matches called off as players decide not to play to protest police shooting of Jacob Blake’, yahoo!sports, 26 Aug. 2020 sports.yahoo.com

United Soccer League (USL) played a few games around that time while the NWSL was between tournaments, so it had no games scheduled.

20 Associated Press, ‘Real Salt Lake owner to sell teams amid reports of racism’, wtopnews, 30 Aug. 2020 wtop.com

21 Id.

22 About Black Players for Change, blackplayersforchange.org

23 ‘Major League Soccer, Black Players for Change and MLS Players Association Team Up to Launch MLS Unites to Vote’, Houston Dynamo, 17 Sept. 2020 www.houstondynamo.com

24 Dylan BUTLER, ‘Black Players for Change announce plans to build 12 mini-pitches’, Major League Soccer, 9 Sept. 2020 www.mlssoccer.com

- ➡ increasing the participation in soccer of members of underserved communities;
- ➡ contracting with more minority-owned businesses;
- ➡ donating USD 1 million to *Black Players for Change* to help the organization grow; and,
- ➡ partnering with numerous coalitions to “develop long-term programming centered around mentorship, workplace development, social justice, health and wellness, and financial literacy.”²⁵

While these initiatives are still in their infancy, they are significant steps to create lasting change that could make the game of soccer more accessible to a new generation of black and brown players in America.

United Soccer League (USL)

As the United States’ second-division soccer league, the USL has remained largely out of the spotlight as it relates to national anthem protests and the need to address social injustice issues. Recent incidents on the USL pitch however have revealed that the USL must follow the MLS’s lead and take immediate action.

On 23 September 2020, during the 71st minute of a USL match between the *LA Galaxy II* and the *San Diego Loyal*, *LA Galaxy II*’s Omar ONTIVEROS directed a racial slur at *Elijah MARTIN*, a black athlete in the *Loyal*.²⁶ No discipline was levied against Mr ONTIVEROS during the match. The *San Diego Loyal* felt strongly that the USL had not done enough to address what had happened during the game. In protest, the *Loyal* announced that the team would forfeit the point it earned during the game even though a playoff spot was on the line. The *Loyal* explained that the team did not want to be part of a match where such incidents had occurred.²⁷ The next day, Mr ONTIVEROS was suspended for six games and fined by the USL. Afterward, the *LA Galaxy II* cut Mr ONTIVEROS from the team.²⁸

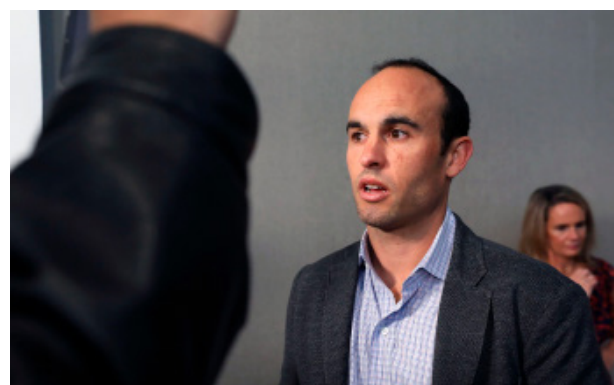
25 MLS Soccer Staff, ‘Major League Soccer unveils steps to combat racism and increase Black representation’, MLS, 19 Oct. 2020 www.mlssoccer.com

26 Edwin PEREZ, ‘After forfeiting point to protest racial slur, San Diego Loyal take on Rising’, Cronkite News, 30 Sept. 2020 cronkitenews.azpbs.org

27 ‘SD Loyal Forfeits Match Played on 9.23 Against LA Galaxy II Following Racist Remark’, San Diego Loyal SC, 25 Sept. 2020 bit.ly

28 Jeff CARLISLE, ‘USL side LA Galaxy II releases player Omar Ontiveros after racist incident’, ESPN, 26 Sept. 2020 www.espn.com
‘After a thorough review of the incident that took place during the LA Galaxy II and San Diego Loyal match on Wednesday, Sept. 23, LA Galaxy II has mutually agreed to part ways with defender Omar Ontiveros,’ the statement read. ‘LA Galaxy II stand with communities of color, and especially the Black community, in the fight against systemic racism, social inequality, bigotry and violence. Our club has no tolerance for racism or bigotry of any kind.’

The *San Diego Loyal* again took a stand the following week, this time against homophobia, when the team walked off the field and forfeited the match that they were winning 3-1. The protest took place after *Junior FLEMMINGS*, a midfielder on the opposing *Phoenix Rising* club, was not punished by the referees even though he called *San Diego Loyal* player Collin MARTIN (an openly gay athlete) a homophobic slur on the field during the game.²⁹ *San Diego Loyal* manager Landon DONOVAN told the referee and the *Phoenix Rising*’s coach that the *San Diego Loyal* would forfeit if Mr FLEMMINGS were not removed from the game.³⁰ After neither the referees nor the coach of the *Phoenix Rising* did anything in response to Mr DONOVAN’s plea for action, the entire *Loyal* team walked off the field in protest of the anti-gay slur that had been uttered and the inaction that followed.



Mr DONOVAN praised his players for their decision to take decisive action: “Our guys, to their immense credit, just said, ‘We’re not going to stand for this.’ They were very clear in that moment that they were giving up all hopes of making the playoffs, even though they were beating one of the best teams in the league, handily. But they said that doesn’t matter. There’s (sic) things more important in life and we have to stick up for what we believe in. And so they made the decision to walk off.”³¹

The decision of the *Loyal* players to take a stand in the hopes that it would bring about meaningful change was well-received. Megan RAPINOE, in particular, congratulated Landon DONOVAN and the *Loyal* players for their decision to address the issue in an immediate and powerful way.³²

“Shouts to @landondonovan @sandiegoloyal for refusing to go along with racism and homophobia. This is how you confront it. See something? Say something. Period. Need more of this energy! So proud and appreciative of Landon and that organization.”³³

29 Statement from Collin MARTIN, Twitter twitter.com

30 ‘Junior’s Major Controversy – Phoenix Rising Striker Says San Diego Opened Him Up To Abuse After Allegations Of Homophobia’, The Gleaner 2 Oct. 2020 jamaica-gleaner.com

31 ‘Landon Donovan Pulls Pro Soccer Team From Field ... After Alleged Homophobic Slur’, TMZ Sports, 1 Oct. 2020 www.tz.com

32 Sam FRANCE, ‘San Diego Loyal forfeiting match after alleged homophobic slur spoke volumes about solidarity, says Martin’, Goal, 1 Oct. 2020 www.goal.com

33 Megan RAPINOE’s Tweet, twitter.com

Id.

After a USL investigation, *Junior FLEMMINGS* was (like Mr *ONTIVEROS*) suspended for six games and fined.³⁴

In response to these two incidents, the USL announced in October 2020 that it would partner with *The Institute for Sport and Social Justice* (Institute), an organization that provides training services and workshops that focus on effecting positive social change “*by inspiring values-based thinking leading to actions that promote social responsibility and equality.*”³⁵ The Institute will provide league-wide training and education for all USL staff and players. Additionally, to further deter the use of bigoted language and socially unacceptable behavior, the USL, USL Players Association, and other constituents have stated that they will work to “*institute increased sanctions for players and coaches found to have used foul and abusive language.*”³⁶ These changes will hopefully help in the long run to eliminate the use of offensive and insensitive language that has no place in the USL or any other sports arena.

Conclusion

The American soccer world has been fundamentally altered by the tremendous sea of change brought about in 2020. Together, these changes mark a watershed moment in the history of American soccer. While the long-term impact of this year’s awakening remains to be seen, it appears that a new road is being paved that could lead to a lasting legacy of greater equality and tolerance on the pitch.

³⁴ ‘Six-game ban for Junior Flemmings’, Jamaica Observer, 6 Oct. 2020 www.jamaicaobserver.com

³⁵ Mission, Institute for Sport and Social Justice, sportandsocialjustice.org

³⁶ ‘All USL Players and Staff to Undergo Mandatory Training Through Partnership with Institute for Sport and Social Justice’, USL, 1 Oct. 2020 www.uslsoccer.com

Professional Football Club Revenues, Direct Investment and COVID-19



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→ **TPO/TPI – FIFA RSTP – FIFA Regulations – Financial control – Financial Fair Play (FFP) – COVID-19**

It remains needless to say that COVID-19 has had a profound detrimental effect on the world's economy. The football industry has not been immune to the worldwide economic downturn. The suspension and cancellation of competitions and the necessity to play matches behind closed doors has negatively affected industry revenues.

Professional Football Clubs and COVID-19

Professional football clubs are particularly vulnerable to the economic effects of COVID-19. The main expense of a professional football club are player expenses in the form of salaries/wages and/or transfer fees. Although the introduction of club licensing and financial fair play regulations have instilled some financial responsibility at a club level, a club applying for a UEFA competition license can still spend up to its break-even point with an acceptable deviation of EUR 5 million per year.

The fact of the matter is that clubs will often budget up to this limit, running an acceptable loss. This is due to the unique nature of the football industry. Football clubs not only compete for revenues but compete on the field for championships. There is a direct correlation between monies spent on players and sporting success. Spending more money on players, despite certain imperfect market distortions, leads to a stronger team, which leads to better sporting results. UEFA has chosen to impose a limit on spending as a function of revenues and expenses as opposed to a North American style salary cap. It is also worthy to note that a professional football player's contract can last as long as five years.

All of these factors put enormous pressure on a professional football club's budget. The unforeseen decrease in television, advertising and matchday revenues caused by COVID-19 have put clubs the world over in a precarious situation.

Professional Football Clubs and Capital Injection

Historically, clubs have been able to raise funds by borrowing money against a particular type of income stream, such as leveraging revenues from future prize money or television rights. Typically, a club will sell a right to a future income stream at a discount in exchange for an immediate capital injection.

This environment, even pre-COVID-19, has incentivized football clubs to come up with new ways to finance their operations.

UEFA prize money and revenues from television rights are usually seen as a low risk where those types of revenues - based on their contractual terms - are predictable. By way of example, a Spanish club that has qualified for the UEFA Champions League group of 16 looking for financing can accurately predict the minimum amount of

UEFA prize money in December that it will receive by the end of the season. This is because amounts received from shared television revenues (the “*market pool*”) are predictable based on competition regulations and a comparison to figures from previous years. Moreover, UEFA prize money for amounts earned for games already won but not yet paid are not just predictable, but certain, for the same reasons.

” This environment, even pre-COVID-19, has incentivized football clubs to come up with new ways to finance their operations “

This gives clubs the ability to raise revenues in the short term with low-risk receivables, on favourable terms as financial institutions are given certainty on their return on investment. The ability to access such funds has never been more necessary. It is more than likely clubs will need to access further capital before the end of the season. UEFA and other federation licensing regulations require that clubs satisfy all of their overdue payables by certain dates, mostly 31 March and 30 June. If the economic effects of COVID-19 continue to be felt at the end of the 2020-2021 season, clubs will certainly seek alternative forms of financing to ensure that they are able to compete in these competitions in 2021-2022.

FIFA Manual on Third-Party Ownership and Investment



Third-party ownership and investment serve professional football clubs in the same manner as these revenue-raising tools. The only difference is that the leveraged asset is the future value of a transfer of a player's contract. These are typically valued as higher-risk transactions as compared to future prize money and television revenues given the uncertainty of the value of a future player transfer. In this sense,

FIFA's Manual on Third-Party Ownership and Third-Party Investment could not have been released at a more appropriate time.

The basic view is that third-party ownership and investment is strictly prohibited by Articles 18bis and 18ter of the FIFA Regulations on the Statutes and Transfer of Players (RSTP). The reality is that the situation is much more nuanced. These revenue-raising tools are still allowed, within strict regulatory parameters. These parameters seek to protect certain sporting values, such as the ability of a club to make personnel decisions free of interference from a lending institution.

” FIFA's Manual on Third-Party Ownership and Third-Party Investment could not have been released at a more appropriate time “

The FIFA TPO/TPI Manual is a welcome publication for practitioners plying their trade in the area. It specifically seeks to comprise “a comprehensive list of contractual agreements that have been examined throughout the years by the FIFA judicial bodies, followed by a brief explanation of the analysis made and the reason why the competent bodies considered that a violation of either article 18TER or article 18TER was committed (or not) by the relevant party.”¹

Articles 18bis and 18ter of the FIFA RSTP

The key-point to take away is that FIFA has not only published a document that has identified the types of transactions prohibited under the RSTP but has also disclosed what types of transactions it considers to respect Articles 18bis and 18ter of the RSTP.

This is the main value-add of the FIFA TPO/TPI Manual, in that it specifically identifies which transactions do not transgress the rules. This type of transparency in the application of the regulations is precisely what is needed during this economic downturn, which may

¹ FIFA Manual on TPO and TPI, 2020 edition, p. 7.

enable financially struggling clubs the ability to raise further revenue on a short-term basis.

This is a positive and welcome addition, specifically because of the ambiguous nature of Articles 18bis and 18ter. Article 18bis simply prohibits clubs from entering into a contract which enables another club or a third-party “to acquire the ability to influence in employment and transfer-related matters.”² Article 18ter is equally ambiguous when it merely speaks to the entitlement of a third party “to participate [...] in compensation payable in relation to the future transfer of a player from one club to another, or [...] any rights in relation to a future transfer.”³

Neither article nor any other portions of the FIFA RSTP define what is a “third-party” or what qualifies as “influence”. The result is that jurists sitting on FIFA dispute resolution bodies and the Court of Arbitration for Sport (CAS) making decisions that affect the ability of clubs to raise financing, are left with little guidance in the interpretation and application of these provisions.

Before the legislation of Articles 18bis and 18ter of the FIFA RSTP, the only limits to commercial financing contracts with respect to the transfer of players was the drafter’s imagination. The FIFA RSTP limited the scope of these transactions with little specificity. FIFA’s TPO/TPI Manual improves transparency by giving practitioners new guidance.

TPO and TPI: Next Steps

Although the FIFA TPO/TPI Manual does present some clarity in the area, the constant criticism is that these are not actual regulations but a resource that explains the interpretation of the regulations. FIFA would have to amend the RSTP to codify the principles outlined in the FIFA TPO/TPI Manual. Without explicit amendments, panel members of the FIFA Dispute Resolution Chamber or the CAS can continue to make decisions on a case by case basis with little restrictions from the actual wording of Articles 18bis and 18ter of the RSTP.

This is due to the doctrine of hierarchy of norms. In [CAS 2015/A/4153 Al-Gharaafa SC v. Nicolas Fedor & FIFA](#), the CAS noted that within the context of whether a FIFA circular must be consistent with the FIFA RSTP, “FIFA Circulars cannot be allowed to take precedence over the clear and specific wording of FIFA’s regulations, including the RSTP, as the RSTP contains provisions of

a higher ranking in the hierarchy of FIFA regulations than the contents of a circular.”

Further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed.

The FIFA TPO/TPI Manual has no real source or authority in law, similar to the RSTP Commentary or a circular. It is merely FIFA’s understanding of the application and interpretation of its own regulations. Although useful, it is not binding on arbitrators nor can practitioners unequivocally rely on its substance.

Ultimately, further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed. Such amendments could, in substance, mirror the interpretation and explanation of application explanations in the FIFA TPO/TPI Manual. This would provide the football legal community with further guidance as to what transactions are on-side and which transactions would raise the yellow flag deeming the transaction off-side.

” Further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed “

It is possible that some stakeholders, from a governance perspective, could argue that such detailed regulations concerning the ability of a club to raise revenue have no place in the RSTP. This author disagrees. When FIFA decided to issue TPO and TPI regulations it decided to wade into an overly complex area of financial transactions. To attempt to regulate such a complex area with a simplistic tool attempting to indiscriminately prohibit all transactions invites criticism that such a blunt tool should be refined for legal transparency.

The FIFA TPO/TPI Manual seeks to clarify the law in the area, but concrete amendments to the FIFA RSTP itself are a necessary step to provide further clarification.

² FIFA RSTP, 2020 edition, Art. 18bis.

³ FIFA RSTP, 2020 edition, Art. 18ter.

Gross vs. Net and the Tax Guaranty Clause



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→ Tax - Tax law - Tax fraud - Salaries - Player contract - Tax Guaranty Clause

Apart from touching on several tax aspects and concepts, this article is addressed to sports lawyers, players and club representatives, who are not familiar with such topics. The author intends to call attention to the repercussions that taxation regulations can have vis-à-vis contracts that are drafted in daily practice.

Introduction - Understanding the Importance of Tax within Football

Today, taxation has become an urgent topic in the football world.

However, the concern about taxes started with the internationalization of players' transfers during the 1980s.

For the first time in history, we had well paid players, who were playing abroad with minimal knowledge of the relevant local tax law and taxation regulations. At the same time, it became more common for players to have their careers and personal lives managed by agents, friends and family members who also had a very limited knowledge of the importance of declaring and paying taxes properly.

A relevant example was *Diego MARADONA's* case. He was heavily persecuted and tax controlled by the Italian Tax Authorities after the Italian national team's defeat and elimination from the 1990 FIFA World Cup on home soil, by *MARADONA's* Argentina. At that time, *MARADONA* was playing for *Napoli* and was accused of not declaring and paying taxes on his wages. It took years for the case to be closed, and it came to a point where *MARADONA* could not enter Italy due to the risk of arrest.

The lack of knowledge was not only a problem for him since many other players have had problems with their taxes. However, during that time, players and agents were not so concerned about accountability and taxation because the ways of controlling these matters were not that sophisticated (there was no internet, no electronic payrolls, no crossing information). A significant amount of payments were made by cash - sometimes for money laundering purposes but, mostly because everyone knew that auditing processes were very slow and it would take years for the tax authorities to process tax returns or even realize that tax returns were not being filled in. Consequently, it could be years before tax authorities would show up, by which time the player would likely not be residing in the relevant country anymore.

However, taxation has found a way.

Nowadays, information is more accessible/available. Football is not a "*Pandora's box*" anymore. Contracts, salaries, bonuses and image rights structures are understood by the media and have been exposed to the public - see for example, the *Football Leaks* investigation. Tax returns are filed electronically and processed quickly. Consequently, tax authorities have become more efficient. Some players, managers, and agents have gone from just well paid to money-making machines - earning revenues from different sources - not only their salaries and bonuses, but investments, advertising and/or endorsement contracts. The spotlight is on them.

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Despite this, some things have not changed.

The effects of not declaring and paying taxes properly are still the same. Fines, penalties, interest and the possibility of being charged with a crime. Not to mention the severe damage to public image that it may cause.

In most relevant jurisdictions, the right of National Tax Authorities to audit a natural person expires in five or ten years, so the effects of not declaring and paying taxes and also of not keeping records properly can arise

in the future: when the player has retired from football, and is living in another country relying on savings.

Taxes in some of Key Football Markets

Another key aspect has been the increasing income tax and social security rates in jurisdictions that are also key football markets - especially after the 2008 Global Financial Crisis.

The "Guide on sportsperson taxation in certain relevant jurisdictions"

Coordinated by *Félix PLAZA ROMERO* from *Garrigues Sports & Entertainment (Thomson ARANZADI)* at page 153 [2008], summarizes the tax schemes in some of the most relevant sports jurisdictions in the world:

COUNTRIES	CIT TAX RATE	WITHHOLDING ROYALTIES IMAGE RIGHTS	PERSONAL INCOME TAX		SPECIAL REGIMES
			RESIDENTS	NON-RESIDENTS	
BELGIUM	33.99%	15% (general), 0% - 20% (Tax Treaty)	25% - 50%	25% - 50% / 18%	18%
BRAZIL	IR - 25% and CSLL - 9%	Residents: 15% to 27.5% Non-Residents: 15% or 25% (tax havens)	15% to 27.5%		N/A
CHINA	25%	10%	5%	5% - 45%	5% - 45% and a flat rate of 20% for license fee
DENMARK	25%	25% (general), 0% - 20% (Tax Treaty) / no specific regime applies to Image Rights	63%	Various	25%
FRANCE	34.43%	15%	50.77%	50.77%	Optional annual adjustment + expatriation
INDIA	30%	10%	0 - 30%	0 - 30%	10%
ITALY	27.5% + 3.9% (Regional Tax)	30% non-residents. Tax treaties could provide for no taxation	23 - 43%	30%	
LUXEMBOURG	29.63% (For Luxembourg City)	No Luxembourg withholding tax on royalties / Image Rights. Income derived from royalties / Image Rights by Luxembourg residents is taxable at a progressive rate (0% - 38.95%)	Progressive rate: 0% - 38.95%	Progressive rate: 0% - 38.95%	10%

MALTA	35%	0%	0 – 35%	0 – 35%	15%
MEXICO	28%	25% or 28%, Tax treaties provide reduced 10% or 15% rates depending on country	28%	15 – 30% (salaries) (only if unrelated to artistic or sports services)	25% or 28%
PORTUGAL	25%	15%	10.5% - 42%	20%	N/A
SPAIN	30%	24% (general), 0% – 20% (Tax Treaty)	24–43%	24%	24%
SWITZERLAND	12%-24%	0%	19% – 48%	17% – 32%	19% – 48%
UNITED KINGDOM	28%	0 – 15% depending on treaty provisions	45%	45%	See comments for non-residents
UNITED STATES	34% – 35% for taxable income over \$335,000, lower graduated rates for taxable income under \$335,000	30%	10 – 35%	10 – 35% on ECI, 30% on FDAP	

As an example: a player who plays for an *English Premier League* team and earns GBP 100,000 (approx. EUR 112,000) a week, resulting in a monthly remuneration of GBP 400,000 (approx. EUR 450,000), will end up paying GBP 180,000 (approx. EUR 202,000) in personal income tax over a tax rate of 45%.

It is important to note that in places like Germany, Italy, and France, the tax rates (including revenue tax and social security contributions) can be around 50%.

Impact on the Transfer of International Players

These high tax rates and complex tax systems end up resulting in a significant impact on the transfer of international players, and clubs that are based in the aforementioned countries have to spend a lot more to attract, sign and keep good players because taxes are higher than the salaries of players, besides expenses like transfer fees, agent fees or economic rights.

According to *Transfermarkt* research, the cost of paying EUR 1 million in salaries by a club is equal to:

- EUR 1.19 million in Turkey;
- EUR 1.78 million in China;

➤ EUR 1.90 million in Germany;

➤ EUR 1.91 million in Spain;

➤ EUR 1.97 million in Italy;

➤ EUR 2.12 million in England;

➤ EUR 2.46 million in Portugal; and,

➤ EUR 2.74 million in France.

That is one of the reasons why clubs like *FC Porto* opt for a strategy such as buying cheaper players to develop and sell them two or three years later. It is very costly for Portuguese clubs to keep high paid players.

Special Tax Provisions and Inpatriation Regimes

In some countries, there are special inpatriation regimes for high profile professionals that apply to all or certain footballers who fall within certain criteria. These specific provisions are set in order to attract high paid and very specialized workers to live and perform their professional activities in these countries.

That was the case in Spain when the Royal Decree 687/2005 was passed and called by many as the "*BECKHAM Law*." An inpatiation regime was introduced, setting a 24,75% flat tax rate instead of a progressive rate from 24,75% to 52% in the employee's arrival year and lasting for the following five years.

Years later, on 1 January 2010, a cap of EUR 600,000 was set. It disabled high paid players like *Real Madrid's VINICIUS Jr.* to benefit from the "*BECKHAM Law*".

In France, a similar inpatiation rule applies a rebate of 30% of the salary for the first five years in the country for workers - and players - who have unique abilities and are recognised by the market. That was the case for several *Paris Saint-Germain* (PSG) players - like *IBRAHIMOVIC* - when PSG started signing big stars from 2012.

In other jurisdictions, there are specific provisions that apply to footballers.

That is the case in Italy where the Law Decree no. 34 was passed to set a 50% rebate on a player's'/ manager's salary for the first two years in the country as long as the player/manager signed a 24-month-contract or longer.

Net Salary and The Tax Guaranty Clause

It has become common, in this context, for clubs based in countries with high tax rates to offer players/ technical staff net salaries or packages.

In these cases, clubs guarantee the players' salary by paying the salary with all taxes deducted (net salary), or the club pays the negotiated salary plus the necessary amount of money to cover their taxes (gross salary) - depending on the collection method - if taxes are withheld or not.

This is where the Tax Guaranty Clause becomes relevant... for both parties.

The player is provided assurance that the negotiated amount of the salary and bonuses will be paid. Further, it may prevent any negative effect of future changes in the tax scheme like an increase to the revenue tax rate or the passing of new regional taxes or social contributions - to name a few examples.

The club is provided assurance that the player will declare and pay their taxes on time, free from penalties, and according to the guidelines provided by the club and in accordance with the law. It also provides

assurance that the player and the club will benefit from the most favorable tax regimes/provisions such as the abovementioned inpatiation regimes, etc.

A proper and detailed wording of Tax Guaranty clauses can avoid misinterpretation of its extent and avoid damage to the parties.

One of the most critical aspects is to clearly define the gross and net amounts.

Other considerations include:

- the kind of taxes that a club shall pay: such as revenue tax, social contributions, regional taxes, and/or taxes on high revenues?
- which items of remuneration are protected by the tax arrangement?: salaries?; collective bonuses?; individual bonuses?
- does the tax arrangement cover other revenues not directly related to the club, such as sponsorship income or prizes paid by a federation?
- what are the territorial limits of Tax Guaranty clauses? What happens if, by the end of the contract, the player moves to a different country (with higher tax rates) and the payments made by the club that year, end up being taxed in a new country, where the club is not based and it has no knowledge of tax law?
- do players have to expose themselves to the risk of facing a criminal procedure because the club requires them to take part in an aggressive and risky tax plan that could be considered tax evasion?
- and last but not least, who will choose and support tax lawyers and advisors in the case where a player has to sue the tax authorities in front of a tax court because he or she was audited on tax arrangements over salaries that were required by the club - such as an image rights structure?

Indeed, the above are some of the issues that can be provided for in a good tax arrangement, irrespective of whether the player's or the club's interests are in consideration.

Net Salary Guaranty and Sport Jurisprudence

As the football world is vast, it is undeniable that there are players with responsible financial advisors who are ready to negotiate and draft perfect tax arrangements covering all aspects mentioned in the previous section. At the same time, there are players who have no idea about taxes and the concepts of net or gross income, as I have already mentioned in the introductory section.

Sometimes players negotiate their salaries as net income, but no net salary provisions are included when it comes to the drafting of their contracts with the clubs.

In such situations, players can prove that the salaries were negotiated as net through other means such as by emails or social media messages.

This position is recognized by the FIFA Dispute Resolution Chamber (DRC) as long as the player is capable of proving the negotiation of a net salary guaranty, even if there is no specific provision in the contract to reflect such negotiation:

"In this respect, the DRC noted that the evidence provided by the Respondent in this regard, as explained before, is very detailed and consistent, whereas the figure indicated by the Claimant, i.e., EUR 5,000 net, is not supported by any evidence. Therefore, the Respondent's explanation with regard to the net amount of the Claimant's remuneration as per the contract should be upheld". FIFA DRC (Player C, from country G / Club E, from country B), 28 August 2014.¹

CAS jurisprudence goes further in recognizing the player's good faith and the presumption of a net salary guaranty as this kind of clauses have become more and more common in recent years:

"In the absence of any reference made in a document entitled "Attestation" establishing an amount of remuneration payable to the player as to whether the amount should be considered as net or gross, the player could have in good faith thought that such amount was to be considered as a net amount and the player's good faith should be preserved. Furthermore, in practice, it is not unusual for a bonus to be expressed for its net amount". [CAS 2015/A/3947 KAS Eupen v. Ibrahima Sory Camara, 14 November 2016.](#)

This is a very interesting position as it forces the clubs, which are usually keener to deal with tax and financial issues, to properly state in the contract if the remuneration is net or gross and the limits of such concepts.

Another, and maybe the most important practical question regarding the breach of a net salary arrangement, is to define if it is sufficient for a player or a club to terminate the contract with just cause if the aforementioned arrangement is not respected.

If negotiation results in a net salary arrangement, it means that the club pays a portion of the salary to the player to enable him or her to pay the taxes over their salaries. It seems that this payment is considered, in the contract, as remuneration. Once it is considered remuneration, it is subject to the same legal treatment/that protects wages and bonuses.

To Whom It May Concern

When it comes to remuneration by negotiation, contracts have become more complex. The Tax Guaranty clause becomes a tool to attract high-level players and make sure they behave properly when it comes to the filing of tax returns.

Even though jurisprudence recognizes verbally negotiated tax guaranties, it is nonetheless essential to focus on tax arrangements because of the potential consequences of both lapsed time and changed territory. This also applies to countries/jurisdictions where the tax rates are low to non-existent - such as the Kingdom of Saudi Arabia - as salaries can be paid with a delay and have repercussions years after the effective date of payment - perhaps with the player living in a different jurisdiction and under a tax rate of 50%.

¹ goldengate-law.com

A Compliance Approach to Sports Integrity



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→ **Integrity - Governance - Sports entities**

It is not only about safeguarding the integrity of sport and preventing and sanctioning misconduct in sports, it is also about actually doing what needs to be done for this to occur.

Introduction

In recent times, important research and strategic documents and guidelines have been developed by a distinct number of organizations, whether directly immersed in sports or in their role as external experts of sports governance, anti-corruption and safeguarding. This is where the two areas of expertise analyzed in this article - Compliance and Integrity² - come into play and intertwine as a same-rooted and equally binding branch for sports.

It is highly beneficial for any organization or professional dealing with sports integrity to have a general view and recognition of what compliance means and represents for the sports industry and its ecosystem. Quoting Stephen COVEY, “Strengths lies in differences, not in similarities”³, which entails that we have to understand what compliance, as a far more developed field of corporate and organizational expertise than sports integrity, has achieved in the past decades and how such differences must help the sports integrity field grow into a more professional, binding and effective risk-based discipline of sports management and law.

This article does not purport to be an academic representation of compliance terminology and doctrine but is instead an article of opinion based on expertise obtained from both the compliance and integrity fields. The main objective of this article is to construct and propose a series of lessons, takeaways and/or recommendations addressed to sports associations to enhance and strengthen their sports integrity policy/strategy/roadmap and which would be applicable to all kinds of sport associations, regardless of the events and/or competitions organized, their size, modality, nature and structure.

These lessons, takeaways and/or recommendations - in line with the ISO⁴ international standards scope - aim to provide solutions to global challenges; in this specific case, faced by the sports community (associations) when dealing with integrity threats to their respective sporting events or competitions. No specific sports were targeted when writing this article since the idea behind it is to promote a certain degree of standardization of what is defined as the application of key strengths of compliance in the sports integrity spectrum.

There is no doubt that the sports integrity field can learn a lot and benefit from the milestones achieved by the compliance field and industry over the years. To the extent possible, this article wishes to pave the way for constructive and efficient debate on how to deal with and envision the future of sports integrity through a “Compliance approach”.

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² Throughout the article, “integrity” and “sports integrity” are used interchangeably, referring to the same concept proposed by the author. The same applies for the use of “association” and “sports association”.

³ More on Stephen COVEY: www.franklincovey.com

⁴ ISO - International Organization for Standardization - www.iso.org

First step. Understanding the definition and scope of “Sports Integrity”: Opening the way into a multidisciplinary concept and discipline

The fact that sports integrity, or to put it in other words integrity in sports, is seen and defined differently depending on who is answering the question and where they sit in the sports world does make it especially hard to treat such an area of expertise in a uniform manner.

From a practical perspective, it is clear that you cannot really dance to the tune if you do not understand the music. Hence, the following three questions arise for debate:

- What is sports integrity?
- What is the purpose of an integrity policy/strategy/roadmap for sports associations?
- How do associations conduct a successful and efficient sports integrity function?

What is sports integrity?

Firstly, to define sports integrity, there are two keywords to focus on: a) respected and b) respectful. A successful and leading sports integrity function would inherently entail that the association’s sporting events or competitions would, at the same time, be respected (by others) and be respectful (to others).

A sports event or competition is respected when it portrays and proves its commitment to the values and ethical principles set by the association under which these events are organized. The National Integrity of Sport Unit (NISU)⁵ defines integrity as “*The manifestation of the ethics and values which promote community confidence in sports, including fair and honest performances and outcomes, unaffected by illegitimate enhancements or external interests.*”⁶ It is all too well known that a lack of integrity would lead to a lack of public support and confidence from fans and spectators as well as other relevant stakeholders and partners, to the full detriment of the sport association’s reputation and sporting and commercial future.

Equally, the NISU continues to define sports integrity by stating that such manifestation of ethics and values has to include the “*positive conduct by athletes, administrators, officials, supporters and other*

stakeholders, on and off the sporting arena, which enhances the reputation and standing of the sporting contest and of sport overall.”⁷ It could then be said that sports integrity needs not only the positive conduct of the organizations and individuals that are subject to their regulations but also the necessary proactive and reactive conduct of the respective international, regional or national sporting governing bodies to address such misconduct as it occurs in an effective, diligent and exemplary manner. This is where sports integrity needs to be respectful.

A leading sports association on integrity would want itself to be characterized both internally and by public opinion as full of the will and determination against any conduct that mistreats or undermines the values and principles of its respective sport. Therefore, such an association needs to be respectful with the organizations and individuals that compose its sport, and by respectful, we mean being on top of every type of misconduct that might threaten not only the sports event or competition itself but also every potential misconduct that could place the respective sports association or the sport itself in disrepute.

Only when the respective governing sports bodies fully understand this vision, do we come to the second stage of deliberation and risk assessment: what specific areas of conduct can or should conform to sports integrity?

The mega-structure dilemma

In large-sized international, regional or national sporting bodies - which tend to work their way annually with significant budgets, personnel and resources - it is much simpler to separate and drawer-up misconducts in sports into specific departments or units to which such competence is assigned as part of their “*mega-structure*”. Therefore, is it not uncommon for important international sport associations to structure an integrity-related core content like anti-discrimination in a certain organizational department, anti-doping in another department, child and youth safeguarding in another and so on, to the point where such areas of content are not even placed within the same directorate or division. They float around a mega-structure where essential core contents of sports integrity are treated and dealt with by different employees, managers, directors and chiefs and, of course, with differentiated leadership and strategy.

⁵ National Integrity of Sport Unit: www1.health.gov.au

⁶ Play by the Rules. “*Integrity in sports – what is it?*” www.playbytherules.net.au

⁷ *Ibid.*

The “rest of the world” structure

Quoting Abraham LINCOLN’s famous 1858 address, “A house divided against itself, cannot stand”;⁸ put in plain terms, for sports associations across the globe that are not part of this group (in this context, i.e. sport associations that cannot afford mega-structures), being the vast majority of international, regional and national associations, to divide some or all of the integrity-related core contents into distinct workgroups, departments or units is not an option they can afford.

A practical perspective which serves as an example: for an Asian, African, European or American national sports association, it could be difficult to have an integrity expert or unit that exclusively handles only the match manipulation area of sports integrity as a full-time employee of the association. Perhaps because the association does not need to handle match manipulation integrity threats on a frequent basis. Meanwhile, let’s imagine this association does have to regularly deal with harassment and xenophobia in the sports competitions it organizes. The solution here is to adapt to the real-life necessity of the majority of sports associations worldwide and innovate and promote reform to have sports integrity recognized as a multidisciplinary concept; this means a combination of core areas of responsibility and competence that would give meaning, priority and stability to a much-overlooked field of sports.

In this specific case, if sports integrity includes all these core matters, the association would be able to address and implement measures and policies against harassment and xenophobia without leaving behind its duties to implement a structured and sustainable anti-match manipulation program (equally, all matters would be accounted for). On the other hand, if we only have an integrity expert or unit for match manipulation, then the program would not succeed because it is not a priority for the association while failing to protect the more existing needs and threats for their sporting integrity in recurrent harassment and xenophobia incidents.

This proposed version of sports integrity is not new; it has been embraced by some sports associations and relevant public sports entities, i.e. the Australian Government’s NISU is a best practice, real-life standard, when it addresses sports integrity by stating: “*In modern sport, activities and behaviours that are defined as lacking integrity include: creating an unfair advantage or the manipulation of results through performance*

enhancing or illicit drugs, match fixing, tanking or the use of insider information for illegal betting purposes. Anti-social behaviours such as bullying, harassment, discrimination and child safeguarding issues are also considered significant integrity issues for sport.”⁹

In light of the above, a true risk assessment exercise and mapping has to be diligently conducted by the corresponding association, responsibly incorporating all the core content of integrity previously identified. This core contents and its respective threats have to be analyzed, evaluated, worked on, responded to and, ultimately, monitored and followed up in a sustainable and accountable management system.

Examples of the key core content of sports integrity are (non-exhaustive list):

Anti-doping	Betting offenses	Child safeguarding
Corruption	Discrimination	Harassment
Match manipulation	Sexual abuse	Violence

What is the purpose of an integrity policy/strategy/roadmap for sports associations?

The purpose of integrity, that is, the reason for which it exists within a sports association’s organigram and mandate, is mainly to protect sports¹⁰ from threats that may be detrimental to the values and principles of a healthy sports culture.

Equally, the purpose of sports integrity is also materialized in the resoluteness of the respective association to promote the values, principles, content and key messages that rise from the integrity flagship. In this regard, a sports association should not see integrity as a checklist requirement to satisfy its good governance report but as a function that needs to be encouraged, enabled and pushed forward through all the levels of higher and middle management.

⁸ Abraham LINCOLN Online. ‘House Divided Speech’, June 16, 1858. www.abrahamlincolnonline.org

⁹ Australian Government. Sports integrity e-Book. Helping you know and manage risks www1.health.gov.au

¹⁰ A general term, including the respective sporting events and competitions, its participants and obliged subjects and stakeholders, as well as the reputation of the sports association under which these are organized.

How do associations conduct a successful and efficient sports integrity function?

Probably much is to be said and analyzed when debating if sports governing bodies have done enough, or are doing enough, to promote integrity and protect sports from integrity-related threats. Working through a multitude of scenarios, we find a small sports association that is fully committed to embracing integrity but lacks the resources and expertise to develop it properly. On the other hand, we find a strong sports association that has all the resources to develop its integrity function but does not really believe in it, so adopts a minimum effort approach where, usually, more work is undertaken so as not to address integrity alerts rather than to actually examine and resolve such integrity alerts. These and many other distinct scenarios can be put on the table for debate, to where the question is finally asked: when is a sports integrity function considered successful and efficient?

“The sports integrity function is deemed efficient, and thereby successful, if it ultimately accomplishes its goals and objectives within a long-term strategy and policy framework

”

Firstly, a sports integrity function can be deemed successful if it is recognized, nurtured and reviewed (accounted for) by upper and middle management with a high (or let's say, appropriate) degree of priority within its administration. Anybody who currently works in the sports integrity field within a sports association can pose the following question: What are the repercussions, risks or consequences - to the association or in the public opinion domain - if tomorrow a decision is taken to eliminate the respective integrity unit, department or division? How many people or entities would notice such a change in the association's organizational structure? Are the responsibilities and objectives of such a unit, department or division easily re-assigned internally, or to an external entity or service provider?

If the repercussions, risks or consequences are evaluated as low/middle or non-significant, if not that many people would even notice such an organizational restructure, and if the responsibilities are easily reassigned internally or to an external entity or service provider, then these are all signs that the sports integrity function was far from what it is supposed to be.

Secondly, the sports integrity function is deemed efficient, and thereby successful, if it ultimately

accomplishes its goals and objectives within a long-term strategy and policy framework. The accomplishment of goals and objectives in sports integrity cannot be taken lightly since, in such a challenging field, every win (even the small ones) is reassurance that the integrity function is performing or functioning with knowledge, skill and competence.

From a practical perspective, let's take the example of a national sports association. The main risk that affects the “*success and efficiency-factor*” of such association's sports integrity function is generally its lack of commitment to its set-up and operational functions, followed by a lack of resources, maintenance and sustainability over medium and long periods of time. In a nutshell, the goals and objectives cannot ultimately be achieved because the sports integrity function is not given sufficient mandate, resources, structure or importance for it to be sufficient, longstanding and capable of accomplishing its purpose and mission.

Therefore, this is why we come to a point where it should not only be considered a need but a duty for sports associations to reevaluate and restructure the way sports integrity is dealt with within their own administration and management, and where the teachings and learnings from the compliance field can truly come in handy.

Lastly, there is no real obstacle to prevent a stronger and more comprehensive and binding branch of sporting regulation and/or law to take center stage, uniting and/or intermingling sporting integrity with compliance. In the end, as hoped for in this article's title, it is not only about safeguarding the integrity of sport and preventing and sanctioning its misconduct, it is also about actually doing what needs to be done for this to occur.

Second Step. Determining a Compliance approach to Sports Integrity: 12 key lessons or takeaways for sports associations to consider and adapt

1. Leadership: integrity must have a seat at the table

Quoting *Peter DRUCKER*, the father of modern management theory and studies, “*Management is doing things right; leadership is doing the right things.*”¹¹ For fields of responsibility like compliance and integrity, it is all about decision-making, about the act or process of

¹¹ Drucker Institute: www.drucker.institute

deciding and determining what role and consequential impact such an area will have on a sports association's agenda, strategy, execution and results.

This decision-making, at this very crucial stage within the identification of organizational and development priorities of a respective sports association, cannot and should not be taken by middle or lower management. *Deloitte*, in its *"Building world-class ethics and compliance programs: Making a good program great"*¹² rightfully states, when referring to this much needed *"Tone from the top"*, the following: *"The starting point for any world-class ethics and compliance program is the board and senior management, and the sense of responsibility they share to protect the shareholders' reputational and financial assets. The board and senior management should do more than pay 'lip service' to ethics and compliance."*¹³ The same applies to the sports integrity field, in the sense that the sports association's upper management should be the ones who guide and direct the *"priority level or rating"* that integrity will have on its vision and administration mandate.

In a nutshell, in order for a responsible sports integrity authority to be able to adequately ensure an efficient policy and strategy going forward, including proposing necessary measures and decisions to effectively respond to the risks and alerts faced within the respective sports field, integrity needs to have a voice at the top, and it certainly needs to have a seat at the table for management discussions, planning and leadership. Paraphrasing the words attributed to the compliance field, integrity *"must have a seat at the table, that is, it should be represented in the committees and other discussion forums of the organization, and its recommendations should be taken into consideration in the decision-making processes of the business areas."*¹⁴

Lessons or takeaways gathered on leadership, compliance and sports integrity are:

- A sports association's only way to achieve a successful and efficient sports integrity function is to have upper management leadership guiding and directing its purpose and mission;
- A sports association can have a competent, highly skilled integrity officer, unit, branch or department. However, without the leadership of its upper management, it will not be able to achieve the objectives sets out to accomplish;

➤ Leadership means decision-making: in the field of sports integrity, this means important or even critical and somewhat difficult decisions being taken. Amongst other decisions, key and indispensable decisions on governance and operations (*i.e.* determining a long-term integrity strategy and honoring it); decisions that affect the association's industry (*i.e.* decisions that affect the sports betting industry in order to protect the integrity of the sport); decisions that impact the relationship with police and judicial authorities (*i.e.* coordination agreements to fight integrity threats); are just three examples of the need of such decision-making to occur at the highest of levels of management in order to set the tone and character of the road to be travelled;

➤ Lastly, leadership means enabling, which is understood as the *"ability to influence, motivate, and enable others to contribute to the success of their organization."*¹⁵ Consequently, leadership by upper management on integrity must necessarily lead to enabling middle and lower management personnel (division, department, unit, branch, officers, etc.) to take care of their responsibilities and duties in the best interests of the organization (over any individual interest) and always prioritize the safeguarding of sports integrity as a core value.

2. Determining the function of integrity

There are certainly different ways in which we could define what is understood today as the *"compliance function"*. *Deloitte*, when asked what the compliance function consists of, points out the following: *"Compliance or regulatory compliance consists of establishing adequate and sufficient policies and procedures to guarantee that a company carries out its activities and business in accordance with the current regulations, policies and internal procedures, promoting a culture of compliance among its employees, managers and related agents."*¹⁶

The compliance function takes on key areas of competence, which entails the prevention, detection and risk management of compliance. Applying this to integrity, the integrity function would be a function that would follow the same path, targeting the risk management of integrity-related threats in sports. This seems quite simple to put on paper but in practice, it presents many more difficulties for its completion and proper execution of tasks and responsibilities.

¹² *Deloitte*, 2015. Building world-class ethics and compliance programs: Making a good program great. www2.deloitte.com

¹³ *Ibid.*, p. 3.

¹⁴ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 1. *'Introduction to the Compliance function in the organizations'*, p. 8.

¹⁵ Robert House, et al. *'Understanding Cultures and Implicit Leadership Theories Across the Globe: An Introduction to Project GLOBE'* Article in *Journal of World Business* · March 2002, p. 7 www.researchgate.net

¹⁶ *Deloitte*. *'The challenges of Compliance'* (article in Spanish) www2.deloitte.com

The integrity function, following common doctrine from the compliance field¹⁷, would comprehend in summary (much more can be debated and improved), the following key activities of duty.

Identification, analysis and evaluation of integrity risks for sports associations and their respective events and/or competitions

A sports association must be able to map its own risks (sporting, institutional, financial, etc.) when it comes to setting up its integrity policy, strategy, roadmap and/or vision. The risks of corruption in sports exist; they exist because we have seen it happen too many times before. Therefore, the risks have to be properly identified for the sporting environment and events/competitions to be adequately protected and safeguarded. Simply said, if the sports association does not *“identify the risks, then they are accepting them by default.”*¹⁸

Respond to the integrity risk

This aspect is directly related to the leadership section commented on above, being that, for a sports association to be able to truly respond to the threats affecting their respective sport, integrity must have a seat at the table and be present at relevant forums and discussions of the association, be able to make recommendations on what needs to be done (putting the interests of the association first) and be able to record the decisions taken by the corresponding authorities.

Responding to integrity risks does not contemplate a one-size-fits-all solution. The sports world is intensely diverse and those working on sports integrity have to know how to adapt their recommendations, measures and protocols to their respective field. As simply put examples, strategies on sports integrity must enable different adaptations to professional sport from amateur sport, youth sports from grassroots, individual sports from collective sport, in-depth analysis on the social and cultural environment the sports is practiced in, and so many other aspects to take into account when working on and defining a proper response roadmap.

Monitor and review the integrity measures (controls) put in place

As an indispensable aspect for success, the integrity function has to be stable in time, this means it has to be seen as a discipline of not only a legal or regulatory nature but also a development that is sustainable and sufficiently immersed in the characteristics of the specific sport modality we are dealing with. Once the strategy is set, the policy and areas of development determined and the integrity measures defined in view of the identified risks, then processes have to be put in place to ensure a significant degree of accountability and control to confirm that the activities and responsibilities that have to be done are actually being done. This point will be commented on further in the following sections.

Report to upper management

The field of sports integrity protects what should be the prime product of any sports association, its sporting events and/or competitions, alongside with its athletes/sportspersons and respective individuals that fall within the scope of application of its regulations. A sports association can have the best infrastructure in the world, the best and most recognizable commercial sponsors or the highest numbers of attendance in their sporting events, but if its sport falls prey to corruption, disrepute or dishonor of its values and principles, then all the effort to bring the sport to such heights would have been in vain. Therefore, integrity has to have a direct channel of communication with the association's decision-making bodies or management, since both: a) deep reform of the association's legal framework, as well as, b) spontaneous handling of serious integrity concerns, would require a proposal to be shared with such management in order to resolve the situation of risk at hand and control the environment around it.

3. Culture of compliance vs. culture of integrity: Is there a difference?

When asked *“what is culture?”* within a company or association day-to-day, Deloitte points out that *“Culture is one of the biggest determinants of how employees behave. Strong cultures have two common elements: there is a high level of agreement about what is valued, and a high level of intensity with regard to those values. Of course, not all cultures encourage good or ethical behaviors. When it comes to developing world-class ethics and compliance programs, the starting point is a positive culture of*

¹⁷ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 1. 'Introduction to the Compliance function in the organizations', p. 7-9.

¹⁸ *Ibid.*

integrity.”¹⁹ Further on, *Deloitte* goes on to develop this term of culture of integrity with key factors to consider, apply and review such as organizational values, tone at the top, accountability, confidence in reporting of incidents, incentives, procedural justice, and others.²⁰ At this point, it is important to be able to differentiate what a “culture of integrity” means from a corporate, management and organizational level of companies, associations and entities of all sorts, from what a “culture of sporting integrity” should be for sports associations.

” Do each of institutional, financial and sporting integrity hold the same value for the association? “

The key factors highlighted by *Deloitte* that should be addressed are those of protecting sports from corruption, disrepute and any type of behavior or activity that encompasses integrity-related misconduct. Plainly put, the association has to embrace the idea that integrity needs to be placed at all different levels of governance and management, with the same level of priority, tone, mandatory nature, accountability and review. Ultimately, the question every sports association should deliberate on is - at its core - a simple one to ask: do each of institutional, financial and sporting integrity hold the same value for the association?

Furthermore, in the compliance field it is said that “the corporate culture emerges as the first risk that needs to be managed”.²¹ In this same sense, if a sports association takes sports integrity seriously and decides to tackle the main challenges from its core, then it needs to institute a culture of integrity (understood as sporting integrity), as it will evidently emerge as a risk that needs to be properly managed.

Leveling the playing field, enabling a GRC to GRI strategy shift aimed at safeguarding sport:

GRC (Governance-Risk-Compliance), in the compliance field, refers to - amongst other valid representations - a “strategy for managing an organization’s overall governance, enterprise risk management and compliance with regulations.”²² If an association were to take this same strategy and apply it to sports integrity, then this new strategy would rely, *inter alia*, on the following:

- Governance: understood as the “set of mechanisms to ensure that the information is getting to the decision-making bodies in a sufficient, complete, correct and timely manner, with the aim that well-informed decisions are adopted to guarantee the establishment of necessary controls and measures.”²³ The set of mechanisms would be defined in order to promote integrity within the scope of the duties and responsibilities (internal-external, national-international, etc.) of the respective association. Equally, integrity would be, as stated before, a matter to be addressed for sporting authorities to take decisions on how to protect the specific sport they are dealing with.
- Risk management: understood as “identifying, analyzing, and managing those risks that could affect the strategy of the organization (...) through mitigation, prevention, acceptance or sharing of risk.”²⁴ This area encompasses an extensive field of integrity risk management, from the risk management of sporting events and/or competitions organized by the respective association to the risk assessment of integrity core content due to cultural, social, economic, sporting criteria (amongst others), to even the risk management when faced with the duty to investigate potential integrity breaches through disciplinary, ethics or any other similar type of formal proceeding.
- Integrity: introduced as the new pillar, part of the proposed GRI (Governance-Risk-Integrity) strategy for sports associations, integrity would play a key role in ensuring that the association, its members (upstream), partners (lateral) and providers (downstream) comply with its duties (regulatory) and internal commitments, processes and policies to lead the way into incorporating sports integrity as a priority and a mandatory area of competence, responsibility and work for the respective sports industry as a whole.

The GRI strategy proposal is set to initiate a long-overdue debate on the level of commitment, but also the level of compulsory and mandatory policy and planning that will constitute the integrity blueprint and roadmap towards, as stated before, actually doing what needs to be done for sport (and all its obliged subjects, individuals, entities, agents, etc.) to safeguard the integrity of sport and prevent and sanction misconduct.

It can be said in a lot of ways, but not much better than this: “Nearly all institutions provide some level

¹⁹ *Deloitte*, 2015. ‘Corporate culture: The second ingredient in a world-class ethics and compliance program’. www2.deloitte.com, p. 3.

²⁰ *Ibid.*

²¹ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 5. ‘Leadership and compliance culture’, p. 154.

²² Kim LINDROS, CIO, ‘What is GRC and why do you need it?’ www.cio.com

²³ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 1. ‘Introduction to the Compliance function in the organizations’, p. 12.

²⁴ *Ibid.*, p. 12.

of training to employees, but a culture of compliance goes beyond once-a-year mandated training, it embeds compliance into everyday workflow and sets the foundation and expectations for individual behavior across an organization.²⁵ When seeking the highest standard of protection of sport against integrity-related misconduct, disrepute and corruption, if we replace the word “compliance” for “integrity” in this last reference²⁶, we can then ask ourselves: Culture of Compliance vs. Culture of Integrity: is there a difference?

4. Chief Compliance Officer and Chief Integrity Officer: why both are necessary

The Chief Compliance Officer (CCO) position and responsibilities have been vastly developed over the years through academic and practical research. This section does not aim to explain or delve into the faculties and characteristics of such a position. As an overview, the CCO “oversees and manages compliance issues within their company or organization. The CCO ensures that the organization is in compliance with various regulatory requirements and that employees are in adherence with internal procedures and policies.”²⁷

Sports associations, mainly international ones, decide on their structure (or mega-structure as seen before) based on different criteria and subject to their management’s best judgment. When dealing with integrity, there is one key challenge that can be addressed by the association when deciding on creating a Chief Integrity Officer (CIO) position: the independence of the national integrity officers (of their respective members, i.e. national federations).

Compliance doctrine has been far too clear when stating that regional or global compliance hubs serve to standardize criteria and support compliance officers in their respective jurisdictions.²⁸ On the other hand, lack of independence, resources or sufficient mandate to properly carry out the duties and responsibilities of integrity officers is probably the main challenge faced by these individuals or departments/units.

The Spanish Compliance Association (ASCOM)²⁹ suggests an ambitious solution to such adversity by

proposing that “an indicator of independence of the Compliance Officer would be a direct hierarchical line to the Chief Compliance Officer of the region (or global CCO), who would be in charge of deciding over the final evaluation (understood as course of action) of the national Compliance Officers (CO). (...) In this way, pressure from upper management (at a national level) is lifted from the Compliance Officer”, for compliance officers to be able and empowered to conduct their activity and role without any limitation whatsoever.

Bringing this matter to the sports integrity field, let’s see again the drafting placing the word “integrity” instead of “compliance”: “an indicator of independence of the Integrity Officer would be a direct hierarchical line to the Chief Integrity Officer of the region (or global CIO), who would be in charge of deciding over the final evaluation (understood as course of action) of the national Integrity Officers (IO) (...) In this way, pressure from upper management (at a national level) is lifted from the Integrity Officer”. Such crafting of the independence of integrity officers would revolutionize the way integrity is promoted and protected in sports worldwide, regardless of the sport we are referring to.

Therefore, in the abovementioned scope and context, there is room enough for (if not a need for) the co-existence of a CCO and a CIO since their duty would entail overseeing and managing, on one hand, all matters related to traditional compliance (regulatory, corporate, good governance, etc.) and, on the other hand, all matters pertaining to sports integrity.³⁰

5. Diligence in the selection process: the right people in the right place

Having to be diligent in the selection of personnel, partners and providers is one key aspect of compliance which companies and organizations should not overlook. This means that such entities should apply a sufficient degree of care, responsibility and caution to the selection of the individuals and companies/organizations they work with (hire), those they work alongside and those who act as service providers.

In the compliance field, diligence must be applied - for example - when dealing with suppliers and in different stages such as its selection process, when it formalizes the relationship and as well in the follow-up and review of such relationship. Bringing this “diligence-based” mindset to the sports integrity field, there are definitely key aspects

²⁵ Thomson Reuters, ‘Culture of Compliance’, [legalthomsonreuters.com](https://www.legalthomsonreuters.com)

²⁶ Example: “Nearly all institutions provide some level of training to employees, but a culture of integrity goes beyond once-a-year mandated training it embeds integrity into everyday workflow and sets the foundation and expectations for individual behavior across an organization.” (the highlighted part is not original text).

²⁷ Data Insider ‘Chief Compliance Officer: What COOs Do (and why your company should have one)’ [digitalguardian.com](https://www.digitalguardian.com)

²⁸ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 6. ‘The role of the Compliance Officer’, p. 167.

²⁹ ASCOM. www.asociacioncompliance.com

³⁰ Which, as a spoiler to be proposed at the end of this article, could be a rather new and comprehensive area and discipline for sports associations to create and invest in: initially referred to as: “Sporting Compliance” (not to be mistaken with the traditional “compliance in sports”).

to be learned from the compliance approach. In a nutshell, the right people must be in the right place, expertise counts, experience counts, decision making makes a significant difference, and leadership must be projected both internally and externally.

“The right people must be in the right place, expertise counts, experience counts, decision making makes a significant difference, and leadership must be projected both internally and externally”

Individuals or units dedicated to sports integrity must be able to recognize the multidisciplinary nature of the field and be consistent in enabling different areas (*i.e.* the legal area, the sporting area, the media/communications area, the CSR area, etc.) of responsibility to move forward in a sustainable and measured approach. In the sports integrity field, little would be accomplished if a “*reactive policy*” is put in place: let’s put out the fire when it starts burning our forest. What is actually needed is completely the opposite: a “*proactive approach/policy*” where the individuals in charge should promote integrity as a core value of the association and in parallel, anticipate and manage the risks and challenges faced, and knowingly accept that sports corruption/integrity misconduct will not be fully eradicated by a single sports association. However, they should have the determination that every battle won, regardless of its size and exposure, is important and relevant for the best interests of the sport in question. The aim is not to save the entire forest, but to put out as many fires as possible for the forest to survive.

As an example, let’s imagine a Tennis Association in a South American country that needs to invest in an individual or team to address integrity-related misconduct. The individual or unit selected for such a task should strategize on different management levels, so as to ensure that necessary measures are taken to start implementing impactful change and reform. In this scenario, we could envision, *inter alia*, this unit working on regulatory reform (as well as their internal policies and processes), investing in the development of education and capacity building programs to be followed and complied with by its members, safeguarding the sports competitions it organizes, supporting the safeguarding of the events or competitions organized by its members, generating internal and external alliances with measurable and specific goals to achieve in the short, mid and long term, conducting investigations into potential misconduct, etc.; all as part of a long-term strategy with clear and ambitious (yet realistic) objectives to be achieved.

Lastly, the keyword here is “*isolation*”, or the lack thereof; quoting Dr. SULLIVAN, “*Recruiting cannot reach its optimal impact, nor can it help drive a firm’s “performance mindset,” if it views itself in isolation. Instead, it must view itself as part of the entire people/productivity process. It’s not enough “just to recruit them,” it’s equally important to look at the next step, which is to ensure that top performers and new hires are continually placed in the right job.*”³¹

6. Integrity Officer Role: Where to begin

The position of the individual or individuals responsible for designing and executing the integrity function brings along with it quite a vast amount of understanding (or misunderstanding), suggestions and uncertainties as to how to begin the job they have been assigned to do. The same thing happens to compliance officers, and it is all about knowing what to do from the moment you are placed in the position. No organization should realistically expect a perfect performance from the very start, but a high standard should be put in place, quoting Maya ANGELO, “*I did then what I knew how to do. Now that I know better, I do better.*”³²

In this regard, ASCOM shares a thorough look at the initial days of a compliance officer, where a short-term strategy (first 90-100 days) and a mid to long-term strategy should be efficiently put in place.³³ In this section, we will emphasize the short-term strategy that an integrity officer or person responsible for integrity should implement.

Taking such criteria and adapting it to the sports integrity field, below we can see a summarized version of what such strategies could or should look like.

Preparation³⁴

This is the combination of preparing mentally for the responsibilities to be undertaken and a learning-based approach of the association. As an example, if an integrity officer is newly appointed to a sports association, he or she should first understand basic aspects of the association, *inter alia*, such as:

- What is the organizational chart of the association?
- Where does integrity sit in such organizational

³¹ John SULLIVAN. Talent management thought leadership. ‘Put the right people in the right place’. drjohnsullivan.com

³² www.goodreads.com

³³ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 6. ‘The role of the Compliance Officer’, p. 174.

³⁴ *Ibid.*

chart? Can its placement be improved?

- What are the historical records of claims filed before the association? Which ones correspond to integrity-related content?
- Is there a policy on the different integrity core topics in place? If so, is the policy or are the policies coherent with what the institution has been doing in the past?
- Who are the key contact persons (and their contacts) of the relevant department for the achievement of the integrity-related objectives?

Communication³⁵

Regardless of whether integrity officers were formerly part of another department of the association or if they are brought into the organization from the outside, the communication phase is critical when initiating synergies to find common points of understanding, responsibility and interest in the working fields of other relevant departments of the association.

In this context and as an example, an integrity officer of a national basketball association who has been recently hired should identify which other departments in the association serve relevant and important purposes for achieving integrity-related objectives in the institution's best interest. These meetings should be quite executive and purpose-oriented. In this sense, the integrity officer has to ask him or herself the following: What is the aim of such meetings, and why am I, as the person responsible for Integrity, requesting an appointment with other colleagues?

The integrity officer from a national basketball association would then schedule meetings with the departments they deem relevant, such as, for example, the refereeing department (*i.e.* direct area of concern for integrity), competition department, legal department, youth department, development department, compliance department, communication and media, etc. Equally, the integrity officer should hold meetings with not only their line manager but also with the authorities from the association that will account and receive their reports, since it is crucial for the integrity officer to understand the concerns and expectations such authorities have on such a field and to count on the ever so important support and mandate from upper management in order to be able to conduct the integrity function to its necessary standard and execution.

³⁵ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 6. 'The role of the Compliance Officer', p. 174.

Situation analysis³⁶

In a nutshell, the integrity officer has to know how to map the risks of its association, especially those risks that directly or indirectly relate to sports integrity and determine how the association is managing - or not managing - such risks. Equally, ASCOM calls upon what is understood as "*quick wins*" that the integrity officer could earn when starting off. An example of such a win for integrity is setting up an integrity section on the association's website, or implementing a much-needed reporting mechanism for integrity offenses if this had not been done before, or including integrity in the board meeting at a mid or high level, or branding the department with an attractive logo to jump-start the integrity work that is needed, amongst many other quick wins.

The quick wins require acceptable acknowledgement of what can be done at that exact moment and a very practical and creative approach on how to earn these wins (objectives) with as little effort as possible.

Strategy definition³⁷

This last aspect is all about alliances, in the sense that integrity (even when understood as a multidisciplinary concept) needs to generate synergies with other internal and external departments to be able to reach its full potential. Alliances can help overcome this first stage of potential hesitation by upper management with respect to how integrity needs to conduct itself within the institution. Integrity should be aligned with strategic, pillar areas of the association in order to be side by side with the individuals/authorities that are making key decisions.

7. Integrity: Comply or explain. When work gets serious

Corporate social responsibility and good governance are two long-standing areas of compliance, referring, *inter alia*, to the way businesses are managed and the voluntary involvement and commitment of businesses (*i.e.* companies, associations) on policies related to all kind of relevant matters such as social, labor and environmental concerns. The principle of "*comply or explain*", a core component of good governance doctrine that has been instituted in a number of relevant international regulations worldwide (*i.e.* EU directives

³⁶ *Ibid.*, p. 175.

³⁷ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 6. 'The role of the Compliance Officer', p. 175.

such as Directive 2014/56/EU³⁸, is well-rooted in the culture of the compliance ecosystem. However, it is, at the same time, probably the aspect most lacking in the legal and policy-oriented framework of sports integrity across the globe (of course, exceptions may apply).

Much needs to be said and proposed when it comes to implementing such a principle in the sports integrity field but, in essence, the following aspects should be taken into consideration:

- Much like true compliance provisions and regulations (*i.e.* pertaining to the fields of anti-corruption, money laundering, market abuse, etc.), the sports integrity legal framework and development/proactive/reactive criteria (as cemented in its vision, strategy and roadmap) for sports associations (regardless of their international, regional, national dimension) have to be mandatory and accounted for.
- Sports associations would then be responsible, liable and answerable for their own actions (or lack thereof) to pursue and comply with their strategy, policy, agreed objectives, regulations, mandate and course of action to best protect their sport from integrity-related misconduct.
- Sports integrity would not be seen as a selective development/proactive/reactive criterion for the sports association to decide whether or not to invest in. Sports integrity would not be an “*if*” but a “*must*” in terms of investment and compliance with its terms and objectives would be supervised and - if needed - explained to the respective competent supervisory authority body.
- It is difficult to foresee a real sustainable and effective course of action for sports associations on sports integrity without the need to re-assess and evaluate the “*place of priority*” that this field has in its respective sport. This is where the change needs to occur for, as anticipated, work for the sports associations to get serious and become accountable and answerable.

The “*all the correct words but little or no action*” dilemma

Sports worldwide faces a dilemma as everybody involved in the respective sports industry is in agreement that integrity in sports should be protected and more work needs to be done. At the same time, sports itself seems not to define a comprehensive

set of mandatory institutional, financial, sporting and development/proactive/reactive objectives and regulatory framework outlining the work that actually needs to be done. Put plainly, you ‘can’t really roast a chicken if it is not in the oven’. In other words, the correct words have to be backed up not by spontaneous and occasional acts of good practice or well-intended investigatory efforts, but by sustainable, structured, financed and accountable programs and policies that set the tone of the sports integrity culture road mapped by the sports association’s leadership.

The principle of unavailability of definitions: a “*comply or explain*” example of its use in sports integrity

When addressing the principle of “*comply or explain*”, ASCOM refers to another principle - the “*principle of unavailability of definitions*”³⁹ - which applies within the compliance field and which could be conveniently used to clarify and resolve; for example, discrepancies or differences of appreciation and understanding when dealing with anti-discrimination policies, potential misconduct and enforced investigative and disciplinary proceedings by an international sports association on its members or obliged subjects/parties.

The “*principle of unavailability of definitions*” establishes that it is not possible for a concept to be interpreted differently from what it is defined in the respective regulation (*i.e.* Conthe Code, Unified code of Governance of Listed Companies, 2006).⁴⁰ Therefore, and drafted in a way that it is not established or portrayed as an exhaustive list but rather a living document open for inclusions or potential amendments, an international sports association could decide to publish an official list of all related concepts and expressions of misconduct when dealing with anti-discrimination. Therefore, all its members would be aware of how such actions and expressions are going to be dealt with (and how they must be dealt with at national level by its members) for, as an example, disciplinary purposes. Quoting NIETZSCHE, the idea of the application of such principle is not to have an undefined, interpretable regulatory provision where “*the text has disappeared under the interpretation*.”⁴¹ If this is done, and the respective national association does not prosecute misconduct that is clearly defined as in breach of anti-discrimination provisions established by the international sports association, then such association would either have to “*comply*” - this is, prosecute the misconduct or “*explain*” by which failure

38 Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts. eur-lex.europa.eu

39 Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 3. ‘Corporate social responsibility and good governance’, p. 83

40 *Ibid.*

41 Friedrich NIETZSCHE, ‘Beyond Good and Evil’, 1886. www.planetebook.com, p. 51.

to prosecute could potentially lead to disciplinary sanctions to be applied against the association for being non-compliant with the provisions established at international level.

A final note on accountability: the compliance debt vs. the integrity debt

There is no better way to say it: *“The right thing to do and the hard thing to do are usually the same.”*⁴² An exemplary sports integrity strategy and vision can contain the best intentions and highest standards, but if it does not contain the means for attaining the work to be done, the objectives to be reached, the results to be reviewed and the non-compliance to be accounted for, then what we end up with is what we can refer to as “wet paper” integrity. The exact same thing applies to the compliance field, when *“organizations that establish Compliance programs count on, for example, ethics code and/or codes of conduct, policies and written proceedings, reporting mechanisms, analysis and evaluation of risks, etc. However, these elements, by themselves, run the risk of becoming mere documents and paperwork, which content does not apply to the day to day business activity (in effect, a “wet paper” Compliance).”*⁴³

“Let’s not forget that organizational culture drives ethical behaviors, which ultimately leads to consolidated leadership and impact on the sports integrity field”

Lastly, we come across the concept of *“integrity debt”* as a twin or half-brother of *“compliance debt”*. Sports associations have to come to the clear conclusion and determination that, when adopting their roadmap, vision and strategy for sports integrity with the aim of protecting their sport from corruption and other integrity-related misconduct, they accumulate an integrity debt *“until they prove that they are complying with the ethical (integrity) standards that have been officially adopted.”*⁴⁴ This debt has to be reviewed by a competent and objective supervisor, and called upon with actionable repercussions when non-compliance has been identified.

Let’s not forget that organizational culture drives ethical behaviors, which ultimately leads to

consolidated leadership and impact on, in this case, the sports integrity field. There are clear disqualifiers of this integrity debt, which would increase the chance of integrity not being truly present in the organization and for an increase in unethical behavior. These disqualifiers, as identified and analyzed by BULGARELLA, are, *inter alia*, the following: a) organizational unfairness, b) abusive manager behavior, c) selfish orientation, d) lack of awareness and e) fear of retaliation.⁴⁵ All very interesting concepts to debrief when it comes to the management of sports associations and its relationship with compliance, ethics and integrity, however these concepts will have to be the subject of another article in the future (let’s not uncork all the bottles at once).

8. Regulatory basis for integrity. 8 questions to be answered

Acknowledging the fact that the sports industry needs to do more to protect sports worldwide from corruption and other integrity-related misconduct, and acknowledging that proposals are currently present and put on the table to address such important aspects and decisions that will shape the future of how sports integrity is conceived globally, the question arises: how does a sports association make the changes it needs to make to redirect its course on integrity?

The first step can be emphasized and referred to in a statement usually attributed to *Albert EINSTEIN*, which says: *“If I had only one hour to save the world, I would spend fifty-five minutes defining the problem, and only five minutes finding the solution.”*⁴⁶ Understanding the problem is not merely recognizing that corruption and other integrity-related misconduct affecting sports needs to be stopped at all costs, understanding the problem is acknowledging that significant change, reform (*i.e.* at various levels of management), investment and an accountability-oriented policy and framework needs to be put in place for a new discipline of sports (*i.e.* as proposed in this article, referred to as Sporting Compliance) to be introduced and made whole within daily and weekly activity of sports associations around the globe.

When dealing with policy-management, the compliance field and doctrine refer to the point where regulations need to be produced at a first stage and how and under which criteria these regulations or provisions are produced and approved. A sports association has to answer the following eight questions (as recommended by ASCOM when dealing with the creation of compliance policy and relevant

⁴² Steve MARABOLI, *‘Life, the Truth and Being Free’*, 1999.

⁴³ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 5. *‘Leadership and compliance culture’*, p. 142.

⁴⁴ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 8. *‘Compliance policies and code of conducts’*, p. 250.

⁴⁵ Filabi & Bulgarella, *‘Organizational Culture Drives ethical behavior: Evidence from pilot studies’*, 2018 OECD Global Anti-Corruption & Integrity Forum. www.oecd.org

⁴⁶ quoteinvestigator.com

regulations)⁴⁷ to be able to move forward and renew or re-dimension the way it treats the integrity field in its respective sports industry:

- 1) Who has the capacity to push forward this new reform package on sports integrity within the association's organizational chart?
- 2) Who must evaluate the suitability of a multidisciplinary and enhanced sports integrity authority (*i.e.* division) within the respective association?
- 3) Which individuals/entities have to be part of their brainstorming/creation process?
- 4) What type of regulations exist and at which regulatory level must the "*framework*" change occur?
- 5) Which position or authority within the organization has sufficient capacity to approve such a reform?
- 6) Who will be in charge of its unveiling to, for example, the association's members, stakeholders and partners?
- 7) Who will be in charge of preserving and archiving the reform package to guarantee transparency and accountability for any future inquiries?
- 8) Who will supervise the entire proceedings so as to guarantee they are compliant with the applicable regulations of the sports association?

The questions are on the table, so once again and in order to indulge *EINSTEIN*, if the problem is genuinely and effectively defined and analyzed for 55 minutes, it should not take more than 5 minutes to answer all of them and move forward.

9. Resources for an effective integrity program. The tank has to be full

The ISO 19600 dedicates in its Chapter 7 "*Support*" a first subsection on Resources, where it introduces this key aspect by stating, "*The organization should determine and provide the resources needed for the establishment, development, implementation, evaluation, maintenance and continual improvement of the compliance management system appropriate to its size, complexity, structure and operations.*"⁴⁸

In a nutshell, let's change the word compliance for "*integrity*" or "*sports integrity*" and you get exactly what a sports association needs: the sufficient resources for the maintenance and continual improvement of their sports integrity function (management system).

The investment vs. cost "*boxing bout*" dilemma

In essence, sports associations are legal persons that need to manage their capacity and reach to comply with their statutory objectives and the acquired commitments and regulatory provisions they fall under. That said, a sports association has a lot to deal with: a) operational costs related to their premises/offices/staff, b) sports competitions costs, c) national taxation, d) development funds, e) professional and amateur competitions expenses. Indeed, we can go on and on and on, with an extensive list of costs and expenses. The key here is perspective and, of course, a mandatory provision (*i.e.* at international, regional or national level) where sports integrity is not seen as a cost to the sports association or its members, but rather an investment and a means to protect and improve the quality and credibility of their main product: the sports competitions or events that are organized under such association's mandate/administration. This round is not an easy one to win, since associations could argue lack of financial capacity and human resources to put in place an effective and continual integrity function. That is why such investment should be thoroughly regulated, with a "*no excuses*" policy alongside a "*comply or explain*" accountability protocol. It may hurt, and you might even get hit (including blows below the belt), but to win this round is to set a precedent on a historical and unprecedented treatment of sports integrity.

Equally, the ISO 19600 establishes that such resources should include "*financial and human resources, as well as access to external advice and specialized skills (...) reference material on compliance (integrity) management and legal obligations, professional development, and technology.*"⁴⁹ Let's focus on the human resources, where once again the need to put "*the right people in the right place*" is of essential importance for the integrity function to be not only sustainable but also efficient and impactful in the pursuit and achievement of its objectives. Adopting ASCOM's take on this, both the association and the integrity person responsible (*i.e.* chief, officer, director, etc.) "*must ensure they have adequate resources to carry out their mandate (right people in the right place). (...) the Compliance (Integrity) Officer must consider how to train and hire specialists.*"⁵⁰

⁴⁷ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 8. 'Compliance policies and code of conducts', p. 237.

⁴⁸ ISO - International Organization for Standardization. 19600 Compliance management systems - Guidelines (www.iso.org), p. 14.

⁴⁹ *Ibid.*

⁵⁰ Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 6. 'The role of the Compliance Officer', p. 197.

10. Promoting integrity. The audience must know

The way a sports association decides to handle and position its approach on sports integrity would most likely determine how its media and communication strategy, proactivity, awareness and risk management on this field will be managed and executed. Quoting *George Bernard SHAW*, “*The single biggest problem in communication is the illusion that it has taken place.*”⁵¹ In other words, it is a mistake to believe that just because a sports association has already addressed the importance of integrity and the safeguarding of its respective sport once (or twice) before through its corporate/institutional communications, that this is enough and that no continued work ethic on the promotion of integrity should be structured from a media and communication angle.

When identifying instruments of good governance in the compliance field, the sharing or registering of information through - *i.e.* a corporate website - is clearly defined and, in some cases, set as a mandatory requirements for companies depending on their condition of obliged subjects (*i.e.* financial markets). Bringing this matter to the sports integrity field, to be transparent and to invest in an integrity section/webpage in the respective sports association website should not be an “*if*” but a “*must*”, part of the mandatory and (ideally) standardized criteria within a specific roadmap/strategy/vision of a respective sports association (*i.e.* at an international, regional, national dimension).

The external communication paradigm. It could be said that for some part of sports management, if the integrity talk comes into play and is freely and publicly addressed and discussed, it could mean that their respective sport (or sport competition) has “*credibility*” issues/concerns/threats that would create reputational risk, if not damage, to the sports association and its members. This is the “*let’s bury the integrity talk*” approach. On the other hand, we have the “*let’s promote the integrity talk approach*”, which goes hand in hand with what is known in the compliance field as the purpose of external communication, which defines itself as the “*set of messages issued by the organization to external audiences (...), with the ultimate goal of benefiting the organization itself.*”⁵²

Therefore, external communication, for the purposes of sports integrity and withing the strategy/roadmap/vision of the respective sports association, should entail as minimum criteria the following:

- *Project a favorable image of the sports association.*⁵³ Working on and holding the integrity flagship should be a matter of leadership, determination, and responsibility, which are all positive and constructive qualities that would reflect the association’s mandate and administration.
- *Develop operational and development aspects of integrity.*⁵⁴ It is the duty of the sports association to create and inform about all the activities and efforts that contribute to the image of the association in relation to sports integrity.
- *Maintain relationships with members and stakeholders.*⁵⁵ There is no better way for a sports association to keep close to its members and stakeholders than with a healthy and constructive communication strategy, and since sports integrity is a field that has to be nurtured and worked on, on a day-to-day / week-to-week basis, it needs constant communication through its appropriate channels and platforms. Equally, an international sports association cannot really promote integrity without being open, transparent and proactive in its approach to sharing information and efforts in this field (*i.e.* both of the association itself and from its members). The sports association has to lead by example so that its members then follow (or comply with) the same standards of communication, transparency and information gathering that would be needed to fit the set criteria.

11. Integrity investigations. Risk-based approach, is it necessary?

Just briefly on integrity-related investigations conducted by sport associations; which can be summarized in the question of, whether or not sports associations should assume the risk when conducting investigations and - even more importantly - when deciding to fight the legal battles before the competent judicial or sporting judicial bodies. Quoting *T.S. ELLIOT*, “*Only those who will risk going too far can possibly find out how far it is possible to go.*”⁵⁶ In the same vein as the mainstream risk management doctrine of compliance, a risk-based approach is needed when deciding to take forward - or not - integrity-related

51 Gwendolyn GALSWORTH, ‘Visual Thinking: The biggest problem in communication’. www.visualworkplace.com

52 Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 10. ‘Communication, training and awareness’, p. 294.

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 www.tseliotociety.uk

claims or alerts into preliminary/official proceedings by a respective sports association.

The risk-based approach, quite popular in compliance-related core matters like money laundering and financing of terrorism, can be understood as the “*identification, evaluation and prior comprehension of the risks, and that the measures that are adopted to mitigate them are proportionate (...) this does not imply that the risk should be eliminated - zero risk - (...) regardless of the adopted measures to identify and mitigate the risks, the risk will always be there.*”⁵⁷ It is certainly true that sports associations have to be responsible when dealing with investigations, regardless of their nature (*i.e.* ethical, disciplinary, integrity, compliance, etc.), and that relevant aspects for such investigations to prosper have to be presented and clearly understood, like for example, its legal framework (and amongst its most important features, the applicable standard of proof). However, there is a clear risk (in this case, for sports integrity) when associations (*i.e.* those that are not bound by the criminal standard of proof - beyond a reasonable doubt - in their respective proceedings) decide to only conduct and take forward investigations that surpass (or appear to surpass) their applicable standard of proof (without actually putting the standard of proof to the test) and place themselves in a “*safety net*” position where investigations would only prosper when there is a guarantee (or appearance of) that the result (*i.e.* sanction) is basically undeniable.

In a nutshell, and in consonance with the risk appetite doctrine that is established, *inter alia*, in the “*ISO 73:2009 Risk Management and addressed as well in the ISO 31000: 2018 Risk Management – Guidelines*”⁵⁸, if sports associations only pursue investigations or cases that they are fully confident of winning, then a significant number of integrity cases will be left behind, without a chance to be challenged and fought in the respective legal battlefields. Ultimately, this would prevent the deliberation of brave decisions by the respective judicial bodies (to be consequently fought once more in the appeal and arbitration proceedings if needed), as well as making the own sports association better equipped by learning from the flaws and identifying areas of improvement to be addressed in future investigations (and, of course, learning from defeat). Most importantly, this would generate relevant decisions (in some cases, jurisprudence) that would allow sports to win and earn hard-fought, landmark decisions in the sports integrity field.

Taking a chapter from the risk appetite book, a sports association has to define how much risk it is willing to accept in search of its value as a leader in the sports integrity field. *GOETHE*⁵⁹ said it best, “*The dangers of life are infinite, and among them is safety.*”⁶⁰

12. Follow-up and review procedures: the sports integrity version of “the Hammer and the Dance”

Supposing we have learned something in these times of pandemic and confinements, it is that strategies, protocols, programs and the like have to be followed up and reviewed to ensure their efficiency and impact towards the proposed goals and objectives. We cannot really end these 12 lessons or takeaways without remembering the words of *Winston CHURCHILL*, “*You must look at facts because they look at you*”.⁶¹ Sports associations, in the same way that companies subject to compliance requirements must, should be committed and requested to (either by their own regulatory framework or through the applicable international sporting regulations) periodically follow up and review their integrity program, action plan and/or agreed objectives (in other words, their obligations and commitments on sports integrity).

The policy a sports association should use to define how to react to compliance or non-compliance of its respective members is a simple one, and we all should know it by now: The Hammer and the Dance.⁶² The analysis is almost self-explanatory:

- If a respective member (*i.e.* be it a national sports federation of an international federation, a sporting club at the league level, a regional federation, etc.) does not comply with the integrity-related obligations and acquired commitments, then the hammer will fall. For example, this would mean accountability on the obligations and commitments to be requested/reviewed and sanctions enforced in case no remedy is proposed and executed promptly by the association. It is important to understand that we are talking about a scenario where the resources to reach such obligations and commitments exist and have been established as mandatory criteria by upper management and/or administration of the respective association or competent authority.
- If the respective member is complying fully with its obligations and commitments on integrity, then let it dance all the way to success. This would mean

57 Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 7. ‘Compliance risk management’, p. 222 (free translation.) See also GAFI (Financial Task Force). www.fatf-gafi.org

58 ISO 31000 does not use the phrase ‘*risk appetite*’, even though it is defined in the ISO Guide 73:2009 Risk management – Vocabulary. Risk appetite is defined in Guide 73 as the amount and type of risk that an organisation is willing to pursue or retain. Institute of Risk Management, ‘*Standard Deviations. A risk practitioner guide to ISO 31000*’, 2018. www.theirm.org

59 www.newyorker.com

60 www.goodreads.com

61 International Churchill Society. winstonchurchill.org

62 ABC News. abc7news.com

that a periodic review of such association's efforts has been done, and its achievements have been properly documented, with *"established key risk indicators and key risk performance indicators to efficiently monitor their level of effectiveness."*⁶³

Lastly and quite importantly, is the question of how to evaluate or measure that the dance is actually effective. In order to do this, we can take a page out of the U.S. Department of Justice Criminal Division's Evaluation of Corporate Compliance Programs⁶⁴, where three main questions have to be addressed and answered (below are the questions adjusted to the sports integrity field):

- Is the sports association's integrity program well designed?
- Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
- Does the sports association integrity program work in practice?⁶⁵

This evaluation alone would need enough room for a whole new and independent article, determining its own lessons and takeaways for the enhancement, improvement and overall progress of the sports integrity field.

Third step. Closing remarks

Sports integrity as a living discipline of expertise: The show must go on

Let this be an article of opinion that leads to constructive conversations, debates and criticism from all passionate professionals and individuals who directly or indirectly have a say and a vision of how sports integrity should be conceived, moved forward, and ultimately progress. There is much to learn and grasp from the compliance approach and experience, in essence, there are many more lessons to gain from this expert field of leadership, accountability and risk management. In the words of *Frederick WILCOX*, *"Progress always involves risks. You cannot steal second base and keep your foot on first."*⁶⁶

For those of you who want to share your thoughts with the author, I would be more than grateful to hear from you and constructively exchange our views, discrepancies, and above all, our shared passion and understanding (or misunderstanding) of sports integrity and its undeniable potential.⁶⁷

What about we start talking about Sporting Compliance?

In the current sports law landscape, we find the field of compliance which is said to be applied to sports, but in general (there, of course, can be exceptions to this), these are compliance provisions, regulations, guidelines and best practices that are requested from or imposed on sports associations as legal persons (and of course on the individuals - obliged subjects - that compose its organization and scope). In other words, we are mainly talking about obligations and acquired commitments of sports associations related to good governance. This can be called *Compliance in sports* or *Compliance applied to sports*.

A new approach is to intertwine the compliance and integrity fields and to introduce a discipline that would gather all identified core content of sports integrity (see *infra*) and create a culture of compliance, efficiency and accountability aimed at the protection of sports events and competitions from all integrity-related threats, which would necessarily entail the establishment of a set of obligations and acquired commitments by and on the sports association and its members. These actions and processes (in view of a defined strategy/vision/roadmap) would be reviewed periodically by an (independent) authority to ensure that the work that needs to be done actually occurs (*i.e.* capacity building, training, investigations, policies, reporting mechanisms, whistleblowing protection, prosecutions, etc.).

This new field could be called, for example, *Sporting Compliance*⁶⁸, which would be understood, *inter alia*, as the (minimum but necessary) mandatory criteria and actions (*i.e.* obligations and acquired commitments) that a sports association would have to comply with to best protect their sports from corruption, reputational risk and all other integrity-related misconduct that affects its sporting events and competitions.

63 Spanish Compliance Association (ASCOM). Material for the preparation of the CESCO Compliance Certification. Module 9. 'Due diligence proceedings and conflict of interest prevention', p. 263.

64 U.S. Department of Justice, Criminal Division. 'Evaluation of Corporate Compliance Programs', Updated June 2020. www.justice.gov

65 *Ibid.* p. 2.

66 www.theoleballgame.com

67 Author's contact information: rodrigo@ariasgrillo.com

68 Each sports association could potentially re-brand this discipline in accordance with their organizational chart (*i.e.* Basketball Sporting Compliance Department, Handball Sporting Compliance Division, Cricket Sporting Compliance Unit, or just Volleyball Compliance, Cycling Compliance or Baseball Compliance). All these personalized working groups would fall under the generic Sporting Compliance category.

Lastly, a few honey-drops of how this new area/approach/discipline of Sporting Compliance could be seen and understood, with the aim of conceiving its true benefit for sports associations around the world (irrespective of its sports modality and structure):

- Sporting Compliance would avoid fragmentation, and therefore misdirection and mis-prioritization by a sports association regarding its integrity (understood in its broad, multidisciplinary scope) related obligations towards the protection of the sport.
- All core content of integrity, which is basically all situations of risk, would fall under the same roof: *i.e.* anti-discrimination, manipulation, harassment, corruption, child safeguarding, etc.; would all be treated under the same leadership and management, which would allow the majority of sports associations around the world to justify the existence of such a field, making it easier to finance and train their personnel to execute multidisciplinary tasks for the agreed objectives to be achieved.
- An easy example of the above is the all-too-well-known media campaigns from sports associations. Instead of having a fragments sports association, with different campaigns (led by different leadership and management) flowing around addressing topics related to integrity, a centralized campaign and sustained strategy to keep it running and relevant (grouping all the core content) would suffice for the association to place the proper priority to all the defined areas of concern/risk that they determine should be addressed. Equally, financial resources would be optimized.
- The avoidance of duplication to tasks and resources: Sporting Compliance would centralize all matters and best distribute both operational and development costs within a sports association. As a clear example, if a capacity-building event is done (*i.e.* training session), such an event could conveniently address all matters concerning sports integrity and not only isolated content of risk (saving a significant amount of resources for the respective sports association).
- Sporting Compliance would, likely, face resistance and hesitation by some sports associations that would ultimately be subject to the respective obligations and acquired commitments. This is understandable (to an extent) since no one really wants more duties and obligations falling on their shoulders these days. This is where leadership comes along and where the tone from the top should persevere.
- Sporting Compliance would set mandatory standards (obligations and acquired commitments) to protect sports in all its forms: professional and amateur sports, men and women sports, youth and grassroots, e-sports, team and individual sports., etc. No sport should really be left behind, no athlete or competition unprotected.
- The short, medium and long term benefits of the implementation of this new discipline would be undeniable for sport, creating a new culture of protection of the sports events and competitions and elevating the level of commitment, duties, and professionalism of all its participants: from athletes to teams, clubs, fans, spectators, referees, management and associations.
- As a final note, doctrine in the matter points to 1977 as one of the first milestones of Compliance, through the passing of the Foreign Corruption Practices Act⁶⁹ in the United States as a response to a bribery scandal. It's taken some time, but Compliance, when truly implemented, today represents an essential aspect of governance. Sport, in almost every modality, has gone through enough scandals of its own, it is time for decision-makers to enable Sport to be strong enough to take care of itself.

*"Integrity is the seed of achievement. It is the principle that never fails."*⁷⁰

69 U.S. Department of Justice, Criminal Division. 'Foreign Corrupt Practices act'. www.justice.gov

70 Earl NIGHTINGALE. www.nightingale.com

Training Compensation in light of the Recent Jurisprudence of FIFA DRC and CAS



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→ **Training compensation - Court of Arbitration for Sport (CAS) - FIFA Dispute Resolution Chamber (FIFA DRC) - Player loan**

In this article, the author will discuss the legal framework of training compensation in an international dimension as established in the FIFA Regulations on the Status and Transfer of Players² and its recent announced amendments in relation to training compensation.³ All relevant recently published jurisprudence of the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport will be discussed in light of the applicable provisions.

Background

Already 25 years ago, the famous *BOSMAN* case led to the abolition of the actual transfer compensation between clubs at the end of a player's contract.⁴ However in the past, there were still some legal openings to protect clubs that were involved with the training and education of players. Thus FIFA introduced a training compensation system for clubs that were involved in the training and education of players. The 2001 edition of the FIFA Regulations on the Status and Transfer of Players (RSTP) were the first rules that contained provisions which regulated the compensation for the training and education of young players. According to FIFA Circular no. 769 dated 24 August 2011, the system of training and education was designed to encourage more and better training of young players and to create solidarity among clubs, by awarding compensation to clubs that had invested in the careers

of its former players.⁵ The *rationale* for FIFA's training compensation system is to ensure that training clubs are adequately rewarded for the efforts and costs they have invested in training young players.⁶

In general

In accordance with the new Article 20 of the RSTP⁷, March 2020 edition, training compensation must be paid to a player's training club(s) when a player is registered for the first time as a professional and each time a professional is transferred until the end of the calendar year in which the player reaches the age of 23.⁸ The obligation to pay training compensation arises

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² If the transfer takes place in one national association, the national regulations of the relevant association are applicable.

³ The amendments are introduced to ensure an efficient and consistent approach in preparation for the future introduction of the Clearing House. See [FIFA Circular no. 1743, 14 December 2020](#).

⁴ [ECJ, 15 December 1995, Case C-415/93, Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liégeois SA v. Jean-Marc Bosman, SA d'Economie Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Association v. Jean-Marc Bosman](#) [1995] ECR I-4837.

⁵ [FIFA Circular no. 769, 24 August 2001](#). See also [FIFA DRC, 10 December 2019, Strumia cases](#) and F.M. de Weger, 'The Jurisprudence of the FIFA Dispute Resolution Chamber', The Hague, T.M.C. Asser Press 2016.

⁶ [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 47.

⁷ Applicable as of January 2021. As from the January 2021 edition of the RSTP, the calculation of the training compensation will be based on the calendar year of the birthday of the player, as opposed to the season. See, in this regard, [FIFA Circular no. 1743, 14 December 2020](#).

⁸ The nature of the player's first registration as a professional must be reflected by an international transfer of the player in TMS or by the international player passport provided by the affiliated national association; see FIFA DRC, 19 June 2020, Tompte.

It is constant jurisprudence of the FIFA DRC that training compensation is calculated upon the football seasons of the old club of the player, not of the new club, in order to prevent clubs not being rewarded for their work in training players when they move to associations which have different season dates. See, in this regard, [FIFA DRC, 26 September 2019, no. 09191934](#). With the amendments of the RSTP as of January 2021, this will not be an issue any more.

whether the transfer takes place during or at the end of the player's contract.⁹ The rules regarding training compensation are laid down in more detail in Annexe 4 of the RSTP, which will be discussed throughout the article. Furthermore, it is important to mention that the provisions concerning training compensation are not applicable to women's football.

From Article 2 par. 2 Annexe 4 to the RSTP, it follows that training compensation is not due if:

- the former club terminates the player's contract without just cause (without prejudice to the rights of the previous clubs);¹⁰ or
- the player is transferred to a category 4 club; or,
- a professional reacquires amateur status on being transferred.¹¹

When a club, with which the player was registered and trained, has ceased to participate in organised football and/or no longer exists due to, in particular, bankruptcy, liquidation, dissolution or loss of affiliation, the association of that club is entitled to receive the training compensation instead. This compensation shall then be reserved for youth football development programmes in the association(s) in question.¹²

The obligation to pay training compensation

As established, training compensation shall be paid to a player's training club(s) when a player is registered for the first time as a professional and each time a professional is transferred until the end of the calendar year in which the player reaches the age of 23.¹³

First professional contract

When a player signs his first contract as a professional, training compensation is payable until the end of the calendar year of his 23rd birthday. In that respect, it

is important to determine the status of the player. A player is considered a professional when he has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs.¹⁴ The long-standing jurisprudence of the FIFA Dispute Resolution Chamber (FIFA DRC), which was reiterated in a decision of 2019, has established that a player's remuneration is a decisive factor in the determination of the status of the player and may well fall short of a living wage, but as long as it exceeds the expenses effectively incurred by the player, the criteria of Article 2 of the RSTP are met.¹⁵ This means that, if the player signs a written contract for the first time before calendar year of his 23rd birthday and gets paid more than merely the expenses that he effectively incurs in return for his footballing activity, training compensation is due. Contrarily, this means that if the player signs a first written contract, but does not get paid more than the expenses he effectively incurs in return for his footballing activity, the player must be considered as an amateur player and as a consequence thereof, no training compensation is due.¹⁶ On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation within 30 days of registration to every club with which the player has previously been registered (in accordance with the players' career history as provided in the player passport)¹⁷ and that has contributed to his training starting from the calendar year of his 12th birthday. The amount payable is calculated on a prorata basis according to the period of training that the player spent with each club.¹⁸

⁹ The obligation to pay training compensation is without prejudice to any obligation to pay compensation for breach of contract; see Art. 1 par. 2 Annexe 4 RSTP.

¹⁰ According to the FIFA Commentary, this club should not be rewarded for this behaviour. See also [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 67.

¹¹ If a player re-registers as a professional within 30 months of being reinstated as an amateur, his new club shall pay training compensation in accordance with Article 20 of the RSTP; see Art. 3 par. 2 RSTP. See also [FIFA DRC, 8 May 2020, Cooper](#).

¹² Art. 3 par. 3 Annexe 4 RSTP.

¹³ See Art. 20 RSTP. As from the January 2021 edition of the RSTP, the calculation of the training compensation is based on the calendar year of the birthday of the player, as opposed to the season.

¹⁴ See Art. 2 par. 2 RSTP. See also [FIFA DRC, 27 July 2020, Victor cases](#). See also FIFA DRC, 5 December 2019, [Andrianarimanana](#) which decision is confirmed by CAS in [CAS 2020/A/6796 Andrianarimanana Aro Hasina Andrianamimanana & Kaizer Chiefs FC v. Fosa Juniors FC & FIFA](#), award of 27 October 2020. According to CAS jurisprudence, the status of the player as a "professional" is exclusively defined in the RSTP without any reference to national regulations. See, in this regard, [CAS 2016/A/4843 Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & FIFA](#), referring to [TAS 2009/A/1895 Le Mans Union Club 72 c. Club Olympique de Bamako](#), quoted in: Dubey J.-P., *'The jurisprudence of the CAS in football matters (except Art. 17 RSTP)'*, CAS Bulletin, 1/2011, p. 4.

¹⁵ [FIFA DRC, 18 October 2019, no. 10190097](#). The FIFA Regulations do not stipulate a minimum wage. The player can still be considered as a non-amateur, even if he agrees to perform services for a meagre salary. See in this regard [CAS 2016/A/4843 Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & FIFA](#), par. 98, referring to [CAS 2006/A/1027 Blackpool F.C. v. Club Topp Oss](#), par. 18.

¹⁶ See also [F.M. DE WEGER, 'The Jurisprudence of the FIFA Dispute Resolution Chamber'](#), The Hague, T.M.C. Asser Press 2016.

¹⁷ The player passport plays a fundamental role in establishing the entitlement of the clubs to training compensation.

¹⁸ See Art. 3 Annexe 4 RSTP. Only the precise period during which a player was effectively trained by a club must be taken into consideration. In other words, this means that to calculate training compensation, it is not only entire seasons that are to be taken into account. See FIFA Commentary explanation, Art. 3 par. 1 Annexe 4, p. 115, footnote 152.

Transfer between clubs of two different associations¹⁹

Aside from the situation where the player signs his first professional contract before the end of the calendar year of his 23rd birthday, training compensation is also due if the professional is transferred between clubs of two different associations before the end of the calendar year in which he reaches the age of 23.²⁰ It is well-established in the jurisprudence of the FIFA DRC, and reiterated in a decision in 2019, that if two clubs conclude a transfer agreement providing for the respective financial obligations, *i.e.* a transfer fee, training compensation is considered as being included in the transfer fee. However, if the parties wish to stipulate the contrary to the aforementioned, *i.e.* training compensation being due in addition to the agreed transfer fee, the clubs need to explicitly mention it in the transfer agreement.²¹ In the case of subsequent transfers of the professional, training compensation will only be owed to his former club for the time he was effectively trained by that club. In this case, the deadline for payment of training compensation is also 30 days following the registration of the professional with the new association.²²

Training period

It follows that a player's training takes place between the ages of 12 and 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. If the player has already terminated his training before the age of 21, then training compensation shall be payable until the end of the calendar year in which the player reaches the age of 23, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training.²³ The burden of proof to establish that a player completed his training period before his 21st birthday lies with the club that claims it.²⁴ There are no specific criteria as to when

the training period can be considered terminated. This always has to be assessed on a case-by-case basis.²⁵ The rule is that a training period terminates when a player turns 21, the exception is where this moment occurs before a player's 21st birthday. FIFA applies a strict approach to the completion of training, so as not to jeopardise the right of training clubs to receive training compensation. Even if a player has played many matches for the first team in a first division, it was still not considered enough in certain cases.²⁶ In an award of the Court of Arbitration for Sport (CAS) of 2019, it was again confirmed that the wording of Article 1 par. 1 Annexe 4 of the RSTP makes it clear that such exception should not be accepted lightly, as it requires that it is evident that a player has terminated his training period before his 21st birthday for an exception to be made.²⁷

“ Both the FIFA DRC and CAS are generally still reluctant to decide a player's training period is terminated ”

Although regular appearances in the A-team of a club have occasionally been considered sufficient reason to conclude that a player finished his training period,²⁸ the majority of CAS jurisprudence suggests that regular appearances in the A-team of a club do “*not necessarily constitute the only and decisive factor for the completion of a player's training.*”²⁹ Several other factors are to be taken into account, such as: (i) the player's value to a club, reflected in the player's salary, in the loan fee that is achieved for his services or in the value of the player's transfer; (ii) the player's public notoriety at the national and international level; (iii) his position at the club, if established as a regular or even holding the captaincy; (iv) the level of games; (v) his regular inclusion in the national team and so forth.³⁰

So, both the FIFA DRC and CAS are generally still reluctant to decide a player's training period is terminated. Several important factors are to be taken into consideration when determining the duration of the training period, such as: (i) the player's value to

20 If the transfer takes place within one association, the national regulations are applicable. In that respect, it is important that according to Article 1 par. 2 of the RSTP, March 2020 edition, the national regulations should also provide a system to reward the clubs investing in the training and education of young players.

21 See [FIFA DRC, 26 September 2019, no. 09191934](#).

22 See Art. 3 Annexe 4 RSTP.

23 See Art. 1 par. 1 Annexe 4 RSTP.

24 See [FIFA DRC, 3 October 2019, no. 10191371](#). See also [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 67 and [CAS 2014/A/3553 FC Karpaty v. FC Zestafoni](#).

25 [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 65.

26 [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 70.

27 [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 93.

28 [CAS 2003/O/527 Hamburger Sport-Verein e.V. v. Odense Boldklub](#); [CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander](#).

29 [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 65, referring to [CAS 2008/A/1705 Grasshopper v. Alianza Lima](#), par. 43. See also [CAS 2017/A/5090 Olympique des Alpes SA v. Genoa Cricket & Football Club](#), par. 83.

30 [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 94, referring to [CAS 2017/A/5090 Olympique des Alpes SA v. Genoa Cricket & Football Club](#), par. 83-84. See also [CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander](#) and [CAS 2008/A/1705 Grasshopper v. Alianza Lima](#).

a club, which is reflected in the salary, (ii) his regular inclusion in the national team; (iii) the number of games played by the player in the “A” team of the club; as well as (iv) the player’s technical skills.

Loan

According to Article 10 par. 1 of the RSTP, professionals may be loaned to another club on the basis of a written agreement between the professional and the clubs concerned.³¹ A club where the player plays on a loan basis is entitled to receive training compensation.³² A loan transfer almost always contains an educational element, especially with young players, and thus cannot be considered in the same way as a regular, permanent transfer. The original club also usually carefully chooses the club where such a player is placed, in order to safeguard the best possible development for the player’s career. The system of training compensation and loan transfers, in fact, often rests upon the same underlying goal, the education and training of young players. Thus, ensuring that the training clubs which register players on a loan basis also benefit from the training compensation mechanism was also one of the main goals of the legislator when drafting Article 10 par. 1 of the RSTP.³³ Furthermore, loan transfers are often free of charge. In the end, a different approach would force the loaning club to not only receive no remuneration but to even have to pay for the loan.³⁴

From the latest jurisprudence, it follows that it has been consistently established that, when a player registers with a club affiliated to a different member association (*i.e.* the new club) from the one where he was previously registered (*i.e.* the former club), any club(s) that may have had the player on loan from the player’s former club should be entitled to claim training compensation from the new club.³⁵ The last sentence of Article 10 par. 1 of the RSTP stipulates that any loan is subject to the same rules applying to the transfer of players, including the provisions on training compensation and the solidarity mechanism. One of the aims of the said provision is to ensure that training clubs, who register players on a loan basis also benefit from the solidarity mechanism and training compensation. This approach is also in line with the FIFA DRC’s well-established jurisprudence that all clubs

which have contributed to the training and education of a player from the age of 12 are, in principle, entitled to training compensation for the timeframe that the player was effectively trained by them.³⁶ Any loan(s) that take place during a player’s registration with a former club do not interrupt the chain of entitlement of training compensation.³⁷ In other words, the period starting from the player’s original registration with a club up until his registration with a new club constitutes one timeframe, irrespective of any loan(s) that may have taken place during that period.³⁸ The nature of a players’ registration, whether on a definite or on a temporary basis with a club claiming training compensation, is in fact not relevant with respect to the question as to whether or not such club is entitled to receive training compensation for the period of time that the player was effectively trained by it.³⁹

“ The analogy established in Article 10 par. 1 of the RSTP could not be extended to the case in which a player is loaned to a club and, thus, is not being definitively transferred to the latter club ”

However, it is worth considering that the analogy established in Article 10 par. 1 of the RSTP could not be extended to the case in which a player is loaned to a club and, thus, is not being definitively transferred to the latter club. In other words, the loan transfer of a player as well as the return of the player from the club that accepted him on loan to the club of origin do not constitute a subsequent transfer in the sense of Article 3 par. 1 sent. 3 Annexe 4 to the RSTP.⁴⁰ Thus, the obligation to pay training compensation arises only in cases where a player is definitively transferred to another club belonging to a different association.⁴¹ The FIFA DRC clarified in 2020 that it could not have been the intention of the legislator of the relevant regulatory provision (Art. 10 par. 1 of the RSTP) to trigger the

³¹ See also [FIFA DRC, 22 September 2019, no. 09190767](#).

³² When granting training compensation to a club who had a player on loan from a former club before registering from said former club to a new club within the EU/EEA, the training category of the loaning club should be taken into consideration, and not the category of the loanee club.

³³ [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 57.

³⁴ [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 60.

³⁵ [FIFA DRC, 21 August 2020, Franchi](#).

³⁶ [FIFA DRC, 3 October 2019, no. 10193416](#); [FIFA DRC, 23 October 2019, no. 10192893](#); [FIFA DRC, 18 June 2020, Ceter](#).

³⁷ Although loans are, within the sense of the Regulations only permitted for professional players when taking place between two clubs affiliated to two different member associations (cf. Art. 10 RSTP), the DRC acknowledged that at national levels, member associations may sanction loans of amateur players between their affiliated clubs.

³⁸ [FIFA DRC, 21 August 2020, Franchi](#). See also [CAS 2018/A/5513 Sport Club Internacional v. Hellas Verona Football Club S.p.A.](#), par. 48, referring to [CAS 2013/A/3119 Dundee United FC v. Club Atlético Vélez Sarsfield](#) and [CAS 2014/A/3710 Bologna FC 1909 S.p.A. v. FC Barcelona](#).

³⁹ [FIFA DRC, 12 April 2019, no. 04191559](#); [FIFA DRC, 22 July 2019, no. 07191442](#); [FIFA DRC, 19 September 2019, no. 09192966](#); [FIFA DRC, 22 September 2019, no. 09190767](#); [FIFA DRC, 2 October 2019, no. 10191448](#); [FIFA DRC, 3 October 2019, no. 10193416](#); [FIFA DRC, 14 October 2019, no. 10194441](#); [FIFA DRC, 23 October 2019, no. 10192893](#); [FIFA DRC, 21 November 2019, no. 11194495](#); [FIFA DRC, 18 June 2020, Ceter](#).

⁴⁰ See also [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 74.

⁴¹ [FIFA DRC, 3 October 2019, no. 10193416](#) and [FIFA DRC, 15 October 2019, no. 10193153](#).

consequences of Article 3 par. 1 Annexe 4 to the RSTP on the occasion of a transfer on a loan basis and, thus, potentially depriving the loan of its essential flexibility and function of providing young players with the opportunity to gain practical experience at another club in order to develop, in a positive way, personally and eventually, also for the benefit of the player's new club.⁴²

Furthermore, the jurisprudence of CAS also established that the obligation to pay training compensation only arises in cases where a player is definitively transferred from one club to another. This approach is considered consistent with the actual *rationale* of the training compensation system, which is to encourage the recruitment and training of young players.⁴³ To hold that the loan of a player would interrupt the training period, could, in the opinion of CAS, deter training clubs from loaning players. It frequently occurs in the world of football that young players are not proficient enough to play for the first team of their club. In order to prepare these players for the first team, or to give these players a chance to train and play in order to try and reach the required level to play for the first team, a solution regularly used is to loan the player concerned to another team, in order for the player to gain experience with another club, and to prepare or give the player the chance to reach the requisite professional level for playing in the first team of the training club. However, suppose the making of such loan would entail the consequence that the training club would thereby waive its entitlement to training compensation. In that case, the training club might decide not to loan the player to another club merely in order to secure its entitlement to training compensation. In such a situation, the player would be deprived of the very training considered to be the most suitable for him. CAS regards such a situation as undesirable and, in 2019, endorsed the view of the FIFA DRC insofar that it states that any other interpretation of the FIFA Regulations would potentially deprive young players of the opportunity to gain practical experience in official matches for another club in order to develop their footballing skills in a positive way.⁴⁴

Thus, the obligation to pay training compensation arises in cases where a player is definitively transferred from one club to another club belonging to a different association, but not when he is temporarily transferred to another club while still being contractually bound to his club of origin (yet, with the effects of the relevant contract being temporarily suspended), such as a loan.

Hence, the relevant entitlement can only be claimed against a new club that acquires the services of a player on a definitive and permanent basis, subject to the fulfilment of the prerequisites established in Article 20 and Annexe 4 of the RSTP. As said, within the framework of loans and for the purposes of the rules governing training compensation, the period of time that the player was registered on loan and the period of time that the player was registered with the club of origin should be considered one entire timeframe.⁴⁵

Within the EU/EEA

Within the European Union (EU)/European Economic Area (EEA), there are special provisions relating to training compensation. Article 6 Annexe 4 of the RSTP is a *lex specialis* to the general rule and is limited to a well-defined geographic scope.⁴⁶ In other words, it is an exception to the general principle of training compensation.⁴⁷ The title of this provision clearly suggests that its scope is narrowly circumscribed by the wording of paragraph 1⁴⁸ and paragraph 2.⁴⁹

As discussed above, as a general rule, a player's training takes place between the ages of 12 and 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. The final year of training may occur before the calendar year of the player's 21st birthday, if it is established that the player completed his training before that time.⁵⁰ However, Article 6 par. 3 Annexe 4 of the RSTP contains special provisions in addition to this general rule. From this article it follows that, when players are moving from one association to another association inside the territory of the EU/EEA, and the former club does not offer the player a contract,⁵¹ no training compensation is payable unless the former club can justify that it is entitled to such compensation.⁵²

⁴⁵ [FIFA DRC, 22 July 2019, no. 07191442.](#)

⁴⁶ See for example [FIFA DRC, 3 October 2019, no. 10191371](#) and [FIFA DRC, 19 September 2019, no. 09190906.](#)

⁴⁷ [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 67, referring to [CAS 2011/A/2682 Udinese Calcio S.p.A v. Helsingborgs IF](#) and [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC.](#)

⁴⁸ "For players moving from one Association to another inside the territory of the EU/EEA."

⁴⁹ "Inside the territory of the EU/EEA."

⁵⁰ Art. 1 par. 1 Annexe 4 RSTP foresees the potential early termination of the training period of a player prior to the age of 21 and is applicable to clubs based in countries outside of the EU/EEA. See [FIFA DRC, 3 October 2019, no. 10191371.](#)

⁵¹ The CAS and the DRC decided, several times, that the obligation of a club to offer the player a contract when claiming training compensation is a requirement which only needs to be met within the EU/EEA, as also follows from the RSTP. This means that if the training club is not located within the EU/EEA, the aforementioned provision does not apply.

⁵² [FIFA DRC, Urminsky, 14 July 2020.](#) This is without prejudice to the right to training compensation of the player's previous club(s); see Art. 6 par. 3 Annexe 4 RSTP.

⁴² [FIFA DRC, 18 June 2020, Ceter.](#)

⁴³ [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 75 referring to [CAS 2011/A/2559 Genoa Cricket FC S.p.A. v. Sports Club Corinthians Paulista](#), par. 2.17 and [CAS 2013/A/3119 Dundee United FC v. Club Atlético Vélez Sarsfield](#), par. 113.

⁴⁴ [CAS 2019/A/6096 FC Lugano SA v. FC Internazionale Milano S.p.A.](#), par. 75 and [CAS 2013/A/3119 Dundee United FC v. Club Atlético Vélez Sarsfield](#), par. 112.

TRAINING COMPENSATION IN LIGHT OF THE RECENT JURISPRUDENCE OF FIFA DRC AND CAS

The former club must offer the player a contract in writing, which offer must be at least of an equivalent value to the current contract, *via* registered post at least 60 days before the expiry of his current contract.⁵³ Unless, according to the FIFA DRC's well-established jurisprudence, a club can bring forward the occurrence of very exceptional circumstances, which had prevented the club from offering the player a contract.⁵⁴ This justification may be very difficult to prove and limited to extraordinary circumstances.⁵⁵ In relation to the entitlement of loaning clubs to training compensation, the argument that a loaning club did not offer the player a contract cannot be upheld when the loaning club is not in the position to offer the player a contract when he is bound by a contract with another club of the player.⁵⁶

The above-mentioned is also supported by consistent CAS jurisprudence.⁵⁷ According to CAS jurisprudence, Article 6 par. 3 Annexe 4 to the RSTP does not require that a club offers a professional contract to all its young amateur players for fear of losing all right to training compensation. Such an obligation would have been too costly for the clubs and would have contravened “*the spirit and purpose of the FIFA transfer rules, which are set out in order to grant to clubs the necessary financial and sportive incentives to invest in training and education of young players.*”⁵⁸ The aims of sporting justice should not be defeated by an overly formalistic interpretation of the FIFA Regulations, which would deviate from their original purpose, appreciating that the standards informal requirements are higher in the case of professionals than amateurs.⁵⁹

The purpose of the two alternative requirements set under Article 6 par. 3 Annexe 4 to the RSTP is to ensure that no player, whether amateur or professional, in whom the club has no interest is impeded to accept the offer of another club, merely because he carries some sort of “*compensation price tag*”. Indeed, if a club

is not interested in the services of one of its players and decides to write off the investment made for its training, the player should be free to move to another club with no strings attached. To put it another way, the application of an automatic compensation price tag for all amateur players should be deemed unreasonable.⁶⁰

From the jurisprudence of CAS, it further follows that both alternatives serve a common purpose, *i.e.* to make the payment of training compensation subject to the condition that the club wanted to retain the services of the player. Only if the club sincerely and honestly pursued this goal shall the player's free movement be impeded by an automatic price tag calculated as a lump sum. It is in light of this common purpose that both alternatives must be interpreted and that CAS established its jurisprudence in relation to the second alternative, whereby the club must demonstrate (absent any offer) that it had a “*genuine and bona fide interest in retaining the services of the player*” in order to be entitled to claim training compensation.⁶¹

“ The application of an automatic compensation price tag for all amateur players should be deemed unreasonable ”

Moreover, the training club must prove that it desired to keep the player on the club's roster, or in its youth academy, with a view to keeping alive the option of granting him a professional contract at a later stage.⁶² The club must take a proactive attitude *vis-à-vis* the player, so as to clearly demonstrate that it still counted on the player for future season(s).⁶³ Any such offer shall be at least of an equivalent value to the current contract. It must further be noted that Article 6 par. 3 Annexe 4 of the RSTP is without prejudice to the right to training compensation of the player's previous club(s).

In light of the above, it must be noted that, according to the well-established CAS jurisprudence, the application of Article 6 par. 3 Annexe 4 of the RSTP depends on the location of the transferring clubs and not on the nationality of the players.⁶⁴ Arguments for the freedom of movement of football players across the EU are

53 Art 6 par. 3 sent. 2 Annexe 4 RSTP. See also [FIFA DRC, 29 June 2020, Holland](#). A club must provide enough documentary evidence that it had offered the player a contract in accordance with Article 6 par. 3 sent. 2 and sent. 3 Annexe 4 to the RSTP (*cf.* Art. 12 par. 3 of the Procedural Rules). A temporary exception is incorporated in the January 2021 edition of the RSTP, following which the contract offer may be made by electronic mail, provided that the former club obtains confirmation from the player that he has received a copy of said offer and can provide such confirmation in case of any dispute. See Article 6 par. 3 (i) Annexe 4 RSTP.

54 [FIFA DRC, Urminsky, 14 July 2020](#).

55 See [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 68.

56 See [FIFA DRC, 19 September 2019, no. 09192966](#).

57 See, *inter alia*, [CAS 2016/A/4721, Royal Standard de Liège v. FC Porto \(Player C.\)](#), par. 60, referring to [CAS 2014/A/3497 SK Slavia Praha v. Genoa Cricket and Football Club](#), par. 65; [CAS 2009/A/1757 MTK Budapest v. FC Internazionale Milano S.p.A.](#) and [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#).

58 See [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 67, referring [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#), and [J.-P. DUBÉY, 'The jurisprudence of the CAS in football matters \(except Art. 17 RSTP\)', CAS Bulletin, 1/2011, p. 7](#) and references.

59 [CAS 2014/A/3497 SK Slavia Praha v. Genoa Cricket and Football Club](#), par. 65.

60 [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 70, referring to [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#), par. 22.

61 [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 70, referring to [CAS 2016/A/4721, Royal Standard de Liège v. FC Porto \(Player C.\)](#), par. 59 and see, *inter alia*, [CAS 2012/A/2890 FC Nitra v. FC Banik Ostrava](#), par. 69 and [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#), par. 23.

62 [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 70, referring to [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#), par. 23.

63 [CAS 2018/A/5733 KRC Genk v. Manchester United FC](#), par. 70, referring to [CAS 2014/A/3497 SK Slavia Praha v. Genoa Cricket and Football Club](#), par. 63.

64 The fact that the criterion of nationality is irrelevant goes back to the *rationale* and the history of the provision itself, and has been confirmed by CAS in [CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC](#).

raised by clubs. However, according to the FIFA DRC and CAS in several decisions, these arguments can only be raised by the player himself and not by the football clubs, although this is questionable. In light of the “*Wilhelmshaven-case*”, it can be questioned whether parties can rely on this argument since the Highest Regional Court emphasized that the “*free movement argument*” was also available to the club, which means that said Article 6 Annexe 4 to the RSTP is applicable when it concerns persons with EU nationality. In the *Wilhelmshaven* case of CAS of 5 October 2009, the Sole Arbitrator of CAS decided that Article 6 Annexe 4 to the RSTP on the intra EU/EEA transfer of players is narrowly circumscribed within a limited geographical area, *i.e.* the EU/EEA territory. Prior to examining if a contract had been offered by the club to the player, the case must fall within the scope of the above provision: in other words, the transfer must take place from one national association to another one within the EU/EEA.⁶⁵

Training costs and calculation of training compensation

In order to calculate the compensation due for training and education costs, associations have been instructed to divide their clubs into a maximum of four categories in accordance with the clubs’ financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average “*player factor*”, which is the ratio of players who need to be trained to produce one professional player. The training costs are established on a confederation basis for each category of club. The categorization of a club at the time of the transfer of a player will be decisive. Each association must classify its clubs into different categories based on the extent of each club’s expenditure on the training of young players.⁶⁶ The category specified must be reviewed and updated every calendar year. Each association is also requested to insert the categorisation of its affiliated clubs concerned into the International Transfer Matching System (TMS).⁶⁷

Confederation	Category I	Category II	Category III	Category IV
AFC	-	USD 40,000	USD 10,000	USD 2,000
CAF	-	USD 30,000	USD 10,000	USD 2,000
CONCACAF	-	USD 40,000	USD 10,000	USD 2,000
CONMEBOL	USD 50,000	USD 30,000	USD 10,000	USD 2,000
OFC	-	USD 30,000	USD 10,000	USD 2,000
UEFA	EUR 90,000	EUR 60,000	EUR 30,000	EUR 10,000

As a general rule, to calculate the training compensation due to a player’s former club(s), it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs of the new club multiplied by the number of years of training, in principle from the calendar year of the player’s 12th birthday to the calendar year of his 21st birthday.⁶⁸ In the case of subsequent transfers, training compensation is calculated based on the training costs of the new club multiplied by the number of years of training with the former club. To ensure that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays (*i.e.* four seasons) shall be based on the training and education costs of category 4 clubs.⁶⁹

For players moving from one association to another inside the territory of the EU/EEA, the amount of training compensation payable shall be established based on the following:

- If the player moves from a lower to a higher category club, the calculation shall be based on the average training costs of the two clubs;
- If the player moves from a higher to a lower category, the calculation shall be based on the training costs of the lower-category club.⁷⁰

⁶⁵ CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*. See for more details: *F.M. de Weger*, ‘The Jurisprudence of the FIFA Dispute Resolution Chamber’, The Hague, T.M.C. Asser Press 2016.

⁶⁶ The category specified shall be reviewed at the beginning of the season only and be valid for the relevant season. Associations are not permitted to amend the category of a club during a season. See [FIFA Circular no. 1726, 30 July 2020](#).

⁶⁷ See Art. 4 Annexe 4 RSTP and [FIFA Circular no. 769, 24 August 2001](#). The categorisation identified in TMS will prevail over any conflicting categorisation. See in this regard also [FIFA Circular no. 1726, 30 July 2020](#).

⁶⁸ As previously indicated, as from 1 January 2021 the calculation method for training compensation is amended and the calculation of training compensation will be based on the calendar year of the birthday of the player, as opposed to the season. See [FIFA Circular no. 1743, 14 December 2020](#).

⁶⁹ See Art. 5 Annexe 4 RSTP. The DRC may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review.

⁷⁰ See Art. 6 par. 1 Annexe 4 RSTP.

The club shall be compensated for the entire time that it trained the player, and not only for the time, it trained him as a professional. Based on the clear wording of Article 2 of Annexe 4 of the RSTP and, as already indicated, training compensation is due regardless of whether the player transfers during or at the end of his contract.⁷¹ If a player is injured for a certain period of time, then training compensation can still be claimed for the period that the player is injured. This particular period has to be considered as part of the training period.⁷² In case of discrepancy between the player passport, issued by the respective national football associations in relation to the date the player was registered, the FIFA DRC will place more emphasis on the information contained in the player passport issued by the football association to which national association the player is affiliated.⁷³

The FIFA DRC may review disputes concerning the amount of training compensation payable and shall have the discretion to adjust this amount if it is clearly disproportionate to the case under review.⁷⁴ In this regard, along with the established jurisprudence, the FIFA DRC deemed it can decide to reallocate the clubs playing in the highest division of the relevant association to the highest available category.⁷⁵ The amount of training compensation is to be calculated in accordance with the costs established on a confederation basis for each club category.⁷⁶ The indicative amount provided by the club will only be altered if the circumstances of the player in question are exceptional and/or if the outcome of the calculation is clearly disproportionate.⁷⁷

Waiver of training compensation

A former club that is entitled to training compensation must take into account that a claim must be submitted to FIFA within two years of the event giving rise to the dispute, otherwise, the FIFA DRC shall not hear the case.⁷⁸ The non-payment of training compensation is considered as the event that gives rise to the dispute.⁷⁹

A club may agree at any time to renounce its entitlement to training compensation, hence only the club which is officially entitled to receive training compensation may waive its right to training compensation.⁸⁰ Any possible settlement concluded between the former club or the new club and the player cannot, in any sense, establish that the former club(s) loses and, therefore, forfeits its right to receive training compensation from the new club.

In 2019, the FIFA DRC decided, in line with its well-established jurisprudence, that a club that waives its right to training compensation would have to express unequivocally its waiving of training compensation rights, in the sense of Article 20 and Annexe 4 to the RSTP concerning training and education provided for a specific player. This waiver should be a clear and unambiguous waiver of its training compensation rights,⁸¹ which document should be uploaded in TMS.⁸² A document which is drafted in very general terms, referring for instance to “*any type of compensation*”, does not affect the potential entitlement to training compensation nor offsets the obligation to pay the training compensation.⁸³

Circumvention

Situations exist in which a club may attempt to circumvent its payment of training compensation⁸⁴ by means of “*bridge transfers*”.⁸⁵ A bridge transfer is presumed by FIFA, unless established to the contrary, that if two consecutive transfers, national or international of the same player occur within a period of 16 weeks, the parties (clubs and player) involved in those two transfers have participated in a bridge transfer.⁸⁶ The aim of FIFA here is to ensure that football transfers have a legitimate purpose and are not undertaken to circumvent FIFA regulations and applicable laws.⁸⁷

In relation to the circumvention of the obligation to pay training compensation, bridge transfers can be characterized as a transfer of a player to a lower category in order to avoid or limit the amount of training compensation. In these cases, a player is often

⁷¹ [FIFA DRC, 15 October 2019, no. 10193153](#).

⁷² Injuries are considered by the FIFA DRC as part of football; see in this regard FIFA DRC, 13 June 2008, no. 681123. When a player is still registered at the club and is doing his rehabilitation, the club is still entitled to training compensation. The burden of proof regarding the degree of training during his injury lies on the club, see CAS 2006/A/1027 Blackpool F.C. v. Club Topp Oss, par. 26-28.

⁷³ [FIFA DRC, 27 July 2020](#), Victor cases.

⁷⁴ Art. 5 par. 4 Annexe 4 RSTP.

⁷⁵ [FIFA DRC, 10 December 2019, Strumia cases](#).

⁷⁶ See for the latest edition [FIFA Circular no. 1726, 30 July 2020](#).

⁷⁷ [FIFA DRC, 9 June 2020, Morel](#).

⁷⁸ See Art. 25 par. 5 RSTP.

⁷⁹ See for example, [FIFA DRC, 18 June 2020, Ceter](#) and [FIFA DRC, 25 September 2019, no. 09192370](#). The deadline for the payment of training compensation is 30 days following the registration of the player with the new association. This is also follows from [CAS 2016/A/4428 Udinese Calcio S.p.A. v. Santos Futebol Clube & FIFA](#), par. 190.

⁸⁰ [FIFA DRC, 23 October 2019, no. 10192893](#).

⁸¹ [FIFA DRC, 23 October 2019, no. 10192755](#).

⁸² [FIFA DRC, 7 February 2020, Keller](#).

⁸³ [FIFA DRC, 7 April 2020, Zanette](#).

⁸⁴ The Swiss Federal Tribunal defines a circumvention of a rule (freely translated) as follows: “A circumvention of a regulation is given in case someone acts according to the wording of such regulation but does not respect/comply with its purpose” (SFT 114 Ib 15, par. 3a).

⁸⁵ Since the March 2020 edition of the RSTP, bridge transfers are defined in Article 5bis.

⁸⁶ See Art. 5bis RSTP.

⁸⁷ [FIFA Circular no. 1709, 13 February 2020](#).

immediately transferred to a third club which, had it signed, the player directly would have had to pay a higher amount of training compensation. A very short stay with lower category clubs and when a player did not play any matches for the bridge club are relevant indications that a situation of circumvention took place.⁸⁸

Proposal

With the principle of procedural economy in mind, FIFA introduced Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (Procedural Rules). FIFA announced in 2019 that the FIFA Players' Status Department (PSD) began to apply, with immediate effect, Article 13.⁸⁹ Article 13 was introduced in order to speed up the decision-making process in training compensation and solidarity mechanism cases without any complex factual or legal issues. The relevant article grants the PSD the ability to submit written proposals to the parties involved in a dispute related to training compensation and the solidarity mechanism regarding the calculation of the amounts owed.⁹⁰ This proposal becomes final and binding after 15 days following its notification, if it is accepted by all parties or the parties fail to provide an answer within the deadline.⁹¹

Parties still need to submit their training compensation claims *via* TMS, pursuant to Article 1 par. 1 Annexe 6 of the RSTP. The claim must contain all the mandatory documentation and information provided for in Article 5 par. 2 and Article 6 par. 2 Annexe 6 to the RSTP, as well as Article 9 par. 1 of the Procedural Rules. Once the PSD is in possession of a complete claim, an analysis of the claim is made in order to determine: (i) that it does not entail any complex legal or factual issues; and (ii) that, *prima facie*, all the regulatory requirements for being entitled to receive training compensation or solidarity contribution have been fulfilled. If both conditions are met, the PSD will provide the parties with a written

proposal *via* TMS.⁹² Although this is understandable from an economic procedural aspect, FIFA should not apply Article 13 too lightly. Furthermore, it is interesting to see which elements are decisive for the PSD in the decision-making process.

Once the proposal of the PSD has been notified to the parties *via* TMS, the parties will have 15 days to either accept or reject the proposal and provide the reasons which could justify the rejection. If one of the parties rejects the proposal, the proceedings will continue according to the pertinent provisions laid down in the Procedural Rules. In the case of rejection by the respondent club, the latter shall provide its position to the claim within the stipulated time frame.

If neither party rejects the proposal of the PSD within the 15 days following its notification *via* TMS, the proposal automatically becomes binding on them.⁹³

Final remarks

In this article, the author reviewed and analysed the recent jurisprudence of FIFA DRC and CAS in relation to the obligation to pay training compensation and shed light on the application of the relevant provisions by the decision making bodies.

FIFA DRC and CAS follow a consistent line and have well-established jurisprudence in relation to the obligation to pay training compensation

From the recent jurisprudence, it appears that the FIFA DRC and CAS follow a consistent line and have well-established jurisprudence in relation to the obligation to pay training compensation. The jurisprudence confirmed that a player is considered to be a professional when he has a written contract and receives payments exceeding expenses. In addition, it was confirmed that the nature of a players' registration, whether on a definite or on a temporary basis with a club claiming training compensation, is not relevant with regard to the question of whether or not such claimant club is entitled to receive training compensation for the period of time that the player was effectively trained by it and, as such, a club where a player plays on loan is entitled to receive training compensation. Furthermore, if the former club does not offer the player a contract within the EU/EEA, no training compensation is payable by the new club, unless the former club can justify that it is entitled to such compensation.

⁸⁸ [FIFA DRC, 30 October 2019, no. 10192730](#). In this case, the DRC did not find the explanation of the club convincing as to why a talented player who was attracting the attention of several clubs would opt to join a small club to stay there for less than a month before moving to a new club.

⁸⁹ See [FIFA Circular no. 1689, 21 August 2019](#). In [FIFA Circular no. 1743, 14 December 2020](#), FIFA confirmed the implementation of proposals by the FIFA general secretariat in training compensation disputes in non-complex contractual disputes.

⁹⁰ See, for example, [FIFA DRC, 21 August 2020, Franchi](#).

⁹¹ Given its wording and the legal effects deriving from it, the correspondence sent by the FIFA Administration, informing the parties that the proposal of FIFA became final and binding, is to be regarded as a decision since it materially and definitively affects the legal position of the clubs, and is therefore enforceable before the competent authority. See, *inter alia*, [FIFA DC, 6 April 2020, ref. 200387](#), par. 18 and [FIFA DC, 14 March 2020, ref. 200228](#), par. 18. This is codified in the Procedural Rules January 2021 edition. See Art. 13 par. 3 Procedural Rules.

⁹² Following Article 2, par. 1, Annexe 6 to the RSTP, all clubs and all member associations should check the "Claims" tab in TMS at regular intervals of at least every three days.

⁹³ See [FIFA Circular no. 1689, 21 August 2019](#).

With regard to the completion of the training and education period, the FIFA DRC and CAS are of the opinion that, if it is evident that the player has terminated his training period before the age of 21, the player may have completed his training. However, following the recent jurisprudence of FIFA DRC and CAS, we can conclude that both institutes are still quite reluctant to establish that the training period of a player has terminated before the age of 21. The decision must be taken on a case-by-case basis in order to establish that the training period was completed.

It is expected that the FIFA DRC and CAS will continue to follow their well-established jurisprudence in the future, as well as further create and, therefore, contribute to a clear and unambiguous regulatory framework in relation to the obligation to pay training compensation in international dimensions. The fact that FIFA elected in 2019 to apply Article 13 of the Procedural Rules is a sign that FIFA is also of the opinion that the FIFA DRC has clear established jurisprudence relating to training compensation. It is interesting to see which elements are decisive for the PSD in the decision-making process to submit a written proposal and what the impact of applying Article 13 of the Procedural Rules will be. Although this is understandable from an economic procedural aspect, FIFA should not apply Article 13 too lightly.

Sports M&A – Recent Changes on the Legal Framework of Investments in Brazilian Football Clubs



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→ **National law – Corporate law – Governance – Broadcasting rights**

Normative Ruling no. 81/2020, 15 June 2020

A new Brazilian Normative Ruling issued in June 2020 has expressly authorized the conversion of civil associations into corporate entities, allowing new forms of investments and M&A transactions involving Brazilian football clubs.

Introduction - New Scenario for Investment in Brazilian Football Clubs

On 15 June 2020, the National Department of Corporate Registry and Integration (*Departamento Nacional de Registro Empresarial e Integração* - DREI), the federal body that regulates the public registries of corporate entities in Brazil, published new Normative Ruling no. 81/2020 (Normative Ruling), that has substantially changed the general guidelines for the public registry of corporate entities. The Normative Ruling has its main grounds in the Brazilian Economic Freedom Act (Law no. 13.874/2019), and due to such regulation, the market for investment in Brazilian football clubs has been indirectly but significantly impacted.

Due to the Normative Ruling, a brand new and unexpected possibility of converting² civil associations into corporate entities has emerged. There are two main reasons that such possibility is considered unexpected: (i) historically, the competent Brazilian authorities for registering legal entities - the Civil Registry of Legal Entities (competent for registering non-corporate entities) or the Board of Trades (competent for registering corporate entities) - had agreed that the transformation of civil associations into corporate entity (and *vice versa*) was only possible in

cases expressly set forth by law; and (ii) due to (i), the Brazilian federal legislative bodies are in the process of formulating legislative bills that aim to, among other matters, regulate the possibility of transforming the Brazilian football clubs organized as civil associations into corporate entities.

In this sense, the changes brought by the Normative Ruling represent an important development for Brazilian football clubs, as the conversion of civil associations into corporate entities is now a viable alternative for the structuring of investment in such clubs. As an example, there is the case of the conversion of *Red Bull Bragantino* (formerly *Clube Atlético Bragantino*, originally incorporated as a non-profit civil association) into a limited liability company, whose conversion process was concluded at the end of August 2020. Such conversion was made possible by virtue of the new Normative Ruling.

Due to the legal framework change mentioned above, the purpose of this article is to evidence the relevance of the Normative Ruling for the football environment, especially with respect to the expansion of the alternatives for investment in Brazilian football clubs.

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² Normative Ruling no. 81/2020 adopts the expression “conversion” instead of “transformation”.

Brazilian Football Clubs - Regulatory Framework

From a legal perspective, investment in Brazilian football clubs involves a series of challenges due to the Brazilian football regulatory framework and the usual market practices. Football clubs in Brazil resulted from a hobby of the Brazilian elite, and the clubs were historically organized mainly as non-profit civil associations. Associations do not have corporate capital, issue stocks or have shareholders - they are incorporated to pursue not-for-profit purposes of its members (which have a common interest), and the eventual revenues are reinvested back into the association. As there are no detailed governance rules for associations, they are mostly self-regulated and, as a result, the high standards of corporate governance and compliance practices are generally absent in such entities.

As a result of the above, over the years, there have been legislative attempts to introduce corporate alternatives for the organization of football clubs, as has been detailed in the article [“Sports M&A - Investments in Brazilian Football Clubs”](#).³ Among such legislative attempts, the *PELÉ* Law imposed, for a brief period, the obligation of transforming clubs from civil associations into corporations. Currently, the *PELÉ* Law sets forth that the corporatization of clubs is discretionary. Despite that, and due to their amateur past, the most common organization type adopted by the Brazilian football clubs to date is civil association, mainly due to the tax exemptions applicable to non-profit civil associations.

To establish a football club in Brazil, it is possible to create a new club or restructure an existing club. The first option is expensive due to the registration fees charged by the State Football Federations and is also challenging from a competition perspective (as it is a particularly difficult path for promotion from the bottom to the top national division). As a result, investors tend to choose the existing club path, even though it requires an in-depth and full-scale legal, financial and compliance due diligence on the target club. This is especially difficult considering the informal nature of the Brazilian football business environment.

Until the enactment of the Normative Ruling, it was not possible to transform Brazilian football clubs originally organized as non-profit civil associations into corporate entities. Investors needed to either: (i) become a member of the non-profit civil association and invest in the club by means of loans and/or donations (with no right to receive profits), or (ii) implement a dropdown structure, by means of the transfer of sports

assets of the association to its corporate subsidiary (a transaction that requires the approval of the Brazilian sports authorities), with the subsequent joining of the investor as a shareholder of such subsidiary.

Conversion of Associations into Corporate Entities

Historically, the only possible transformations of non-corporate entities into corporate entities (or *vice versa*) were transformations expressly authorized by special law. Thus, until the enactment of the Normative Ruling, there were no provisions at law generically or expressly authorizing the transformation of civil associations into corporate entities. As such, the only transformations approved and registered by the Brazilian public registry authorities were those set forth by special law - notably, educational associations.⁴

However, since the unexpected enactment of the Normative Ruling, the conversion of non-profit civil associations into corporate entities has become possible. Such change marks an important development for corporate law generally and for sports law in particular, as it is an additional possibility for structuring investments and M&A transactions involving football clubs.

However, what was the reason for the publication of a new regulation, so unexpectedly, and contrary to the technical guidelines in force until then? Among the justifications published in a Technical Notice issued by an office of the Ministry of Economy (the *Secretaria Especial de Desburocratização, Gestão e Governo Digital do Ministério da Economia*), it was considered important to enhance the purpose for reviewing and consolidating all general rules and guidelines for the public registry of corporate entities, and regulate the legal provisions deriving from the Economic Freedom Act.

With respect to the possibility of converting civil associations into corporate entities, the Technical Notice indicates that: (i) the conversion of a civil association into a corporate entity is completely viable, as there is no formal legal prohibition for such transaction; and (ii) the Economic Freedom Act sets forth that the will of the private parties should prevail in corporate businesses - as a result, the public authorities should avoid prejudicing the free organization of legal entities or economic activities (except in cases of legal restrictions). In addition, the Technical Notice

³ See [Football Legal # 11 \(June 2019\)](#).

⁴ During a brief period, due to a former provision of the *PELÉ* Law that was in force between the years 2000 and 2003, sports associations could also be transformed.

states that the State should not impose limits on those who intend to guarantee the permanence of their activities by means of corporate reorganizations.

Further to the above, considering both the Economic Freedom Act and the Normative Ruling deriving from it, that expressly authorize the conversion of civil associations into corporate entities, a key question emerges: how does one operate the corporate capital (of a corporate entity) that has resulted from the conversion of a civil association? Civil associations do not have corporate capital divided into quotas or shares, and the associates do not make any investment in the association, but rather, they make contributions to the assets of the association.

In order to answer the question above, considering that the Normative Ruling did not provide details on the conversion procedure, it is quite reasonable to use as a guideline precedent cases on the transformation of educational civil associations into corporate entities. In such precedent cases, the attribution of equity interest to the associates is made in accordance with the net equity of the association at the time of the conversion being proportionate to their contribution to the assets of the association. It is also possible to convert eventual loans granted by the associates to the association into equity interest of the company resulting from the transformation of the association into a corporate entity.

To sum up, the conversion procedure relies on the following principles: (i) absence of any legal prohibition; (ii) approval of all of the associates; and (iii) use of the net equity of the association as the basis for the composition of the corporate capital of the corporate entity resulting from the conversion. At the end of the conversion procedure, the civil association, now converted into a corporate entity, is the same legal entity but with a different legal nature and subject to the specific laws and regulations of the new corporate type. That is to say that, the Corporate Taxpayers' Registry (CNPJ) is maintained, which exempts the new corporate entity from the requirement to seek the prior approval of all the associates of the former civil association with respect to the transaction.

It should be stressed that the necessity of obtaining the approval of all associates entangles the conversion of the larger Brazilian football clubs into corporate entities. Due to a highly complex political structure, and due to the massive number of associates (in some cases, the clubs have tens of thousands associates), the unanimous approval of the conversion is virtually impossible. In the sense, the most suitable investment or M&A structure involving such larger clubs is the "dropdown" structure, in a way that the investors may join sports operations *via* the club's subsidiary.

On the other hand, the smaller Brazilian football clubs (as they usually have a simplified association form), are considerably more attractive for direct conversion into a corporate entity. The smaller clubs are usually an interesting target for the prospecting of young talents and their subsequent transfer to international clubs, with no further concerns regarding sports results.

Sufficiency of the Normative Ruling as Legal Basis for Transformation

Despite the foregoing, it should be noted that the Brazilian Civil Code establishes that transformation of non-profit civil associations into corporate entities should either be provided for in the Brazilian Civil Code itself, or in special law. Currently, the Brazilian Civil Code does not deal with the transformation of associations into corporate entities, and historically the prevailing understanding amongst scholars and courts ran contrary to the possibility of transformations (except in cases expressly authorized by law), as they are legal entities of completely different natures. A company, with economic activities and with distribution of profits to the partners *versus* a civil association, with non-economic purposes.

In terms of hierarchy, it is important to note that normative rulings are subordinate to laws and have the purpose of detailing procedures relating to issues already provided for by law. Accordingly, considering that there is no specific law setting forth the transformation of associations into corporate entities (despite the fact that the Normative Ruling derives from the Economic Freedom Act), the validity of such provisions in the Normative Ruling may be questioned.

From a practical perspective, although there is no clarity regarding the sufficiency of the Normative Ruling as the legal basis for converting non-profit civil associations into corporate entities, the Normative Ruling is nonetheless in full force and effect as at this date.

Status of Legislative Bills related to Brazilian Football Clubs

As indicated in the article "[Sports M&A - Investments in Brazilian Football Clubs](#)"⁵, there are a number of different legislative bills in train, aiming to refine the Brazilian sports legal framework - notably, by means of the creation of "Corporate Clubs" (*Clube Empresa*)

⁵ Published in Football Legal # 11 (June 2019).

and “Football Corporations” (*Sociedade Anônima do Futebol - SAF*), and by means of granting tax benefits to clubs organized as corporate entities.

Legislative Bill no. 5082/2016 (initiated by Deputy *Pedro PAULO*) aims to regulate the “Corporate Club”, which would result in the conversion of clubs incorporated as civil associations into a corporate entity already in existence (such as a limited liability company or corporation). Further, this bill intends to create a specific tax regime for Brazilian football entities - the *Regime Especial de Tributação de Entidades de Prática Desportiva Profissionais de Futebol (Simples-Fut)* - as well as regulations applicable to sports entities for the accelerated payment of debts, installment programs and judicial recovery.

Legislative Bill no. 5516/2019 (initiated by Senator *Rodrigo PACHECO*) aims to create a specific football system in Brazil and the concept of a “Football Corporation”. The “Football Corporation” would be a new corporate type, governed by Brazilian corporate law, but having characteristics that would deal with the specific concerns of the sports environment. Furthermore, this bill intends to establish governance, controls and transparency rules, financing alternatives for football entities, and more relaxed provisions relating to the tax regime.

Due to the COVID-19 pandemic, there has been no substantial advance in relation to the legislative bills. However, a new possibility has arisen in this context, being the merger of the two legislative bills referred to above, as recently proposed by Senator *Rodrigo PACHECO*⁶ in an attempt to help the economic recovery of the football market. Also, the pandemic has created severe liquidity crises for Brazilian football clubs, and this could herald an important movement towards the flexibility of corporate structures in the football environment. Moreover, the depreciation of Brazilian Real has given rise to a favorable environment for investment in the sector.

Considering that to date, no new sports law has been enacted, the Normative Ruling, being of a purely corporate nature, has attained great relevance in the Brazilian sports scenario, as discussed at length above. In any case, the Normative Ruling does not obviate the need for the enactment of the abovementioned sports legislative bills.

With the enactment of new sports laws dealing with the different corporate entities and with tax benefits for such entities, among other matters, a greater legal certainty would be achieved. Such certainty would encourage the development of the Brazilian sports market in the long term.

Tax Aspects

The legal tax framework of Brazil is quite complex, and the applicable rules must be evaluated in accordance with the relevant cases. That said, an overview of the tax regime applicable to Brazilian football clubs is as follows:

- For both associations and corporate entities, an employer’s social security contribution is charged at the rate of 5% of the employer’s gross revenue earned from: (iii.1) any form of sponsorship; (iii.2) licensing of trademarks and logos; (iii.3) publicity and advertising; and (iii.4) broadcasting of sports events;
- For both associations and corporate entities, there is a charge of a third-party contribution of 4,5% on the payroll;
- Exclusively for associations (there is no equivalent for corporate entities), there is a charge of 1% on the payroll, as a different social security contribution (PIS);
- Exclusively for associations, there is an exemption from the payment of Corporate Income Taxes (IRPJ/CSLL) and social security contributions (PIS COFINS). Corporate entities pay: (i) PIS COFINS at the rate of 3,65% or 9,25% on the gross revenue - the rate is dependent on the chosen regime of presumed or actual profit; and (ii) IRPJ/CSLL at the rate of 34% where the entity is profitable; and
- For both associations and corporate entities, there is a charge of services tax (ISS) on the gross revenue, at the rate of 5% (in relation to some services, an association can be exempted).

As indicated above, the main difference between the tax regime applicable to non-profit civil associations and corporate entities is the charge of PIS/COFINS and IR/CSLL, which are taxes levied, on top of the revenues and profits of corporate entities. Therefore, in the case where the football club is not profitable (which is the case for most clubs), the tax impact would be mainly PIS/COFINS in a football club organized as a corporate entity. In other words, the tax benefits currently being proposed by the ongoing legislative bills would be relevant for those who seek to profit from an investment in a Brazilian football club.

⁶ Access to the interview: globoesporte.globo.com

Sports Market Scenario and Projections

In the last few years, investors have been noticing that the Brazilian football market is an inviting environment, due to the quick increase in the valuation of clubs when they are promoted in the championships.

Pursuant to the 11th Edition of the Economic and Finance Analysis of the Brazilian Football Clubs published in July 2020 by *Itau* BBA, the total broadcasting rights revenue of clubs (*Direitos de TV*) in 2019 was around BRL 2,413 million (approx. EUR 400 million). Of the total revenue, *Flamengo* alone, a Series A club of the Brazilian Championship, received around BRL 330 million (approx. EUR 52 million), whilst *Vitoria*, a Series B club of the Brazilian Championship, received around BRL 8 million (EUR 1,2 million).

In addition, comparing the relevance of the revenues of broadcasting rights to the total revenues of the clubs, broadcasting rights revenue of the *Avaí* club was at the rate of 31% in 2018, increasing to 75% in 2019, when the club was promoted from Series B to Series A of the Brazilian championship.

As can be seen from the numbers, a Series B club can significantly multiply its revenues if promoted to Series A, as standard broadcasting agreements are disproportional between the two championship divisions.

Furthermore, the television market in Brazil is smaller than it could actually be, notably due to the lack of a responsible league for collective negotiation. Experts in the analysis of the football television rights market in Brazil often indicate that better organization of the clubs around negotiation and the opening up of the market to new competitors, could significantly increase the revenues earned with these rights.

Investors from all around the world have started to perceive that the Brazilian football market not only offers strong talent, but it is also in an early stage of development, such that there is growth potential for secondary revenues which are an added appeal for those planning to invest in Brazilian football clubs.

There is no doubt that the investments and M&A markets in Brazilian football is going through a period of substantial development. Hopefully, we will be able to witness important changes in Brazilian football, either in relation to new sports legislation, or in the emergence of important new players in such markets.

Termination of an Employment Contract under Chinese Labor Law



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→ **Chinese Football Association (CFA) - Breach of contract - Just cause - Labour disputes - Labour law - National law - Fundamental Rights**

In China, it is mandatory that a labor contract dispute be submitted to specific labor arbitration tribunals. If the parties do not agree with the arbitral award, they can then bring an action before an ordinary civil court. This is the general rule for all the contractual labor disputes.

The most important law that the judicial authority refers to is the *Labor Contract Law of the People's Republic of China* (Labor Contract Law). When it comes to a contract concluded between a football player or coach and a Chinese football club however, it should be noted that it can be a little bit tricky.

According to Article 33 of *Sports Law of the People's Republic of China*, any dispute arising from competitive sports activities should be mediated or arbitrated by sports arbitration institutions. The establishment of such sports arbitration institutions and the scope of its jurisdiction should be regulated by the State Council of the People's Republic of China. However, so far, the State Council has not established or enacted any regulations in this regard.

As we all know, the Chinese Football Association (CFA) established an internal arbitration tribunal to hear cases in respect of: 1) decisions made by the CFA Disciplinary Committee; 2) disputes between the member associations, football clubs, footballers, coaches and intermediaries regarding the registration, transfer, qualification, employment contract and intermediary contract, amongst other disputes within its management scope; and 3) other disputes that the arbitration tribunal considers fall within its competence.

Legally speaking however, the CFA is merely a social entity responsible for supervising and managing the football industry and operating on behalf of the Government over specifically authorized issues. Not to

mention, its impartiality has always been questioned. Therefore, its internal regulations and arbitration branch do not have the power to exclude the mandatory law, *i.e. Labor Contract Law of the People's Republic of China and Labor Dispute Mediation and Arbitration Law of the People's Republic of China*, which gives mandatory jurisdiction to all the labor dispute mediation and arbitration tribunals in China. If the parties do not agree with an arbitral award, either party can bring the case to the civil court within 15 days upon the receipt of the award.

In reality, we do see some civil courts define the employment-related dispute between a player and a club as a labor contract dispute and take the case. However, there are also cases where the court thinks that sports-related employment contracts (or labor contracts, depending on how the court defines it) are unique and should comply with their own rules, meaning that the parties should go to the CFA arbitration tribunal, especially if the parties have included arbitration clause of the CFA in their contract.

Depending on where the court is, the outcome can differ enormously. The problem of inconsistencies in the courts is beyond the author's power to resolve. So, this article's focus is not complicated legal theory or analysis but instead serves to give a general idea to foreign legal practitioners who might deal with cases involving Chinese labor law. Its aim is to help foreign legal practitioners understand how the Chinese labor arbitration tribunal and the court might deal with a

labor contract termination between a footballer and a club under Chinese Law.

The author acknowledges that most foreign players include FIFA and CAS as dispute resolution institutions in their contracts and go through procedures before those institutions. Nonetheless, the author has encountered a few cases where foreign footballers or coaches choose to apply Chinese Law and decide to resolve a dispute before the Chinese labor arbitration tribunal and civil courts.

Termination of a Labor Contract

An employee who wants to terminate a labor contract

In China, all labor-related laws, regulations and rules protect laborers' rights. Therefore, it is more difficult for an employer to terminate a contract than for an employee.

Basically, an employee can terminate a labor contract if:

- 1) The employer and the employee, through negotiation, mutually agree to terminate the contract (Article 36 of the *Labor Contract Law*);
- 2) The employee without reason, gives 30 days written notice in advance or three days written notice in advance if it is during the probation period (Article 37 of the *Labor Contract Law*) to the employer;
- 3) The employer committed one of the acts listed below, then the employee can terminate the contract without the need to give notice in advance:¹
 - i. The employer fails to provide protection or working condition as agreed in the labor contract;
 - ii. The employer fails to pay the salary on time;
 - iii. The employer fails to pay the social insurance for the employee;
 - iv. The internal regulation of the employer violates the laws and regulations, which infringe the rights of employees;

¹ The *Labor Contract Law* does not explicitly state that the employee doesn't have to give a notice in advance if the employer falls under those situations. However, many courts in different situations have made it clear that under Article 38, the employee terminates the contract due to the unlawful behavior of the employer. Therefore the employee should not be required to give 30-days' notice which normally would be required when the employer does not engage in any unlawful behavior.

- v. The labor contract is invalidated due to the occurrence of any of the situations falling under Section 1 of Article 26² of the *Labor Contract Law*; or,
- vi. The laws or administrative regulations stipulate other situations.

If the employer forces the employee to work by violence, threat, or false imprisonment, or the employer gives directions violating the regulations, or forces the employee to work in a dangerous situation or any situation that might put the employee in danger, the employee can terminate the labor contract immediately without giving any notice in advance to the employer (Article 38 of the *Labor Contract Law*).

Clubs who want to terminate the labor contract

The law also lists out the situations where an employer can terminate the contract under certain circumstances.

- 1) When the employer and the employee through negotiation, mutually agree to terminate the contract (Article 36 of the *Labor Contract Law*);
- 2) The employer can terminate the contract if:
 - i. The employee is proven to not fit the job description during the probation period;
 - ii. The employee severely violates the internal regulations of the employer;
 - iii. There is serious dereliction of duty or malpractice by the employee which causes material damage to the employer;
 - iv. The employee during the contract term also establishes an employment relationship with other employers, which severely affects his capacity to fulfill his duty, or even after the employer brings it up, still refuses to correct it;
 - v. The labor contract is invalidated due to the occurrence of any of the situations falling under Section 1 of Article 26 of the *Labor Contract Law*; or,

² Section 1 of Article 26 refers to situations where: 1) the contract was concluded due to the threat, fraud or exploitation of the employee's unfavorable situation; 2) the employer exempts its mandatory obligation or excludes the rights of the employee; 3) any specific term or the whole contract violates the mandatory requirements set by the law or administrative regulations.

TERMINATION OF AN EMPLOYMENT CONTRACT UNDER CHINESE LABOR LAW

- vi. The employee has been held criminally responsible (Article 39 of the *Labor Contract Law*).
- 3) In the following situations, an employer can either terminate the contract by giving 30 days written notice in advance or give an extra one-month salary to an employee:
- i. The employee is sick or injured, not due to work, after his medical leave term expiration. However, the employee cannot resume his work nor other work adjusted by the employer;
 - ii. The employee cannot fulfill his duty, even after training or adjustment of working position; or,
 - iii. The substantial change of the objective condition while the labor contract was concluded, which makes the fulfillment of the labor contract impossible. After the employee's negotiation, both parties cannot reach an agreement over the amendment of the labor contract (Article 40 of the *Labor Contract Law*).
- 4) When an employer wants to lay off more than 20 people or less than 20 but over 10% of total employees, under the following situations, the employer needs to report to the labor union or to all employees 30 days in advance, and then listen and consider the suggestions of the labor union or employees. The layoff plan needs to be reported to the labor administrative department if:
- i. The employer is under revitalization according to the [Enterprise Bankruptcy Law](#);
 - ii. The employer encounters serious difficulties in production and business operation;
 - iii. The employer changes products, makes substantial technological renovations or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the labor contract; or,
 - iv. The employer's objective economic situation, on which the labor contract is based, has changed materially, making it impossible to perform the labor contract.

The following employees shall be given retention priority when an employer needs to lay off employees:

- a. Those who have concluded a fixed-term long time period labor contract;

- b. Those who have concluded a labor contract without fixed term; and,
- c. Those whose family has no other employee and has elderly or minors to support.

In the case where an employer intends to hire new employees within six months after it lays off the number of employees according to the first paragraph of this Article, it must notify the employees it laid off and shall, in equal conditions, give priority to those laid off employees (Article 41 of the *Labor Contract Law*).

However, when the employer wants to terminate the contract under Articles 40 and 41 of the *Labor Contract Law*, there are still restrictions. The contracts of the following employees cannot be terminated:

- 1) An employee who engages in operations exposing himself/herself to occupational hazards and has not undergone an occupational health check-up before he leaves his position, or who is suspected of having an occupational disease and is under-diagnosis or medical observation;
- 2) An employee who has been confirmed as having lost or partially lost his capacity to work due to an occupational disease or a work-related injury during his employment with the employer;
- 3) An employee who is sick or injured (not due to work-related reason) and is still within the medical leave term;
- 4) A female employee who is in her pregnancy, confinement³, or nursing period;
- 5) An employee who has been working for the employer continuously for or over 15 years and is less than five years away from his legal retirement age; or,
- 6) Other situations as stipulated by law and administrative regulations.

³ *Postpartum* confinement is a traditional practice following childbirth in some Asian countries, which typically begins immediately after the birth, and the confinement lasts for a culturally variable length: typically for one month or 30 days, up to 40 days, two months or 100 days.

Compensation

Type of Compensation

Chinese labor law sets out two types of compensation in cases of premature contract termination. The first is called *economic compensation*, which is only paid by the employer to the employee when the contract is terminated by 1) the employee under Article 38 of the *Labor Contract Law* and 2) the employer under Articles 36, 40, and 41 of the *Labor Contract Law* and certain situations when the contract expires.⁴

The second is called *compensation*, when the employer terminates the contract, unless the law stipulates explicitly that the employer does not have an obligation to pay any compensation or it only needs to pay economic compensation, the employer needs to pay twice the amount of *economic compensation* to the employee.

As for liquidated damages, these can only be applied to an employee when the employee violates the obligations of the Service Agreement (Article 22 of the *Labor Contract Law*) or the Confidential and Non-Competition Agreement (Article 23 of the *Labor Contract Law*). Aside from these two situations, the law forbids an employer concluding any other kind of clause where the employee might be held accountable for liquidated damages. However, if the employee terminates the contract without reason and fails to give a 30-day notice, the employee will be held responsible for all the actual loss caused thereby. In reality, since the burden of proof is borne by the employer, there are not many cases where the employee has actually been determined to pay the actual loss.

Calculation of Compensation

According to Article 47 of the *Labor Contract Law*, an employee shall be given economic compensation based on the number of years worked for the employer and at the rate of one month's salary for each full year worked. Any period of more than six months but less than one year shall be counted as one year. The economic compensation payable to an employee for any period of fewer than six months shall be one-half of his monthly wages.

In the case where an employee's monthly wage is higher than three times the average monthly salary set by the employer's municipality, the economic

compensation to be paid shall be subject to this three times limit and shall be for no more than 12 years.

The term "*monthly wage*" mentioned here refers to the employee's average monthly wage for the past 12 months prior to the labor contract's termination or expiration.

The *compensation* shall be twice the amount of economic compensation calculated above.

The difference from FIFA Regulations

Pacta sunt servanda is not the principle for labor disputes in China

The legal doctrine of *Pacta sunt servanda* is enshrined in FIFA Regulations and Swiss Law. The application of such principle can be found in CAS jurisprudence, especially when deciding whether the termination of the employment contract between a club and footballer is with or without just cause and the compensation that needs to be determined by the panel.

Under FIFA Regulations, contracts cannot be terminated without just cause by either footballers or clubs. However, since China's labor law tends to protect laborers' rights, the legislators believe that the workers are usually in a weaker position, so the law should protect their rights. Therefore, if the Chinese labor law applies, the player who signs a contract with a Chinese football club would have the right to terminate the agreement without reason by simply giving written notice 30 days in advance. On the contrary, the football club can only terminate the contract when a particular situation listed by the law occurs.

The compensation calculation method

Usually, in the case where the player or the football club terminates the contract without just cause, they will claim compensation according to Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) and the interest stipulated in Swiss Law.

The calculation methods of the FIFA RSTP include "*the residual value approach*" and "*the positive interest*." The residual value approach is calculating the remaining value of the contract. The positive interest on the other hand is decided on a case-by-case basis, and it is roughly the replacement cost.

Whether it is the player or the football club, neither can expect to get too much if the *Chinese Labor Contract*

⁴ It happens when the employer generally cannot operate anymore, such as the employer is in bankruptcy, liquidation or closed due to administrative order, etc.

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Law applies. The *economic compensation* and *compensation* are linked to the time the employee has been working in one company. However, due to footballers' short career life in general and the frequent movement of footballers between clubs, the compensation will not be too high. If the player terminates the contract, it is even possible that the club will not get anything.

“ Since China’s labor law tends to protect laborers’ rights, the legislators believe that the workers are usually in a weaker position, so the law should protect their rights ”

Under Chinese labor law, the parties can also include a penalty clause in their contract, which is in line with Articles 160 to 163 of the Swiss Code of Obligations.

According to the *Chinese Labor Contractual Law*, an employer can impose a penalty obligation on an employee only under two situations. The first is when they sign a service agreement where the employer provides training for the employee, and the amount of such penalty cannot exceed the actual amount the employer spent. The second is where the employee signed a Confidential and Non-Competition Agreement. The Confidential and Non-Competition Agreement would have required the employee not to work in a company that competes with the previous employer even after the labor contract's termination or expiration. However, the employer needs to pay the employee a certain amount of compensation each month under such agreement; in the absence of such compensation, the employee has the right not to comply with such agreement.

Besides the above two situations, any penalty clause imposed on an employee is invalid.

The enforcement of the relevant award and decision

While FIFA decisions have an enforcement system, which is typically more effective than a domestic court, sometimes a party needs to find a way to actually enforce a FIFA decision or a CAS award.

So far, the author has only seen the recognition and enforcement of a CAS award through the New York Convention in China.⁵

Since FIFA however is not recognized as an international arbitration tribunal under the New York Convention, it would be impossible to recognize and enforce FIFA decisions through a Chinese court.

Labor disputes under Chinese Law need to be submitted to a specific labor arbitration tribunal; if the parties do not agree with the award, then either party can bring the case before a regular civil court within 15 days after the receipt of the award. After an award issued by the labor arbitration tribunal enters into force, a party can require civil court to enforce it.

⁵ The author was lucky enough to have the chance to be involved in one enforcement case. It was a dispute arising from a legal service agreement between *Dalian Professional Football Club* (Dalian Pro FC) and a Spanish law firm, where *Dalian Pro FC* refused to pay the legal fee. The case was submitted to CAS, and the Panel issued the award in favor of the lawyer. The CAS award was recognized and enforced in China.

Transfer Fee Factoring – An Australian investment bank becomes a world leader in financing the top European club player transfers



By Peter PALEOLOGOS
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→ **Player transfer – Transfer fee – Financial control – Premier League – TPO – Financial Fair Play (FFP)**

In December 2020, when Macquarie Group Limited (a listed entity on the Australian Stock Exchange) who own and operate Macquarie Bank Limited (Macquarie) released its half-year results, some of its profits will have been generated from the English Premier League (EPL). This is a consequence of Macquarie playing an integral role in the EPL through a practice called transfer-fee factoring. This practice has become a new and popular source of funding for well-known football clubs to fund their player acquisitions, stadium/facility improvements, and transfers.

Who is Macquarie?

Macquarie is an Australian investment bank that has emerged as a global provider of banking, financial, advisory, investment, and funds management services in all major financial markets. They have strong funding, and a well-capitalised position with in excess of AUD 18 billion (approx. EUR 11 billion) market capitalisation. In Australia, Macquarie takes pride in its entrepreneurial approach and is nicknamed the millionaires' factory as employees have high pay and bonus structures for finalising and placing lucrative deals.

Macquarie is authorised and regulated by the Australian Prudential Regulation Authority who are the prudential (banking and authorised deposit taking institutions) regulator of the financial services industry. In relation to its United Kingdom football funding activities, Macquarie is authorised by the United Kingdom Prudential Regulation Authority and is subject to regulation by the United Kingdom Financial Conduct Authority (FCA) and adheres to the highest financial service provider compliance standards.

In order to operate in the United Kingdom, Macquarie also owns a bank, namely Macquarie Bank International Limited. The "head of Macquarie football transfer fee factoring team is Jerry Korczak (Korczak), who runs

the structured finance team based in London and has made Macquarie one of the biggest players in football finance. The Macquarie London office has pieced together about 100 transactions since Korczak kicked off the business, financing big-name clubs to the tune of hundreds of millions of dollars."¹

What is transfer-fee factoring?

Transfer-fee factoring is where a bank helps a football club get paid early by lending against payments (as collateral) due from a customer to the football club like TV broadcaster revenue or sponsor revenue. This is extremely helpful for clubs because there is a growing trend for transfer fees to be paid in instalments.

Mr KORCZAK states that "the business model for 'transfer factoring' isn't that complicated. A club sells a valuable player for, say, £15 million, but the purchasing club pays that in, say, three instalments of £5 million. The selling club wants access to all that money now, to buy new players of its own or invest in its facilities – so

¹ Hans Van LEEUWEN, 22 September 2020, Australian Financial Review, 'Star Macquarie banker kicks goals in Europe' www.afr.com

Macquarie advances the club the full amount, secured against the future payments. Similarly, the bank can lend to a club against its expected revenues from its share of the league's TV rights. It's effectively an accounts-receivable transaction. When you break it down, it's quite simple. However, football has a lot of nuances that you have to make sure you totally understand, whether it's financial fair play, the football creditors' rules – there's a number of things you need to know to make sure you understand the risk you're taking.”²

Most clubs who engage in transfer fee factoring fee agreements with Macquarie can receive the transfer (less the bank's fees) upfront whilst Macquarie obtains a fee or interest fee in exchange for the repayment risk.

“Clubs are increasingly making so-called “factoring” deals, borrowing against their future income to secure cash upfront”

For Macquarie to make a profit on the transfer fee factoring funding, Mr KORCZAK says “the interest rates charged aren't the astronomical ones (6 or 7 per cent), and in the vast majority of cases, the clubs involved in football are high non-investment-grade to low investment-grade credit counter-parties. The Macquarie fee or interest pricing reflects the 'credit ratings of the club, which is normally based on their creditworthiness and cash flows.”³

Specifically, Macquarie's football-fee transfer factoring service provides tailored solutions to its football club clients, which includes the arranging, structuring, and financing of:

- Player transfers;
- Ticket sales;
- Broadcasting rights;
- Events;
- Sponsorship agreements;
- Naming rights agreements;
- Stadia and facility expansions; and,
- Working capital.⁴

Macquarie, when providing the financing, will undertake due diligence and also assess a football club's management structure, ownership, and diversity of its revenue streams, including any lucrative rights the clubs hold to guarantee its funding and loans.

Trend of Football Clubs using transfer fee factoring financing

Macquarie “is understood to be closing in on one hundred (100) transfer fee factoring deals with English football clubs in recent years, reportedly worth close to \$AUD 2 billion, typically secured against the hundreds of millions of pounds clubs receive in broadcast revenue or assets such as stadiums and training grounds.”⁵



These transfer-fee factoring deals have been revealed to include several high profile transfers in the English Premier League, namely Riyad MAHREZ's GBP 60 million (approx. EUR 67 million) move from Leicester City to Manchester City, the GBP 26 million (approx. EUR 29 million) transfer of Tyrone MINGS from Bournemouth to Aston Villa, and Richarlison's GBP 50 million (approx. EUR 56 million) transfer from Watford to Everton.

As transfer factoring fee deals are confidential, most of the information revealing these deals is normally only available when clubs file information with the United Kingdom Companies' House or in Stock Exchange market announcements (if the club is listed).

A review of Companies House documents and other sources by the Australian newspaper reveals that “KorczaK's signature appeared on documents lodged by 2015-16 EPL champions Leicester City showing a loan from Macquarie – the seventh deal with the club in three years – secured against several years of TV income. Further, Sheffield United has struck two loan agreements with Macquarie in the past two weeks, securing loans against its Bramall Lane stadium, training centre, a hotel, and other property, and paid off another from a year ago secured to TV income. Further, Wolverhampton Wanderers Football

² Ibid.

³ Ibid.

⁴ Macquarie Bank Limited, Sports Finance brochure, January 2015.

⁵ John STENSCHOLT, 15 August 2020, The Australian Newspaper, 'Macquarie winning in English soccer as player transfer season kicks off'

Club (1986) Limited lodged a new document with Companies House in London extending its £50m (\$91m) facility with Macquarie from February 2022 to January 2023. The loan is secured against TV income Wolves receives from EPL management, which last year distributed £2.45bn (\$4.47bn) to its 18 clubs in the 2018/19 season. Earlier in July 2020, Crystal Palace confirmed it had paid off a £22.5m loan Macquarie had stepped in and provided the entire amount upfront.”⁶

For *Macquarie*, it assesses requests for transfer-fee factoring based on what assets can be guaranteed or if a lien can be taken over club assets before placing facilities against the club’s future transfers or its TV media rights. Further, by *Macquarie* providing the full fee upfront for clubs to undertake a transfer by lending the entire value of player transfer fees upfront, a club can use the facilities (leftover funding) for other transfer or football purposes. Transfer fee factoring works to a club’s advantage as many transfers are paid in instalments over several years.

The interest rates or fees paid by each club on a transfer-fee factoring arrangement to *Macquarie* may also be affected by the profile of the club. For example, a world-leading club like *FC Barcelona* might be deemed relatively risk-free so that the interest fee would be lower. Conversely, a smaller club might be seen as riskier, and the interest fee may be higher.

Regulatory framework

At a time where FIFA has regulated Third Party Ownership (TPO) and Third Party Influence (TPI) and some confederations and national associations like UEFA and the English Football Association have brought in Financial Fair Play Regulations, *Macquarie* must have a deep understanding of the changing football regulatory environment in order not to provide products, facilities or services that breach legal football regulations.

Financial Fair Play is essentially designed to inhibit football clubs from spending more on players than they could afford. The compelling appeal of the transfer-fee factoring method offered to clubs (who can afford to repay) increases the amount of money clubs have available to spend on players early in the season, when they require it and so as not to fall foul of the Financial Fair Play rules. Repayments are then made typically at the end of the season when the anticipated TV rights money, sponsorship, accumulation of game day income/gate receipts, or player transfer/player loan payments are received.

⁶ *Ibid.*

Taxation challenges

Taxation issues can be sometimes overlooked by clubs when making player transfers. Therefore, the transfer fee factoring method allows clubs, especially in England, where there is 20% VAT payable when selling a player to another club, to avoid the ‘immediate payment of the full tax amount. For instance, if the transfer fee has been structured to be repaid in five equal instalments of GBP 10 million (approx. EUR 11 million) for a GBP 50 million (approx. EUR 56 million) transfer, that leaves more money for clubs to pay other expenses as the club only pays tax on the initial GBP 10 million.

Essentially, football finance experts have stated that “*if the instalments are over a few years, then there’s a lot of cash going out soon after the transfer takes place. Factoring, therefore, allows clubs to acquire funds they need to pay unavoidable expenses from transfer sales. Having cash earlier also allows the club to pay its day-to-day bills rather than use an overdraft, which might come at a higher rate of interest.*”⁷

In the immediate future, *Macquarie’s* transfer-fee factoring method is set to become even more influential as clubs grapple with cash flow issues due to the COVID-19 effect.

Macquarie Bank’s risk appetite

Conversely, the COVID-19 pandemic may significantly affect *Macquarie’s* future transfer-fee factoring deals as football income will be hit, and *Macquarie* may lessen its risk appetite. The worldwide football industry may see a reduction in transfer fees. TV broadcast instalments may also be affected if football competitions are stopped, or competitions are played in hubs where there may likely be fewer matches. Further, TV broadcasters may want rebates for the loss of live-action, and sponsors may cut their marketing spend as their own businesses may not be doing as well financially. However, this lessening of *Macquarie’s* risk appetite may not last for long as the world works through the COVID-19 pandemic.

In fact, football has progressed as a business, “*with more information available on clubs’ finances and the influx of employees at football clubs from major accounting firms in recent years, which makes both the clubs and Macquarie more comfortable with the transfer fee factoring transactions. As Macquarie can*

⁷ Tim SIGSWORTH, 15 October 2019, The Hartlepool Mail, ‘Football finance expert explains how Middlesbrough borrowed money as part of Martin Braithwaite deal’ www.hartlepoolmail.co.uk

provide a secured borrowing facility against both tangible assets like stadiums and receivables such as TV rights and sponsorship.”⁸

Conclusion

Several financial analysts have stated that with “*cash swirling around football, clubs are increasingly making so-called “factoring” deals, borrowing against their future income to secure cash upfront. These loans would help clubs finance big-ticket player transfers as well as pay the wages of their athletes. Italy’s Juventus, Portugal’s Benfica and England’s Leicester City entered factoring transactions in recent years, though they also tend to be common among smaller clubs.*”⁹

Although there are challenges with COVID-19 and regulation, it is acknowledged that the new TV rights deal being signed by the big five leagues (just been signed for the *English Premier League*) and with the transfer player market still remaining strong, this continues to provide *Macquarie* with greater certainty that its structured finance and transfer factoring teams are working with prudent counter-parties such as football clubs in the big European leagues.

As Mr *KORCZAK* stated, the transfer-fee factoring business model, although successful “*didn’t mean it was easy. Sports is a club; you have to be invited in to play. Your reputation is everything in this industry.*”¹⁰

Through its niche-transfer fee factoring market offering, it is obvious that *Macquarie* has established an international market-leading and reliable reputation providing funding to the world’s best football clubs.

⁸ *Jamie POWELL*, 13 November 2018, *The Financial Times*, ‘*The factoring of Riyad Mahrez*’ [ftalphaville.ft.com](https://www.ft.com/content/1a1b1b1b-1a1b-1a1b-1a1b-1a1b1b1b1b1b)

⁹ *Samuel AGINI, Murad AHMED, and Arash MASSOUDI*, 13 June 2020, ‘*Scoreboard by the Financial Times, Europe’s big leagues return. Football’s financial crisis has only just begun*’ investorsnewsblog.com

¹⁰ *Hans VAN LEEUWEN*, 22 September 2020, *Australian Financial Review*, ‘*Star Macquarie banker kicks goals in Europe*’ www.afr.com

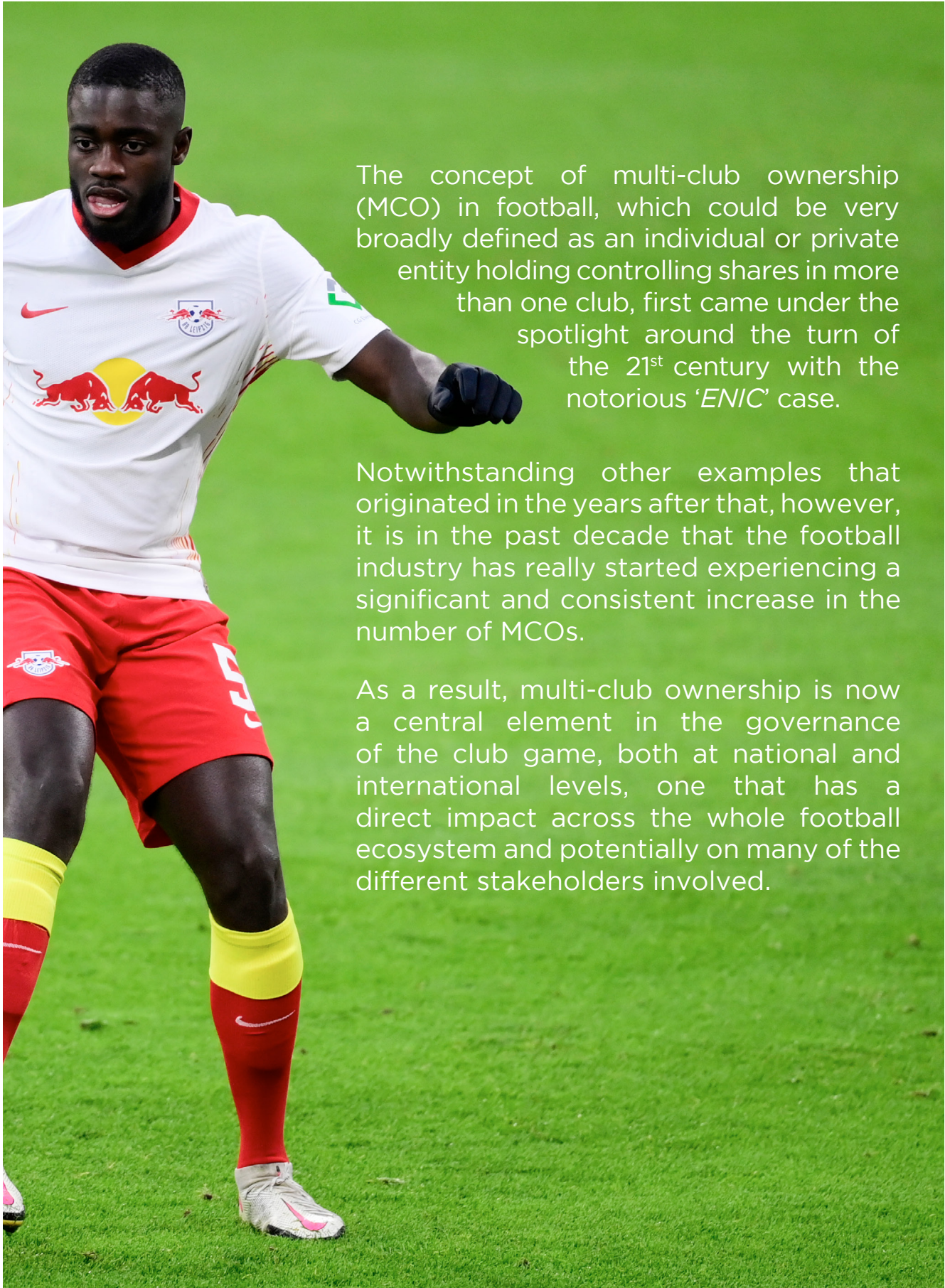
— Special Report —



Multi-Club Ownership



in Football



The concept of multi-club ownership (MCO) in football, which could be very broadly defined as an individual or private entity holding controlling shares in more than one club, first came under the spotlight around the turn of the 21st century with the notorious ‘ENIC’ case.

Notwithstanding other examples that originated in the years after that, however, it is in the past decade that the football industry has really started experiencing a significant and consistent increase in the number of MCOs.

As a result, multi-club ownership is now a central element in the governance of the club game, both at national and international levels, one that has a direct impact across the whole football ecosystem and potentially on many of the different stakeholders involved.

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The Multi-Club Ownership Issue: When and How It All Started¹



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→ **Multi-Club Ownership - Court of Arbitration for Sport (CAS) - European Commission - UEFA - UEFA Club Financial Control Body - European Law - Swiss Law - Conflict of interests - Integrity - Match-fixing**

The issue of multi-club ownership (MCO) in football - that is, the acquisition or control of multiple clubs by the same entity, whether a natural or legal person, directly or through an intermediary - dates back to the late 1990s. At the time, an English company listed on the London Stock Exchange, *ENIC plc*, had acquired a controlling interest in the clubs *AEK Athens* of Greece, *SK Slavia Prague* of the Czech Republic, *Vicenza Calcio* of Italy and *FC Basel* of Switzerland (and had a minority interest in the Scottish club *Glasgow Rangers FC*). When three of those *ENIC*-controlled clubs ended up simultaneously qualifying for the quarterfinals of the 1997-1998 edition of the now abolished UEFA Cup Winners' Cup, UEFA responded by enacting a rule that essentially forbade two or more clubs under common control from participating in the same UEFA competition. This led to key legal battles before the Court of Arbitration for Sport (CAS) and the European Commission and brought the issue of MCO to the public eye for the first time.

This article will act as an introduction to the *Football Legal* Special Report on MCO, by briefly presenting how the issue of MCO first came to be addressed in the world of football more than twenty years ago, in the landmark *ENIC* cases before both the CAS and the European Commission. Having chaired the CAS Panel that ruled on that case, I must say that I was fascinated then, and I am fascinated now, by the complexity of the issue and its many sporting, legal, economic and ethical implications.

The Rule that Brought the MCO Issue to the Football World's Attention

By the late nineties, rules on MCO had already been put in place by several sports regulators and organizers, as well as sovereign States. For example, MCO rules could be found - to varying degrees of strictness - in Europe in the handbook of the English *Premier League* and the Scottish Football League, as well as in

the State legislation of France, Spain and Portugal. In the United States, they could be found in the constitutions of the major sports leagues, such as those of the *NBA*, *NFL*, *NHL* and *MLB*.

“ I was fascinated then, and I am fascinated now, by the complexity of the issue and its many sporting, legal, economic and ethical implications ”

On 19 May 1998, UEFA also decided to adopt a rule on MCO, as it was concerned that the incident of the prior year - when three commonly owned clubs had qualified for the quarterfinals of the same UEFA competition (but had not played against each other owing to a helpful draw and to only one of them reaching the semifinals) - could occur again. The UEFA rule, entitled “*Integrity of the UEFA Club Competitions: Independence of the Clubs*”, prohibited any individual or legal entity from having “*control or influence over*

¹ I am indebted to my associate *Francisco LARIOS, Esq.* for his valuable assistance in the preparation of this article; any errors or omissions are of course my responsibility.

more than one club participating in a UEFA club competition and established that where two or more clubs “fail[ed] to meet the criteria aimed at ensuring the integrity of the competition” only one of the clubs would be admitted to take part in the UEFA club competition. Pursuant to such UEFA rule, when commonly controlled clubs simultaneously became eligible to participate in the same competition, the club to be admitted would be, first, the one with the highest “club coefficient” based on the clubs’ results of the previous years and then, if the club coefficients were the same, the club with the highest “national association coefficient”, based on the previous results of all clubs of a national association (and in case of a further tie, lots would be drawn).

It was this UEFA rule that brought the MCO issue to the attention of the football world. Indeed, less than a month after its enactment, the UEFA rule was challenged at the CAS by the football clubs *AEK Athens* and *SK Slavia Prague*, because either club would not be admitted to participate in the 1998-1999 UEFA Cup due to the new rule. After the clubs lost before the CAS, the rule was once again challenged by their common parent company *ENIC*, this time before the European Commission.

The CAS case: AEK Athens and SK Slavia Prague v. UEFA

On 15 June 1998, *AEK Athens* and *SK Slavia Prague* filed a complaint against UEFA at the CAS, petitioning that the UEFA rule be declared void or annulled. In essence, the clubs argued that the rule violated EU competition law (and Swiss competition law) by restricting the access of potential

investors in clubs in the football market and by going beyond what was necessary to address the issue of potential conflicts of interest in UEFA competitions created by MCO. UEFA, on the other hand, argued that the rule was of a pure sporting nature with the legitimate interest of protecting the integrity of European football competitions and avoiding conflicts of interest and, as such, was not subject to scrutiny under competition law.

Ultimately, the CAS Panel rejected the claims brought by the *ENIC* clubs.² In its analysis, the Panel preliminarily focused on the question of the “integrity of the game”, around which much of the debate in the case revolved. The Panel considered that integrity in football is not only related to honesty and uprightness, but also to the “authenticity of results” and that it has a critical core which is that, in the “public’s perception”, matches and competitions must be “a true test of the best possible athletic, technical, coaching and management skills of the opposing sides.”

“ MCO in the same competition (...) creates a conflict of interest situation that is unavoidably and reasonably perceived by the public as affecting the authenticity of results ”

With the concept of “integrity of the game” clarified, the Panel went on to determine that MCO in the same competition represents a legitimate concern for sports regulators and organizers, particularly because it creates a conflict of interest situation that is unavoidably and reasonably perceived by the public as affecting the authenticity of

results. The Panel found that “even assuming that multi-club owners, directors or executives always act in compliance with the law and do not try to directly fix any match, there are situations when the economic interest of the multi-club owner or parent company are at odds with sporting needs in terms of public perception of the authenticity of result.”

The Panel considered that the main problem with MCO - in terms of conflict of interest - did not lie in direct match-fixing as suggested by the *ENIC* clubs, but on the following three issues:

- The allocation of resources by the common owner among its club: the Panel observed that because there is only one winner in each competition, it would be a more efficient use of a common owner’s resources - from both a sporting and financial standpoint - to place his best players on one team as opposed to allocating them across all of the commonly owned teams. This creates a perception of conflict of interest among the consumers (i.e. the fans) who naturally would question whether a club’s management decisions are made in the interest of that club only or in the interest of another club controlled by the same owner.
- The administration of the commonly owned clubs in view of a match between them: the Panel noted that an owner of multiple clubs might favor one of its clubs prevailing over another where there is a better financial reward to be reaped from the success of one club over another. An owner of a club would be able to affect or condition the performance of its club in a variety of ways which, taken in isolation, would

² [CAS 98/200, AEK Athens and SK Slavia Prague v. UEFA, award of 20 August 1999.](#)

be *per se* legitimate and fall short of match-fixing, including by offering performance-related bonuses to the players and coaches of one club, transferring players from one club to the other, and passing “insider information” from one club to the other (e.g. with regard to players’ health, planned line-up, match tactics and the like).

- The interest of third clubs: the Panel also noted that, in competitions with a round-robin group qualification stage, the public perception would be that a third-party club would be at a disadvantage if placed in a group with two commonly owned clubs. This is because, even without match-fixing, the owner of multiple clubs would be able to induce (through legal means such as, for example, setting bonuses for drawing equal to bonuses for winning the match) one of its clubs to favor the other in the situation where the first club has already virtually qualified to the next stage of the competition and the second has not.

Based on its conclusion that MCO in the same competition inherently creates a reasonable public perception of a conflict of interest situation affecting the authenticity of results, the CAS Panel held that the UEFA rule pursued a legitimate objective. However, the Panel dismissed UEFA’s contention that, in view of its legitimate goal to protect the integrity of the game, the contested rule was to be seen as a rule of a merely sporting character to which EU Law should not have been applied at all; in the Panel’s view, albeit the UEFA rule on MCO did concern a question of great sporting interest, it also impacted on the finances of professional clubs which were certainly performing economic

activities. So, the Panel proceeded with a full analysis of the disputed issue under EU competition law.

In its competition law analysis, the Panel found that the *object* of the UEFA rule did not prevent, restrict or distort competition in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) - then Article 81 TEC - prohibiting restrictive agreements or decisions of associations of undertakings (as was UEFA), since the rule was aimed at protecting the sporting competition from said conflict of interest and preserving the genuineness of results. In addition, based on a thorough scrutiny of the relevant market - defined as the “*market for ownership interests in football clubs capable of taking part in UEFA competitions*” - the Panel found that the UEFA rule did not violate the prohibition of restrictive collusions *by effect*, since its likely economic consequences would have been to prevent a potential process of concentration of club ownership into fewer hands and to increase the number of undertakings on the football markets, thereby actually preserving or even enhancing economic competition between club owners and economic and sporting competition between clubs. Finally, the Panel found that the UEFA rule was objectively necessary to regulate MCO in football competitions and that the rule was proportionate to its objective, as it was narrowly drawn to only prohibit MCO in the same UEFA competition and not MCO as a whole.

In conclusion, the Panel found, in its award of 20 August 1999, that the contested UEFA rule on MCO was not in breach of European or Swiss Law; however, given that UEFA had suddenly adopted the rule and the CAS proceedings had lasted for more than a year,

the Panel held (in an oft-quoted passage of the award) that the *lex sportiva* principle of procedural fairness required that a reasonable period of time be granted to the owners of commonly controlled clubs to determine their course of action (e.g. selling club shares, etc.). Therefore, the CAS Panel determined that the MCO rule could only be implemented by UEFA starting from the following football season.

The European Commission case: ENIC v. UEFA

On 18 February 2000, *ENIC* filed a complaint before the European Commission, arguing once again that the UEFA rule contravened EU competition law. The Commission was not convinced by *ENIC*’s position and dismissed its claim essentially for the same reasons set out in the CAS award.³

First, the Commission determined that the UEFA rule did not *by object* restrict or distort competition in violation of EU competition law since its object was to regulate the conflict of interest created by MCO in the same competition and to protect the integrity of the UEFA competitions.

Second, the Commission found that the *effect* of the UEFA rule was also not restrictive, but rather inherent in the pursuit of its objective. It reasoned as follows:

“Without the UEFA rule, the proper functioning of the market where the clubs develop their economic activities would be under threat, since the public’s perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability. If

³ [European Commission, Case COMP/37 806, ENIC v. UEFA, 25 June 2002.](#)

UEFA competitions were not credible and consumers did not have the perception that the games played represent honest sporting competition between the participants, the competitions would be devalued with the inevitable consequence over time of lower consumer confidence, interest and marketability. Without a solid sporting foundation, clubs would be less capable of extracting value from ancillary activities and investment in clubs would lose value.”

Third, the Commission held that, in any case, the UEFA rule did not go beyond what was necessary to pursue its legitimate aim of ensuring the uncertainty of a competition’s outcome and to guarantee that the fans have the perception that football matches are being played in a correct way.

Conclusion

The two *ENIC* cases yielded landmark decisions and allowed the legitimate enactment of MCO rules by many sports and State regulators.

However, the MCO issue is still alive. Indeed, after the *ENIC* cases, MCO has actually become increasingly more common place in football. Today, MCO is prevalent all around the world, with the most notable examples being *City Football Group*, which owns 11 football clubs across the globe (including its flagship club in the UK, *Manchester City FC*), and *Red Bull GmbH*, the energy drink giant controlling multiple football clubs, including *RB Leipzig* in Germany and *RB Salzburg* in Austria, which were at the center of a recent legal dispute concerning the participation of commonly owned

clubs in the same competition.⁴ The MCO phenomenon has even expanded to occur “*cross-sports*” (where, however, issues of conflict of interest do not arise), with the prime example being *Kroenke Sports & Entertainment*, which not only owns the *Premier League* club *Arsenal FC* and the *MLS* club *Colorado Rapids*, but also multiple teams outside of football including in the *NFL*, *NBA* and *NHL*, among other sports.

It is therefore absolutely fitting that this issue of *Football Legal* presents a Special Report on the fascinating topic of MCO, surely of great interest to many international football stakeholders.

⁴ [UEFA CFCB Adjudicatory Chamber, Case AC-01/2017, RasenBallsport Leipzig GmbH and FC Red Bull Salzburg GmbH, 16 June 2017.](#)

1 Preserving the Integrity of Competitions from Conflicts of Interests



Current Legal Global Framework and Evolution of the UEFA Integrity Rule



By William STERNHEIMER
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→ **Multi-Club Ownership (MCO) – FIFA Regulations – UEFA Regulations – Court of Arbitration for Sport (CAS) – Integrity**

Introduction

The notion of “Multi-Club Ownership” refers to the situation in which a person or a company owns shares in more than one club. This is now quite common in football worldwide. One of the most recent examples is the *City Football Group* (City Group), which owns stakes in ten clubs¹, its flagship being *Manchester City FC*. The *City Group* now has a footprint across five continents and ten countries.

Although the *City Group* has been a source of attention recently, the notion of Multi-Club Ownership was developed in the 1990s and can take several forms, for different purposes.² Over the decades, and with the growth of this business model, the need for regulation became clear at different levels (local, continental, and global),

due to (*inter alia*) the risk that the integrity of matches and/or competitions could be undermined.

According to the Global Club Football 2018 Report published by FIFA, the phenomenon of Multi-Club Ownership is regulated in 33% of the Members Associations (MAs).³ However, there are significant disparities between the regulations imposed on this issue: some MAs have a strong, prohibitive approach, with investors forbidden to own shares in multiple clubs of the same league, while others have a more open attitude. These disparities can be linked to the broad-brush approach adopted by football’s ultimate regulator, FIFA. The issue of Multi-Club Ownership is addressed in Article 20 par. 2, of the [FIFA Statutes](#).⁴

³ resources.fifa.com

⁴ Such provision reads as follows:

“In any case, the member association shall ensure that neither a natural nor a legal person (including holding companies and subsidiaries) exercises control in any manner whatsoever (in particular through a majority shareholding, a majority of voting rights, a majority of seats on the board of directors or any other form of economic dependence or control, etc...) over more than one club whenever the integrity of any match or competition could be jeopardised.”

It is important to note that the issue of Multi-Club Ownership cannot be specifically regulated by FIFA as clubs are not direct members of FIFA.

However, at the regional level, Confederations have not specifically addressed the issue of Multi-Club Ownership - except for UEFA.⁵ UEFA has attempted to limit Multi-Club Ownership in its competitions via the “*Integrity of the UEFA Club Competitions: Independence of the Clubs*” rule of 19 May 1998 (the Rule) prohibiting the participation of two or more clubs under “*common control*” in the same competition. The Court of Arbitration for Sport (CAS) has analyzed the validity of this provision. More recently, UEFA has broadened the scope of what may be considered as Multi-Club Ownership.

CAS 98/200 AEK Athens and SK Slavia Prague v. UEFA: the ENIC saga as the basis for the jurisprudence on Multi-Club Ownership

In 1998, an English company, *ENIC*, was a majority shareholder in the Greek football club *AEK PAE* (AEK) and the Czech football club *SK Slavia Praha* (Slavia).⁶ *Slavia* and *AEK* both qualified to participate in the 1998-1999 UEFA Cup. On 7 May 1998, UEFA sent to its MAs the regulations and entry forms for this competition. No mention was made in those documents of the issue of Multi-Club Ownership. Yet, on 19 May 1998, the UEFA Executive Committee adopted the Rule. As a consequence, *AEK* was not admitted to the 1998-1999 UEFA Cup.⁷

⁵ Confederations such as the AFC and Concacaf have specifically copy-pasted Article 20 par. 2 of the FIFA Statutes in their own Statutes, while others just make a general reference to the FIFA Statutes without adding a specific article to the issue of Multi-Club Ownership.

⁶ *ENIC* owned 53,7% of *Slavia* and 78,4% of *AEK*. *ENIC* further owned several other European clubs.

⁷ The decision was made to only select the club with the highest UEFA coefficient, *Slavia* in that case.

¹ *Manchester City* (UK), *New York City* (USA), *Melbourne City* (Australia), *Yokohama F. Marinos* (Japan), *Montevideo City Torque* (Uruguay), *Girona FC* (Spain), *Sichuan Jiuniu* (China), *Mumbai City FC* (India), *Lommel SK* (Belgium) and its last addition, *Espérance Sportive Troyes Aube Champagne* (ESTAC, France) www.cityfootballgroup.com

² Some examples: *Atlético de Madrid* (Spain) with *Atlético San Luis* (Mexico) and *RC Lens* (France); *Fiorentina* (Italy) with *Pune City* (India); *AS Monaco* (Monaco) with *Cercle Brugge* (Belgium); or the Pozzo Family with *Udinese* (Italy) and *Watford* (UK).

On 15 June 1998, *AEK* and *Slavia* (Claimants) filed a request for arbitration at CAS arguing that the Rule should be declared null and void as it created a distinction between clubs under “*common control*” and others. According to the Claimants, the Rule violated European and Swiss competition laws, the freedom of movement provisions under EU Law, as well as general principles of law.⁸

“ Both CAS and the EC agreed that, given the purpose of the Rule, the end justified the means ”

The Panel firstly focused its attention on underlining the importance of integrity in football and deemed that it was “*crucially related to the authenticity of results*” with “*the public’s perception*” at its core.⁹ The Panel further explained that by having several clubs with the same owner competing in the same competition, “*the perception of an inherent conflict of interest in multi-club ownership within the same championship or competition seems wholly reasonable.*”¹⁰ The Panel believed that ownership of multiple clubs competing in the same competition represented a justified concern for sports regulators and organizers, and that the Rule constituted “*an essential feature for the organization of a professional football competition*”,¹¹ thereby rendering it, in principle, legitimate.¹²

Following the CAS award, on 18 February 2000, *ENIC* lodged an appeal to the European Commission (EC) claiming that the Rule violated the EC Treaty as it restricted investment in the European market. The EC rejected the complaint, concluding that the objective of the Rule was not to distort competition.¹³ It added that the limitations on the freedom of clubs and investors were inherent to the purpose of the Rule and did not go beyond “*what is necessary to ensure its legitimate aim of protecting the uncertainty of the results*”.¹⁴

In other words, both CAS and the EC agreed that, given the purpose of the Rule, the end justified the means.

Decision of the Adjudicatory Chamber AC-01/20167, Rasenballsport Leipzig GMBH & FC Red Bull Salzburg GMBH: the concept of decisive influence

The energy drink giant, *Red Bull GmbH* (*Red Bull*), has been linked to sports, sponsoring events, competitions and even individual athletes, since its beginnings. Its link to football started in 2005 when it owned stakes in *SV Austria Salzburg* (Austria), which then became *Red Bull Salzburg* (RB Salzburg). *Red Bull* today owns stakes in *Red Bull New York* (USA), *Red Bull Brasil* (Brazil), *Red Bull Bragantino* (Brazil), *RasenBallSport Leipzig* (RB Leipzig, Germany), and *FC Liefering* (Austria).¹⁵

At the end of the 2016-2017 European football season, both *RB Salzburg* and *RB Leipzig*

(Clubs) qualified for the 2017-2018 edition of the UEFA Champions League group stage. On 26 May 2017, the Chief Investigator of the UEFA Club Financial Control Body (CFCB) opened an investigation to determine whether the Clubs were eligible to participate in the 2017-2018 UEFA Champions League. In particular, the CFCB analyzed the compliance of the Clubs with Article 5 of the UEFA Champions League Regulations 2015-2018 Cycle (UCLR), which was an adaptation of the Rule as examined in the *ENIC* award by CAS but with the addition of the concept of “*decisive influence*” to include indirect forms of control.¹⁶

The CFCB considered that *Red Bull* had many links with the Clubs, in different forms:

- For *RB Salzburg*, *Red Bull* had control over the access of the General Assembly of the *RB Salzburg* association and was the main sponsor of *RB Salzburg*. Furthermore, its stadium was rented from a subsidiary of *Red Bull*;
- For *RB Leipzig*, *Red Bull* was the team’s main sponsor and had a “*decisive influence*” over the association, holding the voting rights of *RB Leipzig*.

The CFCB further noted that the Clubs had a cooperation agreement which saw many loans/transfers between them. Furthermore, people allegedly connected to *Red Bull* had been involved in the operations of both Clubs.

The main issue for the CFCB was therefore to analyse whether *Red*

8 The Claimants were granted interim relief so that both *Slavia* and *AEK* could participate in the 1998-1999 UEFA Cup. The clubs did not play against each other and were both eliminated early on.

9 Par. 25 of the award.

10 Par. 47 of the award.

11 Par. 136 of the award.

12 The Panel, however, considered that UEFA had violated its duty of procedural fairness with respect to the 1998-1999 season as it had modified the participation requirements for the UEFA Cup at a late stage, after the participants had already been made aware of the requirements.

13 ec.europa.eu.

14 *Ibid*, at par. 47, lit (c).

15 *Red Bull* also owned stakes in *Red Bull Ghana* (Ghana), a club and academy that was dissolved in 2014.

16 Art. 5.01 (c) of the UCLR reads as follows: “no individual or legal entity may have control or influence over more than one club participating in a UEFA club competition, such control or influence being defined in this context as: [...] iv. Being able to exercise by any means a decisive influence in the decision-making of the club.”

Bull had the ability to exercise, by any means, “*decisive influence*” in the decision-making of the Clubs. In the absence of a definition of this concept, the CFCB limited its analysis to the extension of *Red Bull*’s influence on both of the Clubs, declaring that the “*benchmark for establishing decisive influence is a high one, requiring the ability to direct the decision making of both clubs by any means.*” The CFCB explained that the notion had been deliberately left in “*flexible terms*” to “*capture attempts to circumvent the integrity rules by alternative means*” other than those already provided for in the *ENIC* award.¹⁷

“ The main issue for the CFCB was therefore to analyse whether Red Bull had the ability to exercise, by any means, “decisive influence” in the decision-making of the Clubs “

With the above in mind, the CFCB took note that *Red Bull* had taken measures to address its concerns as regards its potentially decisive influence. More precisely, the CFCB observed that:

- *RB Salzburg* had removed from the General Assembly of its association individuals with alleged links to *Red Bull* and *RB Leipzig*;
- the cooperation agreement signed between the Clubs had been terminated; and,
- *Red Bull* had amended its sponsorship agreements with *RB Salzburg*.¹⁸

The CFCB concluded that, in view of the above measures taken by *Red Bull*, it could accept the admission of both of the Clubs into the 2017-2018 edition of the UEFA Champions League, determining that *Red Bull* had no decisive influence over *RB Salzburg*.¹⁹

Conclusion

By limiting its analysis to high-level reasoning and by not entering into the details of the mechanisms that could or should be sanctioned by the Rule, the CFCB decision did not provide clear directions to clubs and their owners as to what might constitute a “*decisive influence*”.

This is still a pertinent issue since the Regulations of the UEFA Champions League for 2020-2021 contain the same broad and undefined notion of “*decisive influence*”.²⁰

Given how significant the phenomenon of Multi-Club Ownership has become globally, with more owners, companies, and clubs involved, it may not be long until the issue arises again. The absence of a clear and detailed regulatory framework would make it difficult to predict how any given case might be determined. That said, it is not difficult to imagine that an overhaul of the system is probably just one high-profile case away.

¹⁷ Par. 38 of the decision.

¹⁸ The rights granted to *Red Bull* and the amounts paid by *Red Bull* were reduced.

¹⁹ The CFCB was of the opinion that since it found that *Red Bull* had no decisive influence over *RB Salzburg*, it did not need to assess the same issue in respect to *RB Leipzig*.

²⁰ Art. 5(01)c) iv documents.uefa.com

Multi-Club Ownership Rules within UEFA



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→ **Multiple-Club Ownership (MCO) - UEFA - UEFA Regulations - Financial control - Club Licensing - Financial Fair Play (FFP) - UEFA Club Financial Control Body (UEFA CFCB) - Court of Arbitration for Sport (CAS) - Integrity**

This article offers an overview of the UEFA Regulatory Framework applicable to Multi-Club Ownership (MCO) cases and describes the proceedings before the UEFA Club Financial Control Body in such cases.

Introduction

If the question of MCO seems relatively recent, UEFA has had first regulated this matter in 1998.

But what is MCO? In simplified terms, it can be defined as a private company (or an individual) controlling two or more clubs or being in a “*position to influence the management, administration and/or sporting performance*” of these different clubs.¹

MCO is thus a business model that seeks to combine economic and sporting interests. The fact remains that there is an inherent need to balance this approach with the integrity of the European club competitions, which need to be safeguarded via regulatory measures adopted by UEFA.

Indeed, the first ownership issue arose already back in 1998, when the Greek club *AEK Athens* and the Czech club *Slavia Prague* became eligible

to participate in the 1998-1999 UEFA Cup. Both clubs were under the control of the same English company: *ENIC*.

On 19 May 1998, the UEFA Executive Committee addressed the issue of MCO and adopted a rule (Initial Rule) entitled “*Integrity of the UEFA Club Competitions: Independence of the Club*” and drafted as follows:

“A. General Principle

It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.

B. Criteria

With regard to admission to the UEFA club competitions, the following criteria are applicable in addition to the respective competition regulations: 1. No club participating in a UEFA club competition may, either directly or indirectly: (a) hold or deal in the securities or shares of any other club, or (b) be a member of any other club, or (c) be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or (d) have any power whatsoever in the management, administration and/or sporting performance of any other club participating in the same UEFA club competition. 2. No person may at the same time, either directly or indirectly, be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition. 3. In the case of two or more clubs which are under common control,

¹ UEFA Executive Committee, decision of 19 May 1998.

only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it: (a) holds a majority of the shareholders' voting rights, or (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or (c) is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question. 4. The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs to these competitions. It furthermore reserves the right to act vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition."

In a Circular Letter forwarded to the UEFA Member Associations on 26 May 1998, the UEFA Executive Committee explained that: *"The new rule stems from the general principle that no individual or corporate body may wield direct and decisive influence on more than one team taking part in the same UEFA club competition. More specifically, no club nor an individual or a legal entity may exert direct or indirect involvement in or influence on more than one club taking part. A special provision has also been included to address the issue of individuals or legal entities that control several clubs at the same time."*

The clubs *AEK Athens* and *Slavia Prague* both qualified on sporting merits for the 1998-1999 UEFA Cup.

The two clubs filed a request before the Court of Arbitration for Sport (CAS)² in order to declare the Initial Rule as null and void.

The CAS ruled in favour of UEFA (the Initial Rule was to be implemented starting from 2000-2001 season) and explained that the latter, in enacting such a rule purported *"to prevent the conflict of interest inherent in commonly owned clubs taking part in the same competition and to ensure a genuine athletic event with truly uncertain result"*³, which was considered as a *"legitimate goal to pursue"*.⁴ In short, the CAS stated that the Initial Rule *"[did] not restrict competition, that it [was] necessary and proportionate to the objective pursued, that it [did] not unfairly discriminate between commonly controlled clubs and other clubs, and that it [was] objectively justified"*.⁵

On 18 February 2000, *ENIC* lodged a further complaint against UEFA before the European Commission.

The European Commission came to the conclusion that the Initial Rule was not only compatible with European Law but could be justified by the need to guarantee the integrity of the competitions. Additionally, the Commission recognised the specific characteristics of the sporting sector that need to be taken into account. Finally, the European Competition Commissioner, Mr Mario MONTI, perfectly summarised in a few words the matter at stake: *"The main purpose of the UEFA rule is to protect the integrity of the competition, in other words, to avoid situations where the owner of two or more clubs participating in the competition could be tempted to rig matches."*⁶

The *ENIC* saga comforted UEFA's initial assessment of a need to regulate to protect the integrity of European club competitions. This is now fully accepted in the football industry and is well engraved in the UEFA Regulatory Framework.

UEFA Regulatory Framework

Since the decision of the UEFA Executive Committee on 19 May 1998, UEFA has developed a comprehensive set of rules and regulations, which comprises now the UEFA Statutes (Edition 2020), the UEFA competitions regulations, in particular the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season) and the Regulations of the UEFA Europa League 2018-21 Cycle (2020/21 season), and the UEFA Club Licensing and Financial Fair play Regulations (Edition 2018), to deal with multi-club ownership cases. These will be collectively referred to as the *"UEFA Regulatory Framework"* in this article.

“ The European Commission came to the conclusion that the Initial Rule was not only compatible with European Law but could be justified by the need to guarantee the integrity of the competitions ”

In limine, it is important to recall the legal principles applicable to the formulation and the interpretation of the UEFA Regulatory Framework, as follows:

- From a regulatory and drafting perspective, the UEFA Regulatory Framework follows the principle of hierarchy of norms, which is twofold: on the one hand, the rules and regulations adopted by UEFA must have a specific legal basis in the UEFA Statutes (either directly or indirectly, e.g. *via* a delegation of power) and, on the other hand, they must conform to those of a higher authority (e.g. rules and regulations shall comply with the UEFA Statutes).

² CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, award of 20 August 1999.

³ *Ibid.*, par. 113.

⁴ *Ibid.*, par. 127.

⁵ *Ibid.*, par. 144.

⁶ A reproduction of the declaration is available using: www.uefa.com

➔ From an interpretation perspective, the Swiss Federal Tribunal held that the statutes and secondary-level rules (e.g. regulations like the UEFA competitions regulations) of a major sport organisation, such as UEFA, are subject to the rules of interpretation pertaining to laws⁷, not to contracts. In this context, the UEFA Regulatory Framework is to be interpreted in an objective manner accordingly.⁸ Further, the Swiss Federal Tribunal recalled on multiple occasions that there is no hierarchy between the four methods of interpretation, *i.e.* literal, systematic, purposive and historic, although any interpretation starts with the wording of the law itself.⁹

These legal principles and rules of interpretation aim at construing the UEFA Regulatory Framework, which will now be discussed in detail.

UEFA Statutes

The *UEFA Statutes* constitute the basis for UEFA's regulatory authority and establishes the limits of the same. In the context of regulating MCO, the relevant provisions of the UEFA Statutes can be divided into three categories: (i) the objectives of UEFA; (ii) the obligations of UEFA Member Associations; and (iii) the UEFA competitions and related regulations.

(i) UEFA has the objective, among others, "*to prevent all methods or practices which might jeopardise the regularity of matches or competitions or give rise to the abuse of football.*"¹⁰ In this regard,

there is a general consensus that MCO falls within the material scope of application of this provision, especially if these clubs participate in the same competition, because of the threat to the integrity of the game and its effects on public perception.¹¹

(ii) UEFA Member Associations have embodied the objectives of UEFA by deciding to submit themselves to a series of obligations which prohibit MCO at the domestic level and institute a club licensing system to participate in European competitions.¹² At the national level, multi-club ownership occurs if a natural or legal person (including holding companies or subsidiaries) exercises control or influence over more than one of the clubs affiliated to the same UEFA Member Association whenever the integrity of any match or competition organised by it could be jeopardised. UEFA Member Associations shall also observe the minimum requirements for granting a license to clubs participating in UEFA competitions.¹³

(iii) The UEFA Executive Committee is vested with a delegation of power to draw up regulations governing the conditions of participation in and staging UEFA competitions and defining a club licensing system.¹⁴ In doing so, the UEFA Executive Committee will seek to implement in the relevant regulations UEFA's objective to prevent cases of multi-club ownership.

UEFA Competitions Regulations

The UEFA Competitions Regulations comprise *inter alia* the *Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season)* and the *Regulations of*

the UEFA Europa League 2018-21 Cycle (2020/21 season).¹⁵ Each includes a provision dedicated to the integrity of the competition.

From a systematic perspective, Article 5: (i) establishes a set of criteria to ensure the integrity of the UEFA club competitions before, (ii) provides a rule of conflict to admit participants in these competitions, in case two or more clubs fail the test and, finally, and (iii) allows for a mechanism to replace clubs not admitted to take part.

(i) The set of criteria aimed at ensuring the integrity of competitions apply essentially to clubs participating in UEFA competitions, individuals and legal entities.¹⁶ These include, *inter alia*, holding of shares in other clubs, membership of other clubs or having a role in the management, administration or sporting performance of any of these clubs at the same time.¹⁷

(ii) The rule of conflict embedded within the UEFA Regulatory Framework states that only one club will be admitted in case two or more clubs fail to meet the criteria above. In this regard, the rule gives precedence to the club which qualifies for the most prestigious UEFA club competition (*i.e.* in descending order: the UEFA Champions League or the UEFA Europa League) and, subsidiarily, to the highest-ranked club in the domestic championship

⁷ [SFT 4A_462/2019 of 29 July 2020, par. 7.2.](#)

⁸ [CAS 2016/A/4602 Football Association of Serbia v. UEFA, award of 24 January 2017, par. 101.](#)

⁹ [SFT 4A_462/2019 of 29 July 2020, par. 7.2.](#)

¹⁰ Art. 2 par. 1(e) of the UEFA Statutes.

¹¹ [CAS 98/200, AEK Athens and SK Slavia Prague v. UEFA, award of 20 August 1999, par. 48.](#)

¹² Art. 7bis par. 4 and 5 of the UEFA Statutes.

¹³ Art. 50 par. 1bis(c) of the UEFA Statutes.

¹⁴ Art. 50 par. 1 and 1bis of the UEFA Statutes.

¹⁵ The wording of the relevant provisions in the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season) and Regulations of the UEFA Europa League 2018-21 Cycle (2020/21 season) is identical. This is because of the interrelation between the UEFA Champions League and the UEFA Europa League. Therefore, the analyses of the relevant provisions in the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season) applies *mutatis mutandis* to the relevant provision in the Regulations of the UEFA Europa League 2018-21 Cycle (2020/21 season).

¹⁶ Art. 5.01 of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

¹⁷ Art. 5.01 of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

giving access to the relevant UEFA club competition.¹⁸ In a last resort, access is granted to the club whose association is ranked highest in the access list.¹⁹

(iii) In the event of a MCO case, one or more clubs will not be authorised to take part in UEFA club competitions and will need to be replaced accordingly.²⁰ As a rule, they will be replaced “*by the next best-placed club in the top domestic championship of the same association, provided the new club fulfils the admission criteria.*”²¹

UEFA Club Licensing and Financial Fair Play Regulations

The UEFA Club Licensing and Financial Fair Play Regulations are of particular relevance in the context of MCO on two accounts, namely: (i) to define or interpret terms or concepts, such as control, used as well in the *Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season)*; and (ii) in the identification of the legal group structure and the ultimate controlling party of clubs.

(i) The *UEFA Club Licensing and Financial Fair Play Regulations* define a certain number of terms of art or concepts relevant for club licensing purposes. From a systematic perspective, these definitions may be used to supplement other rules and regulations, such as the UEFA competition regulations, in order to maintain the coherence of the UEFA Regulatory Framework, even without express cross-references.

(ii) The *UEFA Club Licensing and Financial Fair Play Regulations* require a license applicant (*i.e.* any club applying for a license to participate in UEFA club competitions)²² to disclose its legal group structure and its ultimate controlling party. Further, license applicants must clearly identify and include information on any other club in respect of which the license applicant’s ultimate controlling party or key management personnel has, directly or indirectly, any ownership interest, voting rights, and/or any involvement or influence whatsoever in relation to the governance of the other club’s financial and operating policies.²³

The UEFA Regulatory Framework not only establishes substantive rules on MCO but also regulates how UEFA, including its Organs for the Administration of Justice, deal with such cases.

Proceedings and Competent Body within UEFA

The implementation of the UEFA Regulatory Framework requires UEFA to define, among others, which is the competent body to deal with MCO cases and the rules applicable in the relevant proceedings.

General principles

As a rule, Article 4.01(d) of the UEFA Competition Regulations establishes the following: “*to be eligible to participate in the competition, clubs must comply with the rules aimed at ensuring the integrity of the competition as defined in Article 5.*”

Procedural matters are further codified in Article 4 of the relevant UEFA Competition Regulations²⁴, especially ad Articles 4.05 and 4.06, which read as follows:

“[t]he UEFA administration communicates the decisions on admission to the competition to the clubs in writing, with a copy to their associations. Such decisions are final” (Article 4.05); and,

“if there is any doubt as to whether a club fulfils the admission criteria defined in [...] Paragraph 4.01 (d), the UEFA administration refers the case to the UEFA Club Financial Control Body, which decides on the admission without delay in accordance with the Procedural rules governing the UEFA Club Financial Control Body.” (Article 4.06)

Competent body

Pursuant to Articles 4.05 and 4.06, the first point that can be made is that the UEFA administration, placed under the direction of the UEFA General Secretary²⁵, is the initial decision-maker.

When dealing with an admission case in respect of the integrity rules, the UEFA administration can choose from two options, as follows:

Option (i): to decide directly on a club’s admission to the UEFA Champions or Europa League if there is no doubt as to whether such club has complied with the integrity rules, provided that all other admission criteria are also fulfilled; or,

¹⁸ Art. 5.02(a-b) of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

¹⁹ Art. 5.02(c) of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

²⁰ Art. 5.03 of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

²¹ Art. 4.08 of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

²² Art. 46(1) of the UEFA Club Licensing and Financial Fair Play Regulations.

²³ Art. 46(2)(g) of the UEFA Club Licensing and Financial Fair Play Regulations.

²⁴ Similar to the substantive rules, the procedural rules in the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season) and the Regulations of the UEFA Europa League 2018-21 Cycle (2020/21 season) are identical.

²⁵ Art. 39 of the UEFA Statutes.

Option (ii): to refer the case to the UEFA Club Financial Control Body (UEFA CFCB) if there is any doubt as to whether the club has complied with the integrity rules.

“The UEFA administration, placed under the direction of the UEFA General Secretary, is the initial decision-maker”

In respect of the first option above, pursuant to the UEFA Competitions Regulations, the decisions of the UEFA administration are final and are appealable only before CAS in Lausanne, Switzerland, in accordance with the provisions laid down in the UEFA Statutes.

In respect of the second option above, that is to say when the UEFA administration has doubts as to whether the club fulfils the integrity rules, the case is referred to the UEFA Organs for the Administration of Justice, namely the UEFA CFCB in the case at hand, which then becomes the final decision-maker within UEFA.

The UEFA CFCB is the latest Organ for the Administration of Justice established by UEFA and is vested with the authority to decide on cases mainly regarding club licensing and financial fair play matters and, subsidiarily, in club eligibility to the UEFA club competitions, which includes MCO cases. In this regard, Article 4.07 further specifies the mandatory jurisdiction of the UEFA CFCB to hear such cases, to the exclusion of the UEFA Control, Ethics and Disciplinary Body.

Proceedings before the UEFA CFCB

When a case regarding MCO is referred to the UEFA CFCB, it first reaches the desk of the

Investigatory Chamber. The latter is headed by the CFCB Chief Investigator²⁶, who shall lead the proceedings, establish the facts and collect all relevant evidence.²⁷ The CFCB Chief Investigator is provided with a broad power of investigation since “all means of evidence may be considered” according to the Procedural rules governing the UEFA CFCB (Procedural Rules).²⁸ In the framework of his investigation, the CFCB Chief Investigator may summon the clubs to a hearing before the CFCB Investigatory Chamber.²⁹

Once his investigation is complete, and after having consulted with his fellow members of the CFCB Investigatory Chamber³⁰, the CFCB Chief Investigator disposes of the following alternative:

Alternative (i): if the Chief Investigator considers that the clubs involved in the case fulfil the integrity rules, he decides to accept the clubs’ admissions to the UEFA club competitions concerned; or

Alternative (ii): if he considers that the integrity rules are not complied with by the clubs concerned, these clubs are referred to the CFCB Adjudicatory Chamber, before which the proceedings will go on and be terminated with a final decision that will be appealable before the CAS. In his referral decision, the CFCB Chief Investigator may recommend not to accept at least one of the clubs concerned.³¹

In the second option above, the final decision consisting of accepting

or rejecting the clubs’ admissions to the UEFA club competitions lies with the CFCB Adjudicatory Chamber, which indeed becomes the competent decision-maker within the CFCB (and UEFA) once the case is referred by the CFCB Chief Investigator.

Before the CFCB Adjudicatory Chamber, the judgment stage, which opposes the clubs (as defendants) and the reporting investigator chosen among the members of the CFCB Investigatory Chamber (as prosecutor), is conducted by the CFCB Chairman. The clubs are invited to submit their written observations in respect of the referral decision made by the CFCB Chief Investigator and a hearing usually takes place before the judges of the CFCB Adjudicatory Chamber where the clubs and the reporting investigator plead their case.³²

The CFCB Adjudicatory Chamber may also consider all means of evidence (like the CFCB Investigatory Chamber).

At the end of the judgment stage, the CFCB Adjudicatory Chamber makes its final decision, accepting or rejecting the admission of the clubs.³³ Such final decision may be challenged before the CAS.³⁴

Conclusion

The UEFA Regulatory Framework governing MCO is now well established and has been subject to minimal changes since the CAS last considered this topic in the seminal award CAS 98/200 *AEK Athens and SK Slavia Prague / UEFA* of 20 August 1999.

²⁶ Art. 4(3)(a) of the Procedural rules governing the UEFA Club Financial Control Body.

²⁷ Art. 12 of the Procedural rules governing the UEFA Club Financial Control Body.

²⁸ Art. 13(2) of the Procedural rules governing the UEFA Club Financial Control Body.

²⁹ Art. 13(1) of the Procedural rules governing the UEFA Club Financial Control Body.

³⁰ Art. 14(1) of the Procedural rules governing the UEFA Club Financial Control Body.

³¹ See Art. 5.02(a-c) of the Regulations of the UEFA Champions League 2018-21 Cycle (2020/21 season).

³² Art. 19-21 of the Procedural rules governing the UEFA Club Financial Control Body.

³³ Art. 27 of the Procedural rules governing the UEFA Club Financial Control Body.

³⁴ Art. 34 of the Procedural rules governing the UEFA Club Financial Control Body.

Restrictions on (Multiple) Club Ownership in European Football: An EU Law Perspective



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→ **Multi-Club Ownership – European Law – European Commission – UEFA – Conflict of interests – Integrity**

Introduction

The continued commercialization of European football has led to increased investments in football clubs by financial holdings, private investors, state-owned shareholder organisations and sponsors. Whilst early on, investment in football clubs seemed more popular with media companies,¹ a wider and more diverse range of investors is now evident.²

Although club investments predominantly are a tool for

profit maximisation³ and portfolio diversification for such investors,⁴ the potential impact on the integrity of competition has quickly become a concern for football's sports governing bodies and seemingly the prime reason for imposing restrictions on club ownership.

Whereas restrictions on club ownership, at first sight, seem to serve a legitimate sporting interest, such rules effectively dampen demand and therefore affect the internal market and restrict competition in the market for clubs. A balance is required between the premise of a free market and the need to safeguard the integrity of the game. In particular, EU Law and EU internal

market and competition law frames the debate and lays down the rules for striking this balance.

Applicable Rules and Regulations

The UEFA club competitions' regulations,⁵ on the one hand, and the UEFA statutes,⁶ on the other hand, stipulate a number of club ownership restrictions.

To ensure the integrity of the UEFA club competitions, no club participating in a UEFA club competition (i.e. the UEFA Champions League and/or the UEFA Europa League)⁷ may, either directly or indirectly:⁸

- i. hold or deal in the securities or shares of any other club participating in a UEFA club competition;
- ii. be a member of any other club participating in a UEFA club competition;
- iii. be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition; or,
- iv. have any power whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition.

¹ In Italy, for example, media companies own(ed) shares in, among others, *AC Milan*, *Fiorentina*, *Torino*, *Lazio*, *Parma*, *Internazionale* and *Roma*. In England, media companies own(ed) a stake in, among others, *Manchester United*, *Manchester City*, *Leeds United*, *Sunderland*, *Chelsea*, *Newcastle*, *Aston Villa* and *Middlesbrough*. Some media companies, such as the *English National Investment Company (ENIC)*, acquired shares in several European football clubs in the late 1990s.

² Well-known examples are stakes taken in football clubs by the *City Football Group*, the *Volkswagen Group*, the *King Power International Group*, the *Suning Holdings Group*, investments by the *Pozzo family* (since the mid-1980s) and private investors (some labeled "sugar daddies") such as *Roman Abramovich*, *Vincent Tan* and *Roland Duchatelet*. Clubs taking a stake in other clubs also occurs. Examples of the latter include: *Atlético and Lens*; *Monaco and Cercle Brugge*; and *Ajax and Ajax Cape Town*.

³ This happens through optimising operations and the pooling of resources, such as optimising the talent supply chain (management, scouting and analytics) and the tying of stand-alone football networks. Other benefits include the benefit of scale (e.g. to attract sponsors and coordinate sales and marketing efforts) and the potential "disneyfication" of football (i.e. clubs as entertainment franchises).

⁴ Sometimes, the *rationale* behind an acquisition is not predominantly economic but rather a means to exert 'soft' power and acquire international recognition in sport as a means of participating in the global development of a country or nation.

⁵ Regulations of the UEFA Champions League and the Regulations of the Europa League (UEFA Regulations), available at documents.uefa.com

⁶ UEFA 2020 Statutes (UEFA Statutes), available at documents.uefa.com

⁷ It should be noted that the restriction is applied across all UEFA-organised competitions. This makes sense in that a club starting a season in the UEFA Champions League can, at a later stage of the same season, participate in the UEFA Europa League.

⁸ Article 5 (Integrity of the competition) of the UEFA Regulations.

Moreover, no one may simultaneously be involved, either directly or indirectly, in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in a UEFA club competition.

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

- i. holding a majority of the shareholders' voting rights;
- ii. having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the club;
- iii. being a shareholder and alone controlling a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club; or,
- iv. being able to exercise by any means a decisive influence in the decision-making of the club.

Finally, according to the UEFA Statutes, Member Associations must observe the principles of loyalty, integrity and sportsmanship in accordance with the principles of fair play. Moreover, Member Associations must ensure that neither a natural nor a legal person (including holding companies and subsidiaries) exercises control or influence over more than one of their clubs whenever the integrity of any match or competition organised at Member Association level could be jeopardised. Member Associations must include such an obligation in their statutes and lay down the necessary implementing provisions.⁹

Hence, the regulations of national football association foresee similar rules. Whereas some national regulations are modelled after the UEFA Regulations, some are very country-specific.¹⁰

Restrictions on Multiple Club Ownership: What's in a Name?

Although the prime example of multiple club ownership would be a scenario in which one investor – directly or indirectly¹¹ – holds majority shares (and hence has a controlling interest) in two or more clubs playing in the same competition, other scenarios risk affecting the integrity of competitions as well. Minority stakes in different clubs may endanger the integrity as well¹² as other forms of simultaneous influence on different clubs.¹³

Since the prime concern of football's sports governing bodies is the avoidance of collusion that would arise where clubs under the same ownership or control face each other in matches of the same competition, the rules logically seek a broad scope. This is why most football governing bodies tend

to give a rather broad definition to multiple club ownership and deploy a wide array of restrictions on club ownership. The idea is to capture and avoid any situation in which the same entity or person(s) exercise (decisive) influence over more than one club in the same competition.

Restrictions on Multiple Club Ownership and EU Law

Given the economic dimension of sport, both EU internal market law – freedom of movement – and EU competition law¹⁴ are at the core of this debate.¹⁵ Regulations must be compatible with internal market and competition law provisions and may not go beyond what is necessary in the pursuit of a legitimate objective relating to the proper organisation and conduct of sport. The principle of proportionality must be respected.

Restrictions on club ownership have been looked at from an EU Law perspective in the past. In the *ENIC* case, the European Commission rejected a complaint in which *ENIC* had argued that UEFA's restriction on ownership rule restricted competition.¹⁶ The Commission considered that the object of the contested rule was not to distort competition but to protect the integrity of the UEFA competitions. Moreover, the Commission considered

¹⁰ The "50+1" rule imposed by the German Football Association and the German National Football League are a prime example.

¹¹ For example: a company holds shares of club A whilst the Ultimate Beneficial Owner of such a company holds shares in club B.

¹² For example: holding 30% of the shares of club A and 20% of the shares of club B. There is no defined shareholding level at which decisive influence arises. Depending on the circumstances, the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence (in particular, if the minority shareholder acquires the ability to block strategic commercial decisions or the appointment of key management).

¹³ For example: holding shares of club A and being a sponsor of club B; or holding shares in one club but owning the stadium of another club; or the same family holding shares of two or more clubs or intermediaries controlling or influencing two or more clubs. See, on the increasingly complex relationship between clubs, owners and sponsors: J. KAY, 'The power and influence of sponsors in football', www.lawinsport.com, [2013].

¹⁴ As well as its implementation in national competition law.

¹⁵ See the [European Commission's White Paper on Sport, COM \(2007\) 391, 11 July 2007](#).

¹⁶ *ENIC* at the time owned a stake in six professional football clubs in various member states and challenged the rule, which UEFA had adopted in 1998, that stated that no two clubs or more participating in a UEFA competition could be directly or indirectly controlled by the same entity or managed by the same person. Before filing the complaint with the Commission, *ENIC* saw a similar complaint rebuked before the CAS ([CAS 98/2000, AEK PAE and SK Slavia Praha v UEFA, 20 August 1999](#)).

⁹ A similar provision is laid down in the FIFA Statutes.

that the rule “aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competition between the participants, as consumers may suspect that teams with a common owner will not genuinely compete.”¹⁷ The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim. Although the *ENIC* decision predates the landmark decision in terms of EU and competition, *MECA MEDINA*,¹⁸ it has been argued since that the same conclusion would be reached “on the basis of the *Wouters* criteria applied in *Meca Medina*.”¹⁹

“In the absence of a clear new CAS award²⁰ on the matter and/or a Court of Justice of the European Union ruling means that caution, for the time being, is well-advised”

However, the assessment of whether a certain sporting rule is compatible with EU Law is to be made on a case-by-case basis. Rules and regulations evolve.²¹ Regulations adopted by sports governing bodies are to be seen as decisions taken by an association (or associations) of undertakings under Article 101 of the Treaty on the Functioning of the European Union (TFEU). Moreover, regarding

the particular responsibility of an undertaking in a dominant position, subjectivity and/or a margin of discretion – being almost inevitably a source of discrimination – should be avoided at the risk of being regarded as an abuse within the meaning of Article 102 TFEU.²² Given the increased investments in European football, new legal challenges against club ownership restrictions from such sports governing bodies are a possibility. Arguments developed by critics include the perceived lack of need of (some) ownership restriction rules,²³ the alleged discretion allowed in applying certain rules²⁴ and the difficulty of implementing effective control mechanisms in the global, complex and often opaque world of professional football.²⁵ In addition, the (lack of) proportionality of restrictions will always be open to being tested.

A lot will depend on the approach taken by football’s governing bodies. From its perspective, UEFA has shown a certain degree of flexibility and pragmatism in applying its integrity rule. In the widely-publicised *Red Bull* case,²⁶ it adopted a strict interpretation of the notion of “decisive influence”, ultimately allowing both *Red Bull Salzburg* and *RasenBallSport Leipzig* to participate in the 2017-2018 UEFA competitions. Whereas the Investigatory Chamber of the UEFA Club Financial Control Body (UEFA CFCB) had concluded

that the clubs failed to satisfy the criteria aimed at ensuring the competition’s integrity,²⁷ the UEFA CFCB Adjudicatory Chamber ruled that a number of changes made by *Red Bull Salzburg*²⁸ ensured that *Red Bull GmbH* did not have any decisive influence or legal power over it and that there was no longer sufficient connection between the two clubs. The UEFA CFCB Adjudicatory Chamber showed it was well aware of the detrimental and potential disproportional impact that a ban from UEFA competitions would have on a club. It considered that it was necessary to have a high threshold to assess whether or not the influence would affect the integrity of the competition. A “decisive” influence, being the power to direct the decision-making process of a club, is required. The standard necessarily had to be stricter than the “significant influence” standard used in the UEFA Club Licensing and Financial Fair Play Regulations. The UEFA CFCB Adjudicatory Chamber found support in EU Law that the test of “decisive influence”²⁹ is a difficult test to satisfy, by referring to the Council

²⁷ The two clubs were linked, with *Red Bull GmbH (Red Bull)* exercising influence over both entities. Both football clubs were limited companies that were wholly owned by the said company. *Red Bull* was able to exert influence and have access to the members of both associations. Additionally, *Red Bull* had sponsorship deals with both *Leipzig* and *Salzburg* and it granted loans to *Salzburg*. Other elements were *Salzburg* stadium (rented from a subsidiary of *Red Bull*) and the presence of a co-operation agreement between *Salzburg* and *Leipzig* (loans and transfers between the two clubs, common branding and shared management members).

²⁸ Before the hearing, a number of changes were adopted, including: *Salzburg* removed individuals from its association that were linked to *Red Bull*; the loans were terminated; the co-operation agreement with *Leipzig* was terminated; and the sponsorship agreements were amended. *Salzburg* also made commitments to address any issues regarding its lease with the *Red Bull* subsidiary and to address branding issues.

²⁹ The lack of definition and guidelines for the interpretation of this notion is considered regrettable by some authors (L. PASTORE, ‘Third Party Ownership and Multi-Club Ownership : where football is heading for’, *Rivista di Diritto ed. Economia dello Sport*, vol. XIV, Fasc. 1, [2018] and T. GRELL, ‘Multi-Club Ownership in European Football – Part II: The Concept of Decisive Influence in the *Red Bull Case*’, [2018], www.asser.nl)

¹⁷ [European Commission, Case COMP/37 806, ENIC v. UEFA](#), 25 June 2002.

¹⁸ [ECJ, Case C-519/04 P](#), 11 July 2016, *Meca-Medina* [2006] ECR I-6991.

¹⁹ [European Commission's White Paper on Sport, COM \(2007\) 391](#), 11 July 2007, Staff Working Document, Annex I, Sport and EU Competition rules, 69; S. WEATHERILL, ‘Case C-519/04 P *Meca-Medina* [2006] ECR I-6991’, in J. Anderson (ed.), *Leading cases in sports law*, 145.

²⁰ The CAS award in the *ENIC* case relates to older regulations.

²¹ The notion of “decisive influence” has become key in the UEFA Regulations and was not part of the UEFA Regulations at the time of the *ENIC* decision.

²² [European Commission, Decision of 20 June 2001 relating to a proceeding under Article 82 of the EC Treaty \(COMP/E-2/36.041/PO\), Michelin](#).

²³ Some football economists cast doubt on the necessity and appropriateness of the market intervention caused by certain integrity rules (M. BREUER, ‘Multi-club Ownerships’, in *The Palgrave Handbook on the Economics of Manipulation in Sport*, M. Breuer and D. Forrest (eds.), [2018], 133).

²⁴ The rules and the notions set out there should be as clear as possible and not leave any margin for interpretation.

²⁵ Ownership structures are sometimes subject to ‘window dressing’. In some countries, it is really difficult to get a clear view on the ownership structures.

²⁶ [UEFA CFCB Adjudicatory Chamber, Case AC-01/2017, RasenBallSport Leipzig GmbH and FC Red Bull Salzburg GmbH](#), 16 June 2017.

Regulation (EC) no. 139/2004 on the control of concentrations between undertakings. The decisive influence over multiple clubs should relate to matters that affect a club's performance in a competition (excluding simply generic corporate, commercial, financial or other business activities that do not directly affect sporting performance).

By adopting a strict approach, UEFA *de facto* seems to have set a high threshold to ban clubs from its competitions. A wise approach for avoiding EU Law challenges and an example worth following by national sports' decision-making bodies and arbitration courts. That being said, awaiting a clear new CAS award on the matter and/or a CJEU ruling means that caution, for the time being, is well-advised.

Takeover of OGC Nice by INEOS Group: An Analysis by the French Competition Authority



→ **Multi-Club Ownership (MCO) – Competition law – National courts**

French Competition Authority, Decision no. 19-DCC-160, 21 August 2019

On 22 July 2019, the INEOS Group notified the French Competition Authority of its intention to assume control of Olympique Gymnaste Club de Nice Côte d'Azur, the company which manages OGC Nice Football Club (OGC Nice). In a decision dated 21 August 2019, the French Competition Authority

authorized the transaction, without attaching any particular conditions. From a multi-club ownership perspective, the aforementioned transaction means that, eventually, the INEOS Group would have to modify its football clubs' legal structure in the event two or more clubs belonging to the INEOS Group qualify for UEFA club competitions. On the picture, Bob RATCLIFFE, CEO of INEOS football with the OGC emblem, after the group completed the takeover of Nice Football Club on 27 August 2019.

The Parties to the Transaction

The *INEOS Group* is a diversified global company, which is involved in the manufacture of petrochemicals, specialty chemicals and other petroleum products, as well as in the exploration and production of oil and gas.

SAS Olympique Gymnaste Club de Nice Côte d'Azur is a professional sports company, created by the *Association OGC Nice Côte d'Azur*, to ensure the efficient management of all activities related to the participation of the professional football club *OGC Nice* in the following sports events: *Ligue 1 / Ligue 2* championship, national cups of France and, in the event of qualification, European club competitions organized by UEFA.

Considerations of the French Competition Authority

This was the first time the French Competition Authority was required to rule on a transaction within the club football sector. Therefore, the French Competition Authority was required to identify the relevant French markets regarding which football clubs are active. At the time of publication of the decision, the European Commission had not yet had the opportunity to examine such a transaction from a competition law perspective.

The French Competition Authority, in performing its evaluation of the transaction, paid specific attention to the market for the transfer of professional football players, which, up until that point, had never been defined in its decision-making practice. At the end of the investigation, the French Competition Authority reached

the groundbreaking conclusion that there is, in fact, a market in which different professional football clubs compete in order to attract the best and most talented players (an international market of the most talented professionals), as well as the fact that the said market has a European and international dimension, which are similar, but ultimately different logistically. In this respect, the French Competition Authority held that professional players and their market are determined based on:

- Their net pay;
- The reputation of their clubs;
- The duration of their contracts;
- The competitiveness of the relevant national championship; and,
- The international competitions in which their clubs participate.

The French Competition Authority, not limiting its inquiry to a particular sport such as football, also took into consideration the market for sports advertising and marketing, that it held was becoming increasingly international in scope.

“ There is a market in which different professional football clubs compete in order to attract the best and most talented players ”

The Outcome

The French Competition Authority noted that, after the transaction, the new entity would only have a limited position in the different sectors of activity that professional football clubs usually operate within, particularly in terms of the market for the transfer of professional footballers, where its market share was held to be less than 1%. The French Competition Authority therefore authorized this takeover, without subjecting it to any particular or additional conditions.

Analysis

This is not the first time, however, that the *INEOS Group* has entered the football market. In 2017, the *INEOS Group* acquired a controlling-interest in *Lausanne-Sport FC*, the main football club in the city of Lausanne, that plays in the second division of Swiss football. Therefore, it could be considered that the *INEOS Group* is taking part in MCO operations, which may need to be addressed by UEFA in the near future if two or more clubs belonging to the *INEOS Group* take part in the same UEFA club competition.

Speaking publicly after the French Competition Authority had authorized the takeover, Sir *Jim RATCLIFFE*, the founder and CEO of *INEOS*, stated that “*we made some mistakes at Lausanne, but we are fast learners, these have been rectified, and we are already seeing the benefits. Clubs need to be successful off the pitch, as well as on it, and OGC Nice will be no different, as we look to take the club from strength to strength in all aspects over the coming years.*”¹

It is interesting that with *Lausanne-Sport FC* earning a promotion to the Swiss top division for the 2020-2021 season, the club is eligible to participate in UEFA competitions. Depending on where the club finishes in the league at the end of the season, the *INEOS Group* will need to aware that there is a prohibition on two or more teams, which are owned by the same entity, competing in the same UEFA competition.

¹ www.ogcnice.com

AFC Regulatory Framework



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→ **Multi-Club Ownership - Asian Football
Confederation (AFC) - AFC Regulations
- Club licensing**

The AFC has a framework of rules relating to MCO, which aim to safeguard the integrity of national and international football competitions in Asia.

As a starting point, matters regarding MCO are dealt with under the AFC Club Licensing Regulations - Edition 2016 (CLRs). Any club applying for a licence must submit a legally-valid declaration outlining its ownership structure and control mechanism(s). This declaration must satisfy various conditions. Notably, there is a prohibition on any natural or legal person involved in the management, administration and/or sporting performance of one club from, either directly or indirectly, being involved in or having any power whatsoever over the management, administration and/or sporting performance of another club participating in the same competition. The rules also contain various prohibitions relating to the holding of shares in and the exercise of voting rights over other clubs in the same competition, and a provision concerning the exercise of decisive influence.

Compliance with the criteria regarding MCO in the CLRs is mandatory in order to be granted a licence to participate in the AFC's club competitions. The inclusion of these rules thus has an impact on a continental level, as well as flows through to the national level through the domestic club licensing system.

These core principles are also reflected in the AFC Statutes, which require each AFC Member Association to ensure that no natural or legal person (including holding companies and subsidiaries) can exercise third-party control in any manner whatsoever (in particular through a majority shareholding, a majority of voting rights, a majority of seats on the board of directors or any other form of economic dependence or control) over more than one club, whenever the integrity of any match or competition could be jeopardised.

At the continental level, matters regarding multi-club ownership are also dealt with under the Entry Manual for AFC Club Competitions 2021 (Entry Manual). The Entry

Manual sets out the principles for allocating slots to participate in the AFC's club competitions to AFC Member Associations and their eligible clubs.

The Entry Manual prohibits individuals or legal entities from having control or influence over more than one participating club. The concepts of "control or influence" are defined as: (i) holding a majority of the shareholders' voting rights; (ii) having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the club; (iii) being a shareholder and alone controlling a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club; or (iv) being able to exercise, by any means, a decisive influence in the decision-making of a club.

It is the statutory obligation of the AFC to promote integrity, ethics and fair play in Asian football. The concept of MCO is popular all over the world and, as Asian football grows in professionalism and economic terms, it is becoming popular in Asia too.

As the regulators of Asian football, the AFC is proactively working to make sure that MCO models do not affect the integrity of football competitions at the national and continental levels. With the above-mentioned regulatory framework and constant monitoring through the club licensing system, we aim to proactively avoid any ownership structures affecting the integrity of professional football in Asia.

Not as yet, which highlights the positive conformity of the clubs and other stakeholders in Asian football with the AFC's regulatory framework.

CONMEBOL Regulatory Framework



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→ **Multi-Club Ownership - CONMEBOL -
CONMEBOL Regulations**

We perceive individuals who economically support clubs favourably; however, limits must be set, given that if we have individuals who control more than one club participating in the same competition, this could risk the integrity of the said tournament. Consequently, CONMEBOL has established limitations regarding ownership.

Article 7 of the CONMEBOL Statute states the obligations of Member Associations, which must include in their statutes provisions ensuring that no natural or legal person can control more than one club.

In addition, CONMEBOL's Club Licensing Regulations establish as a requirement that, to participate in CONMEBOL *Libertadores* and CONMEBOL *Sudamericana* tournaments, license applicant clubs must submit a legally valid declaration describing the ownership structure and control mechanism of the club and confirming that no natural or legal person involved directly or indirectly in the management, administration and/or sporting performance:

- a) Owns or tradestitles or securities of any other club participating in the same competition; or,
- b) Owns the majority of the shareholder voting rights of any other club participating in the same competition; or,
- c) Has the right to appoint or dismiss most of board or management or department members of another participating club in the same competition; or,
- d) Is a shareholder and controls most of the shareholder voting rights of shareholders in any other club participating in the same competition in accordance with an agreement signed with other shareholders of the relevant club; or,
- e) Belongs to the leadership structure of any other club participating in the same competition; or,
- f) Is involved in any quality in the management, administration and/or sporting performance

of any other club participating in its competition; or,

- g) Has any power in the management, administration and/or sporting performance of any other club participating in the same competition.

In conclusion, CONMEBOL prohibits multi-ownership in its competitions.

Multi-Club Ownership Rules in German Football



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→ **Multi-Club Ownership – German Football League (DFL) – German Football Association (DFB) – National Law – National Regulations**

Before examining the specific rules that govern multi-club ownership in Germany, it is important to understand the general legal framework of investments in German football, that significantly distinguishes German football from most other countries. In that regard, the so-called “50+1-Rule” has already been the subject of a separate article.¹

In short, this rule – despite several efforts to have it abandoned or declared null and void, is still in place and supported by the majority of German football clubs – stipulates that the voting shares of any company through which a professional football club is run must be held by the “mother association” by at a minimum of 50% plus one additional vote. In other words, it must be safeguarded that the club (association) always has more votes than the entirety of all other shareholders of a company through which professional football is run.

This rule ensures that the club always has the final say in decisions within the corporation. To secure this influence, structures that circumvent this competence of the club – for example, the implementation of certain boards within the club that are furnished with important competencies and are composed of representatives appointed by the investor rather than elected by the association – are prohibited.

Even though there have been certain exemptions to this principle (such as the engagement of “Volkswagen” with “VfL Wolfsburg” or of “Bayer” with “Bayer Leverkusen”) these can be explained by the fact that such structures existed before the 50+1-Rule was introduced. In general, this rule is strictly observed in the licensing procedure of the German Football League (DFL). This is why thus far, German clubs have not attracted much interest from foreign investors, since once they are aware of the 50+1-Rule and the restrictions it entails for their (financial) investment, most of them lose interest in pursuing their investment further. Obviously, no one wants to invest substantial amounts of money without having the final say in how this money is utilized.

However, the 50+1-Rule shall not be the central spotlight of this article. However, it is essential to keep it in mind while considering any investment in a German football club, which is why it

seemed advisable to recap this principle first.

In respect of multi-club ownership, there are basically two (almost identical) rules in the German football regulations, one being § 8.6 of the By-laws of the DFL (governing the 1. and 2. Bundesliga), and the other being § 9.2 of the Statute of the 3. League (that is governed by the German Football Association (DFB)).

Both rules – as mentioned before with nearly identical wording – say the following:

“No one may directly or indirectly participate in more than one corporation of the league with a share of 10% of more of the voting rights or the capital. Regardless of the amount of the share, no one may directly or indirectly hold capital or voting rights in more than three corporations of the league. These limitations do not apply for shares that were acquired prior to 4 March 2015.

¹ See [Football Legal # 1 \(June 2014\), p. 79](#)

Corporations are obliged to ensure by appropriate measures that the aforementioned restrictions are observed as far as legally possible and reasonable. A corporation that cannot influence the composition of its shareholders, in particular in the case of a stock exchange listing, is only responsible for violations of the restrictions of multi-club ownership by their shareholders if it has been actively and culpably involved in that violation.

Indirect participation in the sense of par. 1 is to be assumed if someone is in the position to exert dominant influence on the direct shareholder or the direct shareholder holds his share on account of someone else. In this case, the share of the direct shareholder will be fully attributable to the share of the indirect shareholder."

” The legal framework in Germany, both the “50+1-Rule” and the specific rules on multi-club ownership, do not leave much room for such engagement and make it quite unattractive “

In practice, these restrictions mean that no considerable multi-club ownership is permitted in Germany. Holding shares in more than one club is only permissible as long as the shares remain below 10%. In contrast, it is remarkable that this cap applies to both voting and capital shares, whereas the “50+1-Rule” only applies to voting shares but does not impose any restrictions in respect of capital shares. By setting such a restrictive framework – in addition to “the 50+1-Rule”, this avoids a joint venture of several minority

shareholders acquiring a majority together – it is safeguarded that no one who has shares in another corporation can hold or acquire a number of shares that might allow him to have a substantial influence on decisions around the corporation or even to only have a “blocking minority” that would allow the obstruction of decisions that the majority of shareholders might take (such a blocking majority generally requires a percentage share of at least 25%).

As a consequence, multi-club ownership is not a substantial issue in Germany.

What would be permissible under the said rules – but has been of no practical relevance so far – would be the acquisition of more than 10% of the voting and/or capital shares in a corporation affiliated with the 1. or 2. *Bundesliga* and at the same time in another corporation affiliated with the 3. *League* (or lower). The reason behind this is that both of the rules quoted above apply only within the competence of the respective federation, *i.e.* for the 1. and 2. *Bundesliga* the DFL and for the 3. *League* the DFB.

There is no rule in place that prohibits a “crossed” acquisition. However, once a 3. *League* club that an investor might hold more than 10% of its shares achieves the promotion to the 2. *League* and applies for a license, this club/corporation will face the problem that such license will be refused if the investor (still) holds a share of 10% or more in a club/corporation that has been affiliated before and remains affiliated.

Considering this at least potential problem in the case of promotion (or relegation of a 2. *League* team), investments in more than one club so far have either: been capped below 10%; or mandatorily reduced, once both of the teams

the investor holds shares of 10% or more in, start to compete under the same shield of football governing body (*i.e.* DFB or DFL).

In conclusion, the legal framework in Germany, both the “50+1-Rule” and the specific rules on multi-club ownership, do not leave much room for such engagement and make it quite unattractive.

2 A Growing and Multi-Faceted Phenomenon



A Geographical Overview of the Multi-Club Ownership Phenomenon



This overview is non-exhaustive



Multi-club ownership around the world *(non-exhaustive list)*

City Football Group



Manchester City FC
(Manchester, England)



New York City FC
(New York, USA)



Montevideo City Torque
(Montevideo, Uruguay)



Melbourne City
(Melbourne, Australia)



ES Troyes AC
(Troyes, France)



Lommel SK
(Lommel, Belgium)



Girona FC
(Girona, Spain)



Yokohama F. Marinos
(Yokohama, Japan)



Sichuan Jiuniu FC
(Chengdu, China)



Mumbai City FC
(Mumbai, India)

Group Atlético



Club Atlético de Madrid
(Madrid, Spain)



Racing Club de Lens
(Lens, France)



Atlético Ottawa
(Ottawa, Canada)



Club Atlético de San Luis
(San Luis Potosí, Mexico)

King Power



Leicester City FC
(Leicester, England)



Oud-Heverlee Leuven
(Leuven, Belgium)

Kroenke Sports & Entertainment



Colorado Rapids
(Denver, USA)



Arsenal FC
(London, England)

Roland DUCHÂTELET



Charlton
(London, England)



Carl Zeiss Jena
(Jena, Germany)



AD Alcorcón
(Alcorcón, Spain)



Royal Standard de Liège
(Liège, Belgium)



Sint-Truidense VV
(Saint-Trond, Belgium)



Újpest FC
(Budapest, Hungary)

Pozzo Family



Watford FC
(Watford, England)



Udinese Calcio
(Udine, Italy)

Hope Group



Chongqing Dangdai Lifan FC
(Chongqing, China)



Granada CF
(Granada, Spain)



CD Tondela
(Tondela, Portugal)

Core Sports Capital



Vendsyssel FF
(Hjørring, Denmark)



Austria Lustenau
(Lustenau, Austria)



Clermont Foot 63
(Clermont-Ferrand, France)

Red Bull



RB Leipzig
(Leipzig, Germany)



Red Bull Salzburg
(Salzburg, Austria)



FC Liefering
(Salzburg, Austria)



New York Red Bulls
(New York, USA)



Red Bull Bragantino
(São Paulo, Brazil)

Group Pachuca



CF Pachuca
(Pachuca, Mexico)



Club León
(León, Mexico)



Everton de Viña del Mar
(Viña del Mar, Chile)

AS Monaco



AS Monaco FC
(Monaco, Monaco)



Cercle Brugge
(Brugge, Belgium)

FCM



Brentford
(Brentford, England)



FC Midtjylland
(Herning & Ikast, Denmark)

Joey Saputo



Impact Montréal
(Montréal, Québec)



Bologna F.C. 1909
(Bologna, Italy)

INEOS



OGC Nice
(Nice, France)



Lausanne-Sport FC
(Lausanne, Switzerland)

Suning Investment Group



FC Internazionale Milano
(Milan, Italy)



Jiangsu Suning
(Nankin, China)

The growth of MCO in football and the reasons behind it



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→ **Multi-club ownership – Financial control
– Player transfer – Court of Arbitration
for Sport (CAS)**

In this article, the authors will focus on the current landscape of multi-club ownership in football. The analysis will start by illustrating the factors and trends that led to the growth of this phenomenon over the last decade in particular. After describing the notorious cases of the City Football Group and Red Bull, the authors will look at the geography and potential motives of a series of other examples to identify some of the macro-categories of MCO that exist in today's football. In addition, the article will also touch on other type of structures that, despite not being multi-club ownership as such, may eventually lead to similar effects.

The significant financial growth experienced by the football industry since the start of new millennium is central in explaining this scenario. In 1996-1997, around the time of ENIC's first investment in the game, the aggregate revenues of the top 20 clubs in Europe amounted to EUR 1.2 billion.³ For the 2018-2019 season, the same figure skyrocketed to EUR 9.3 billion, a value nearly eight times higher.⁴ A similar trend is also evident across European football as a whole. Between 2009 and 2018 alone, the aggregate revenues of all top division clubs in the continent increased by nearly 80%, from EUR 11.7 billion to EUR 21.1 billion.⁵ Largely driven

by a continuous increase in the value of media rights, this growth has disproportionately benefited the most important markets, with the effect of significantly widening the gap between clubs from the wealthiest football nations and the others. In 2018, three-quarters of the aggregate revenue of top-tier division clubs in Europe was generated in the big-5 leagues, the highest percentage ever recorded.⁶

Perhaps even more significant in the context of MCO are the effects that the financial expansion of the football industry has had on the players' transfer market. Between 2011 and 2019, the aggregate transfer fees paid in the context of national and international transfers have nearly tripled, from EUR 3.7 billion to EUR 10 billion.⁷ On the one hand, this growth in the cost of transfer fees has made it increasingly financially sensible for clubs to invest in talent scouting

and player development, rather than resorting to the signing of already experienced players. On the other, the significant amount of money circulating in the transfer market has stimulated the speculative side of dealing with player economic rights, as considerable capital gains may now be achieved with this specific type of activity. Speculation in the transfer market was also at the heart of the numerous Third-Party Ownership (TPO) agreements that emerged at the beginning of the last decade, whereby external investors would provide financing to clubs in exchange for a percentage of the economic rights of certain players, in order to benefit from their subsequent transfers. As FIFA banned this practice in 2015, this may also have incentivised certain investors to take control of one or more clubs directly and, thereby, having a legally compliant influence on the players' transfer policy.

1 Austria, Belgium, England (top two divisions), France, Germany, Greece, Italy, Netherlands, Portugal, Russia, Spain, Switzerland, Turkey, Ukraine.

2 UEFA, 'The European Club Footballing Landscape, Club Licensing Benchmarking Report Financial Year 2016'.

3 Deloitte, 'Football Money League, changing of the guard'. February 2006.

4 Deloitte, 'Football Money League, eye on the prize'. January 2020.

5 UEFA, 'The European Club Footballing Landscape, Club Licensing Benchmarking Report Financial Year 2018'.

6 Ibid.

7 Values based on data from FIFA TMS and the CIES Football Observatory.

Whilst the broad definition of multi-club ownership applies to all those instances whereby an individual or private entity holds controlling shares in more than one club, each individual case of MCO may have very different characteristics and motives. Based on a series of examples, the following paragraphs aim to illustrate some of the categories of multi-club ownership that are evident in today's football club landscape.

Cross-national vs. domestic MCOs

Whilst the focus of this article is primarily on cases of multi-club ownership that extend beyond national borders, it should be noted that there are instances whereby the same individual or private entity may hold significant shares in more than one professional club in the same country, or even competing in the same division. Typically, and to a varying extent, national associations or domestic leagues have certain rules in place to prevent or limit this type of situation. As of 2018, around a third of the 211 FIFA member associations reported the existence of some sort of regulation on multi-club ownership in their countries.⁸ In the case of the English *Premier League*, for example, two articles in the competition's handbook state that “No Person may either directly or indirectly be involved in or have any power to determine or influence the management or administration of more than one Club” and that “No Person may either directly or indirectly hold or acquire any Significant Interest”⁹

*in a Club while such Person either directly or indirectly holds any Holding in another Club.”*¹⁰

Notwithstanding this, cases in football whereby the same individual or private entity controls more than one club participating in the same domestic league are not unheard of. In Mexico, where many professional clubs are owned by large corporations, this type of outcome has become rather common over the years. At the turn of the century, when the *Major League Soccer* (MLS) was facing difficulties in attracting investors, the *Anschutz Entertainment Group* (AEG) found itself at the helm of as many as six teams at the same time.¹¹ Whilst this particular situation only lasted for a limited period, it may be argued that the *MLS* is, by itself, an example of multi-club ownership, given that the league technically owns all the franchises that take part in the tournament. However, this may be considered more as a specificity of *MLS*'s hybrid single-entity structure, rather than MCO as intended for the purposes of this article.

Cross-national MCOs: The cases of the City Football Group and Red Bull

When looking at current examples of cross-national multi-club ownership in football, two cases stand out based on their reach and the objectives they endeavor to achieve. The *City Football Group* (CFG) finds its origins in 2008 when the *Abu Dhabi United Group* (ADUG), controlled by Sheikh Mansour BIN ZAYED AL NAHYAN, took over *Manchester City FC* (England). Nevertheless, it was not until 2013, when the CFG purchased the rights to operate

a new franchise in the *MLS* - the *New York City FC* - that the project started to take shape. From there, the CFG has expanded at an unparalleled pace, completing investments in Australia, Belgium, China, France, Japan, India, Spain and Uruguay.¹² Currently, the *City Football Group* owns shares in ten clubs across five different continents, with other partnerships, such as those involving *Atlético Venezuela* (Venezuela) and *NAC Breda* (Netherlands), also having been formed over the years.

As the football industry was evolving, the *City Football Group* sought to capitalise on the opportunities offered by the globalization of the game, by creating a multinational of football and tap into growing and relatively unexplored markets. By going beyond the mere sporting sphere, CFG's objective was to establish a clear and recognizable brand and export it across the world, thereby creating synergies in the process. Nevertheless, performances on the pitch are still a key element of the strategy. Over the years, the *City Football Group* has invested heavily in player development, situating itself in an ideal position to identify talent from a number of regions around the world and directly control and influence their careers. The recent acquisitions of clubs in Belgium and France may suggest that this particular element of CFG's strategy is indeed becoming increasingly important. From a financial perspective, the strategy of the *City Football Group* appears to be proving effective. In December 2015, *China Media Capital* (CMC) Holdings led a consortium to acquire 13% of the

8 FIFA, 'Global Club Football 2018' Report, 2018

9 Article A.1.186 of the *Premier League Handbook* Season 2020/21 defines significant interest as the “holding and/or possession of the legal or beneficial interest in, and/or the ability to exercise the voting rights applicable to, shares in the Club which confer in aggregate on the holder(s) thereof 10 per cent or more of the total voting rights exercisable in respect of any class of Shares of the Club”.

10 *Premier League, 'Handbook, Season 2020/21'*. Art. 1.4 and 1.5.

11 *Chicago Fire, Colorado Rapids, DC United, Los Angeles Galaxy, New York Metro Stars and San José Earthquakes*.

12 These investments took place according to the following timeline: 2014: *Melbourne Heart* (Australia, now *Melbourne City FC*) and *Yokohama F. Marinos* (Japan); 2017: *Club Atlético Torque* (Uruguay, now *Montevideo City Torque*) and *Girona FC* (Spain); 2019: *Sichuan Jiuniu FC* (China) and *Mumbai City FC* (India); 2020: *Lommel SK* (Belgium) and *Troyes AC* (France).

CFG for USD 400 million, valuing it at USD 3 billion in total. Four years later, this valuation had already grown to USD 4.8 billion, when *Silver Lake*, a US-based private equity firm, acquired slightly over 10% of CFG for USD 500 million.

The second most significant example of MCO in football, in terms of the total number of clubs involved, is that implemented by *Red Bull*. The project began in 2005 with the acquisition of *SV Austria Salzburg* (later renamed *Red Bull Salzburg*) in the company's home country. In the three years that followed, it had already expanded overseas with the creation or acquisition of clubs in Brazil, Ghana and the United States.¹³ In 2009, *Red Bull's* football project achieved a major turning point, with the purchase of the playing licence of *SSV Markranstädt*. The German side, which was at the time competing in the fifth division, would eventually be refounded as *RasenBallsport Leipzig* and represents the flagship club in the strategy. *Red Bull's* other two major investments in football are dated 2012 and 2019. Mostly acting as a second team for *Red Bull Salzburg*, *FC Liefering* (Austria) represents a key addition to strengthen player development activities within the group of clubs. The overall *rationale* resembles that of a talent supply chain, whereby players progress through different stages of development before eventually getting to perform at the highest level. This is well exemplified by the case of *Dayot Upamecano*. Currently regarded as one of the most promising talents in Europe, he played both at *FC Liefering* and *Red Bull Salzburg* before eventually joining *RB Leipzig*. The recent investment

in *Red Bull Bragantino* (Brazil) provides the Austrian company with direct access to the highest level of Brazilian football. The club currently competes in the *Série A*, the country's top-tier division, after having achieved promotion at the end of last season.

In the case of *Red Bull*, it may be argued that investments in football clubs are just an important part of a broader plan, whose ultimate objective is to market the company's product, the energy drink, on the global stage. Akin to the strategies implemented across other sports properties - such as, for example, in *Formula 1* - *Red Bull* aims to engage with its young target audience through a project aimed at delivering sporting results, but also very much focused on the development of promising talents. In this context, multi-club ownership represents the ideal platform. In addition to its global reach, however, *Red Bull's* strategy attracted particular interest in the overall narrative of MCO in football, due to its involvement in another important judicial case related to the topic. Again, the situation originated when two of the clubs in the group's strategy - *FC Red Bull Salzburg* and *RB Leipzig* - qualified for the same international competition, the 2017-2018 UEFA Champions League. Compared to the applicable rule at the time of the *ENIC* case, UEFA had added an additional clause in its 2015-2018 regulatory framework, stating that an individual or private entity is deemed as having control or influence over a club also when "able to exercise by any means a decisive influence in the decision-making of the club."¹⁴ The *Red Bull* case revolved precisely around whether the Austrian company was in the position to exercise "decisive influence" on both *FC Red Bull Salzburg* and *RB Leipzig*. Initially, the case was referred to

the Adjudicatory Chamber of the UEFA Club Financial Control Body (CFCB). Eventually, however, both clubs were allowed to participate in the Champions League after it was concluded that, as a result of some changes to the decision-making structure of *FC Red Bull Salzburg*, as well as to its financial links with *Red Bull*, there was no "decisive influence" over the club. More specifically, the CFCB Adjudicatory Chamber stated in its decision that "the *Red Bull* and *FC Red Bull Salzburg* relationship resembles only a standard sponsorship relationship."¹⁵

Overview of cross-national MCOs in today's football

Besides the two cases presented so far, multi-club ownership in football is manifested in a multitude of strategies, normally quite limited in terms of the number of clubs involved. Out of the 21 MCOs that include at least a club from one of the big-5 European leagues, 14 (67%) only comprise two clubs. MCOs are typically characterised by a hierarchical structure, with a lead club at the top and the others across one or more subordinate positions, normally identifiable based on the "nationality" of the clubs or the specific leagues in which they compete. This vertical ownership structure can be seen in many cases of MCOs, including those linking *Leicester City FC* (England) and *OH Leuven* (Belgium) or *AS Monaco* (France) and *Cercle Brugge* (Belgium). In other instances, however, multi-club ownership may also have a more horizontal structure. Here, the hierarchy between clubs may be more difficult to define and may vary depending on several aspects, including promotions/relegations

¹³ These investments took place according to the following timeline: 2006: *New York MetroStars* (USA, now *New York Red Bulls*); 2007: *Red Bull Brasil* (Brasil, now *Red Bull Bragantino*); 2009: *Red Bull Ghana* (Ghana). The project in Ghana was eventually terminated in 2014.

¹⁴ UEFA, 'UEFA Champions League Regulations 2015-18 Cycle'. Art. 5.01 (c).

¹⁵ [UEFA CFCB Adjudicatory Chamber, Case AC-01/2017, RasenBallsport Leipzig GmbH and FC Red Bull Salzburg GmbH, 16 June 2017](#), par. 55.

or qualifications to international competitions. Possibly the best example of this scenario, the MCO that includes *Watford FC* (England) and *Udinese Calcio* (Italy) is one of the very few that could temporarily count on a club in at least two of the big-5 European leagues at the same time.¹⁶

” MCOs are typically characterised by a hierarchical structure, with a lead club at the top and the others across one or more subordinate positions “

Whilst it is nearly impossible to use a one-size-fits-all approach to explain the *rationale* behind each individual MCO in football today, it is evident that, driven by the factors canvassed earlier in this article, many of these strategies emerged as a solution to legally optimise talent scouting, player development and player recruitment activities. The main idea being to take advantage of the opportunities offered by owning another club to expand scouting networks and, perhaps more importantly, provide young players with a concrete opportunity to gain playing experience at a competitive level and in an ideal environment, whilst still maintaining direct control and influence over their careers. Ultimately, this process may have a dual objective. If one considers the mere sporting aspect, it may be aimed at preparing the most promising talents for a future at the lead club. Financially, the goal could be to increase the transfer value of certain players in view of a potential subsequent transfer.

Interestingly, the MCO that originated in 2009 with the

takeover of *Granada CF* (Spain) by the owners of *Udinese Calcio*, and that later would be further expanded with the acquisition of *Watford FC*, is often referred to as the pioneer example of multi-club ownership designed for the purposes just described. This case, and more precisely the significant number of players that were being loaned out from *Udinese Calcio* to *Watford FC*, is also what led the 72 clubs in the English Football League (EFL) to unanimously vote in 2013 in favor of rules limiting the number of foreign loans to a single team. The effects of this strategy on the number of transfers between the clubs involved were evident from the beginning and are still visible today. During the most recent transfer window, three players moved from *Watford FC* to *Udinese Calcio*, as another four went instead in the opposite direction. This type of MCOs has become increasingly common in recent years. Another case often mentioned is that of *Roland DUCHÂTELET*, a Belgian businessman and politician who owned as many as six clubs in 2014 - *Charlton Athletic FC* (England), *AD Alcorcón* (Spain), *Standard Liège* (Belgium), *Sint-Truidense VV* (Belgium), *FC Carl Zeiss Jena* (Germany) and *FC Újpest* (Hungary). To cite one of the most recent examples, *Gérard LOPEZ* - at the time owner of *OSC Lille* (France) - acquired *R.E. Mouscron* (Belgium) in August 2020. Just a few weeks later, a total of 12 players, whose average age was 21.6 years old, had already moved from the French to the Belgian club.

The examples mentioned so far refer to cases where there exists a formal link between clubs at the ownership level. Sometimes, however, similar scenarios may also be achieved through a simple partnership or collaboration. For example, *Manchester City FC* (England) and *NAC Breda*

(Netherlands) signed in 2016 a five-year deal that saw the development of young talent at the Dutch club. In a more controversial case, the real nature of the relationship between the owners of *Chelsea FC* (England) and *SBV Vitesse* (Netherlands) has been questioned for years, after a significant number of players started moving between the two clubs at the beginning of the last decade. This specific example was also subject to an investigation by the Royal Dutch Football Association (KNVB) which eventually cleared both clubs from any allegation. However, the fact that both cases described in this paragraph involved a club from the Netherlands may not be a coincidence. The applicable KNVB rule at the time stated that shareholders of a professional football club in the country could not be directly or indirectly related as a shareholder, executive director, supervisory director or in a similar capacity to another Dutch or foreign professional football organisation that is a member of an association affiliated with UEFA.¹⁷ Within this framework, close partnerships or collaborations may have represented a way to bypass the prohibition for clubs to be formally linked at ownership level.

” Many of these strategies emerged as a solution to legally optimise talent scouting, player development and player recruitment activities “

Many of the strategies described above facilitate European clubs in the development of young players from non-EU countries,

¹⁶ Between 2009 and 2016, the Pozzo family - owner of *Udinese Calcio* (Italy) since 1986 - also controlled *Granada CF* (Spain).

¹⁷ The rule was reviewed in 2019. As of 1 January 2020, shareholders of a professional football club in the Netherlands can be directly related with one foreign professional football club that is a member of an association affiliated with UEFA.

mostly in Africa or South America, that are renowned for their ability to produce talent at the highest level. Nevertheless, the number of MCOs in Europe that involve clubs from such countries or regions is relatively limited. In South America, it is for example the case of the previously illustrated investments of the *City Football Group* and *Red Bull* in Uruguay and Brazil, respectively. Despite the considerable talent pool on the continent, acquisitions of football clubs in Africa are possibly even rarer. Some examples are the previously mentioned projects of *AFC Ajax* in South Africa and *Red Bull* in Ghana, both of which have nevertheless been terminated.

” There are instances where club acquisitions in foreign countries appear to be predominantly driven by commercial motives “

In some cases, European investments in African football are aimed at forming close partnership with private academies rather than at acquiring clubs directly. *FC Metz* (France), for example, has collaborated since 2003 with the *Génération Foot* academy in Senegal, in addition to controlling *RFC Seraing* (Belgium). *Sadio MANÉ* - currently at *Liverpool FC* (England) - is one of the players that benefited from the opportunities offered by this specific network. Sometimes, the scenario just described may also be reversed. In 2016, *Tom VERNON*, founder of the *Right to Dream* academy in Ghana, joined forces with a group of investors to acquire *FC Nordsjælland* (Denmark) and be in the position to provide its best prospects with direct access to European football. For similar reasons, the *Aspire Academy* - a

project based in Qatar - acquired *KAS Eupen* (Belgium) in 2012.

Whilst player development is certainly a central element in nearly every case of MCO, there are instances where club acquisitions in foreign countries appear to be predominantly driven by commercial motives instead. For example, as part of its internationalization strategy, *Atlético Madrid* (Spain) set out to export its brand to Canada, India and Mexico by investing in *Atlético Ottawa*, *Atlético de Kolkata* and *Atlético San Luis*, respectively.¹⁸ In 2014, *ACF Fiorentina* (Italy) invested in *FC Pune*, another club from the Indian Super League.¹⁹ Interestingly, the parent company of *Olympique Lyonnais* (France) extended this strategy to women's football as well when it acquired the *Reign FC* - a member of the National Women's Soccer League (NWSL) - to take advantage of the popularity of this version of the game in the United States. On the other hand, cross-national MCOs may also be the consequence of club owners looking to access new business or strategic opportunities after having initially invested in their domestic countries. For instance, this is the case of the multi-club ownership that includes *Jiangsu Suning* (China) and *FC Internazionale Milano* (Italy), *Colorado Rapids* (USA) and *Arsenal FC* (England), *Montreal Impact* (Canada) and *Bologna FC* (Italy). Indeed, several types of business projects can derive from building a network of clubs. *Core Sports Capital* (CSC), a Swiss company, invested in *Vendsyssel FF* (Denmark), *Clermont Foot 63* (France) and *SC Austria Lustenau* (Austria) before setting up a football consulting firm based on their first-hand experience in running these three clubs.

¹⁸ The association with *Atlético de Kolkata* eventually ended in 2017.

¹⁹ The club was dissolved in 2019.

Whilst all the cases of multi-club ownership mentioned so far in the article include at least a European club, it should be noted that this is not always the case. One example is that of the *Grupo Pachuca* which, amongst others, currently controls *CF Pachuca* and *Club León* in Mexico, *Everton de Viña del Mar* in Chile and, until recently, was also involved with the Argentinian club of the *Talleres de Córdoba*. Finally, in a relatively new phenomenon related to MCO, the increasing number of clubs concentrating in the hands of a smaller number of investors also results in new indirect links at ownership level. *Marcelo CLAURE* controls *Club Bolívar* (Bolivia) and is part of the ownership group at *Inter Miami CF* (USA). Nevertheless, he is also indirectly connected with the *City Football Group* as a result of his investment in 35% of shares of *Girona CF* (Spain). *MSP Sports Capital* and *Bolt Football Holdings* - two American investment firms - were recently involved in a series of takeovers that ultimately establish a link between *AD Alcorcón* (Spain), *Crystal Palace* (England), *Estoril Praia* (Portugal) and *Waasland-Beveren* (Belgium). To add more intricacy to this case, the takeover of the Belgian club also raised concerns in light of the potential involvement of the CEO of the *Aspire Academy* and the resulting connections with *KAS Eupen*, another club from the same country. Whilst the existence of this issue was denied, it demonstrates some of the challenges that club ownership concentration may possibly lead to. Sometimes, indirect links at club ownership level may also be of different nature. For example, *Grasshopper Club Zürich* (Suisse) was recently taken over by a Hong Kong-based company controlled by the wife of *Guo GUANGCHANG*, the owner of *Wolverhampton Wanderers* (England).

Simon CLIFF: “CFG’s ambitions are to increase participation in football on and off the field, to find and develop the best football talent and to deliver an exciting and forward playing game”



*Interview with Simon CLIFF
Group General Counsel, City Football
Group (CFG)
Manchester – England*

→ **Multi-Club Ownership (MCO) – FIFA Regulations**

Can you briefly introduce yourself?

I was a corporate lawyer in the city of London in a former life and my law firm represented Abu Dhabi United Group (ADUG) in its 2008 acquisition of Manchester City FC. After the transaction closed, I joined Manchester City FC, initially for a 3-month secondment. I am still here 12 years later!

Could you describe the structuring of your group?

City Football Group (CFG) was created in 2013 when we acquired the New York City FC franchise in Major League Soccer. CFG was wholly-owned by ADUG until 2015, when China Media Capital bought a minority shareholding. This was followed by Silver Lake Partners investing in CFG and acquiring a shareholding in 2019. Today, CFG is owned 77% by Abu Dhabi United Group, 13% by China Media Capital and 10% by Silver Lake.

There are ten football clubs that form part of CFG, most wholly or majority-owned: Manchester City FC, New York City FC, Melbourne City FC, Yokohama F Marinos, Montevideo City Torque FC, Girona FC, Sichuan Jiuniu, Mumbai City FC, Lommel SK and ESTAC Troyes.

CFG’s ambitions are to increase participation in football on and off the field, to find and develop the best football talent and to deliver an exciting and forward playing game.

By achieving these ambitions - playing attractive football, engaging our community of passionate fans and adopting a uniquely global yet local approach - we are growing a sustainable and socially responsible organisation, consistent with what ‘City’ football has meant to people for over a century.

Your group is established in several countries and geographical areas. Is the lack of a single rule applicable to the MCO detrimental or, on the contrary, favourable?

City Football Group has football clubs in ten countries on four continents. Each club manages itself and, naturally, works within its applicable legal and regulatory frameworks.

What do you think of the current FIFA reform concerning the restriction of player loans between clubs?

CFG aims to be compliant with the rules and regulations of the governing bodies to which our football clubs are subject and to work positively with the governing bodies of football. Player loans, well-organised and managed, benefit player development, which FIFA recognises. Overall, FIFA’s commitment to the principles of the rule of law, good governance

and transparency is positive and benefits all the participants and stakeholders of the game we love.

What reform on the MCO or any other related subject would you like to see in the near future?

I am passionate about good governance in football. The game has made great strides in recent years and I expect that to continue. The challenge for all participants, whether governing body, club, player, fan group, is to recognise that best practices of governance, well-known to the international corporate world for decades, such as integrity, independence and transparency, are not a threat or a zero-sum game, but enhance football for all of us, above all for those we all ultimately serve: the fans. The impressive leadership shown by FIFA in championing governance throughout football is crucial. With strong principles of governance underpinning the game, all participants and many different business models can thrive.

Jiang LIZHANG: “Our intention is to place Hope Group into the global top tier’s commercial platforms in the field of football management”



Interview with Jiang LIZHANG
President, Hope Group
Shanghai – China

→ **Multi-Club Ownership (MCO) – Player loan – Player transfer – FIFA Regulations**

Can you briefly introduce yourself?

My name is *Jiang LIZHANG* and, currently, I am the President of *Hope Group*, a holding company in the sports industry and current shareholder of some football clubs such as *Chongqing Dangdai Lifan Football Club* in China, *Parma Football Club* in Italy,¹ *Granada Football Club* in Spain and *CD Tondela* in Portugal, as well as the *NBA* basketball team, *Minnesota Timberwolves* in the USA.

I have been deeply involved in the sports industry for more than 15 years and I decided to invest in the “*Sports+*” project cluster,² aiming to exploit the increase of Chinese consumers in the sports industry, renew the model of this industry in China, combine the top sports resources and build synergies between China and the sports industry worldwide.

During this time, I founded the marketing company *Desports*

in 2004, which I sold in 2015 to set up the *Hope Group*, with the purpose of carrying out different investment projects in sports with a particular focus on football.

How would you describe the philosophy of your group regarding investments in football?

In football, *Hope Group* currently manages the four abovementioned professional football clubs in which I hold the position of Honorary Chairman in *Granada Football Club* and Chairman of *Chongqing Dangdai Lifan Football Club*.

The idea of *Hope Group* is to develop a solid platform in the sports industry, with football as the core of our projects. With this in mind, we are committed to connecting China with the rest of the world through independent and well-managed football clubs which, at the same time, share resources between them as “*brother clubs*”.

Our intention is to place *Hope Group* into the global top tier’s commercial platforms in the field of football management.

Your group is established in several countries and geographical areas. Is the lack of a single rule applicable to the MCO detrimental or, on the contrary, favourable?

I do not see any particular complication in managing clubs in multiple countries at the same time. As in other industries, football follows the same trend of globalization, under which countries become more integrated and influence one other. One of the keys to success in owning football clubs in different countries, which operate under their various goals and strategies, is to implement a strategy between the various clubs and share common resources for the benefit of all clubs involved.

What do you think of the current FIFA reform concerning the restriction of player loans between clubs?

We understand the underlying reasons for this reform by FIFA, which we fully respect. For the purpose of fostering the training of local football players, we hope that such a policy will achieve positive results. Once the new regulations in this respect are published, we will strictly follow them.

¹ To the knowledge of the editor, the *Hope Group* is no longer a shareholder of *Parma FC* since it sold its shares to the Krause Group in 2020; see *Parma FC*’s Media release of 18 September 2020 parmacalcio1913.com

² The “*Sports+*” project cluster is a common term used in recent years in the Chinese sports industry, referring to the cluster of sport-related projects that combine technologies including internet, digitalisation, marketing etc. to maximize its social influence and commercial value.

An Emerging Trend in the Australian A-League



By Peter PALEOLOGOS
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→ **Multi-Club Ownership – Australian A-League – Football Federation Australia (FFA) – National Regulations – AFC Regulations**

The combination of the recent corporatisation and huge exponential financial growth of the football market worldwide has made the multi-club ownership strategy increasingly popular with big clubs, investment groups and corporate entities internationally.

This is exemplified by the emergence of leading multi-ownership type market players such as the *City Football Group* (CFG) who own such clubs as *Manchester City FC*, *Yokohama F. Marinos* (Yokohama Marinos), and *Melbourne City FC* (Melbourne City) based in the Australian A-League.

The CFG's unique multi-ownership club strategy is best exemplified by *Don DRANSFIELD*, CFG's Director of Operations Development, who stated recently:

“Our strategy very much is to look at the underlying synergies and network benefits that result from being able to operate both across multiple geographies and across multiple elements of the value chain within each of those geographies.”¹

The CFG model has, amongst other markets, some significant achievements in Australia, where Australian international *Aaron Mooy*, who was contracted to *Melbourne City*, was then signed by sister club *Manchester City FC*, then went on loan to *Huddersfield Town AFC* and was subsequently transferred to this latter club for GBP 10 million (approx. EUR 11.2 million) which was received by CFG.

This multi-ownership model has now re-emerged in Australia, with another A-League club, being *Adelaide United FC* (Adelaide United), having owners who are currently focused on using a similar approach to CFG. Recently, the *Adelaide United* Chairman *Piet VAN DER POL* confirmed “that *Adelaide United* will be bundled up with its Chinese sister club, the *Qingdao Red Lions*, and possibly a European club, and listed on a European stock exchange by the end of 2021 if COVID travel restrictions were lifted next year.”²

Adelaide United is owned by *Australian Football Opportunities Pty Ltd* (AFO), which in turn is owned by the Hong Kong-registered *Global Football Opportunities* (GFO). The initial shareholder and first director of GFO was *Rob VAN ECK*, who is the Managing Director of *Smart Brands International*, which is involved with the development, production, and worldwide distribution of high-quality consumer goods under major retail brands including *Goodyear*, *Dunlop*, and *Grundig*³. The long-term goal of AFO and its parent GFO is to set up a portfolio of three to five clubs globally. Indeed, Mr *VAN DER POL* has stated that “having multiple clubs under the one umbrella would be a safer investment option than one which depended on the fluctuations of one team.”⁴

This multi-ownership strategy has a twofold objective as a football club ownership model. Firstly, to hedge

¹ *Euan McTEAR*, 5 December 2019, World Football Summit website ‘Inside City Football Group’s multi-ownership strategy where 1+1=3’. worldfootballsommit.com

² *Michael McGUIRE*, 1 November 2020, The Advertiser, ‘Adelaide United could be floated on Euro stock exchange’.

³ *Bonita MERIADES*, Writer, 18 October 2018, Football Today News, ‘Long read: know your A-League owners’ footballtoday.news

⁴ *Michael McGUIRE*, 1 November 2020, The Advertiser, ‘Adelaide United could be floated on Euro stock exchange’.

risk and leverage opportunities by having several clubs in different countries and leagues. Secondly, to open a network and pipeline of talented player transfers and inter-group collaboration and resource sharing.

However, the multi-ownership model does have one impediment when clubs are located in the same confederation. For instance, should *Melbourne City* and *Yokohama Marinos* make the Asian Champion League or, indeed, *Adelaide United* (a previous runner up) and *Qingdao Red Lions FC*, then licensing, integrity and conflict of interest issues will arise. This is due to the fact that multi-ownership in Australia is affected by both the Asian Football Confederation (AFC) Regulations and Football Federation Australia (FFA) Club Licensing participation rules. For instance, Article 11 of the AFC Club Licensing Regulations stipulates legal criteria concerning the ownership and control of clubs participating in AFC competitions that prevent multi-owned clubs from partaking in the same AFC competitions (as set out as follows):

"The Licence Applicant must submit a legally valid declaration outlining the ownership structure and control mechanism of the Club. No natural or legal person involved in the management, administration and/or sporting performance of the club, either directly or indirectly:

a) holds or deals in the securities or shares that allows such person to exercise decisive influence in the activities of any other club participating in the same competition; and

b) holds a majority of the shareholders' voting

*rights of any other club participating in the same competition."*⁵

This ownership prohibition also applies in Australia, where it is generally prohibited for any person or entity to control or influence more than one club in the *A-League* competition for integrity reasons.

Recently, in another potential multi-ownership move, the Canberra Region Football Collective (CRFC) also "*made a formal offer to Football Federation Australia (FFA) to either buy a new A-League club licence which is being bankrolled by a 'local high net-worth family' and a European-based investment group, which has a network of clubs and would relocate key staff to Canberra to help run the team.*"⁶ Although there is no information as to which European entity is behind the CRFC bid, it indicates that the multi-club ownership model is most welcome in the Australian football market. Generally, investors are looking for value. With the *A-League* in the process of expansion and in need of investment, this will ensure that there is a continued trend that FFA and the *A-League* will engage with international club consortiums and entities interested in investing in the Australian football ecosystem, especially consortiums who have a good track record with other football clubs such as *CFG*.

⁵ AFC Club Licensing Regulations, Edition 2016 - Article 11: Legal criteria (ownership and control of club).

⁶ Vince RUGARI, 25 August 2020, Sydney Morning Herald, 'Clive Palmer's former club joins Canberra in race for A-League licence' www.smh.com.au

Ahmet SCHAEFER: “Our philosophy is really about football clubs with strong regional identities”



Interview with Ahmet SCHAEFER
Founder & CEO, Core Sports Capital
Zug – Switzerland

→ **Multi-Club Ownership (MCO) – Player loan – Player transfer – FIFA Regulations – UEFA Regulations – Financial control**

Can you briefly introduce yourself?

Swiss by my father and Turkish by my mother, I grew up in Zurich, graduated in business at the local university and found my first job in a company selling hospitality packages for the FIFA 2006 World Cup in Germany. Then, I worked in FIFA in the President's office as Mr BLATTER's personal assistant. My career changed in 2011 when I joined *MP & Silva*, first in London and then in Dubai, managing their TV rights portfolio for Asia and selling those rights to Asian channels and media groups. Through those activities, I was in contact with various football associations, notably the eight Arab Gulf Football Associations that wanted to create a regional body grouping them and aimed at better developing the Gulf Cup. The latter was created in 1970 and is the very popular regional equivalent of the Euro for Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, the UAE and Yemen. The Arab Gulf Cup Football Federation was successfully founded in 2016.

I thus felt the wish to go back to the field of football and started thinking about investing in clubs.

How would you describe the philosophy of your group regarding investments in football?

Core Sports Capital (CSC) is a Switzerland-based football-only company. Our main and first goal was to create a club alliance serving its member clubs the same way in which airline alliances serve their member alliances with synergies, exchanges or opportunities to offer players career evolution possibilities while staying in clubs sharing the same playing style, and for example, scale savings for scouting expenses.

Other club alliances exist already:

- State-owned sovereign fund-financed alliances such as the Qatari one (*Paris SG, Eupen, Cultura Leonesa*) and the *Abu Dhabi City Group*;
- Family-owned such as the Italian *Pozzo* family (*Udinese*,

Watford) and the shrinking ones developed some years ago by Malaysian *Vincent TAN* and Belgian *Roland DUCHÂTELET*;

- Brand-promotion club alliances such as the *Red Bull* strategy in various countries (such as Austria, Germany, the USA, etc.).

Our alliance presents some differences because:

1. We focus on tier-2 clubs that can receive as a group the services that individually they could not afford in terms of expertise, networks, human resources, etc.;
2. CSC is a football-only company without having a soft-power searching county behind or an investor funneling money into football from another economic business; and,
3. CSC has two subsidiaries (Advisory and Innovations) beyond the main Alliance subsidiary, dedicated to consultancy activities for all

football stakeholders and developing an integrating AI-based system for the monitoring of players' performance.

Our philosophy is really about football clubs with strong regional identities, growth potential to the highest national football level, financial stability and a group strategy focusing on players, style of play and business synergies.

Your group is established in several countries and geographical areas. Can you tell us what guided these choices? Is the lack of a single rule applicable to MCO detrimental or, on the contrary, favourable? How do you deal with the different national legal systems (e.g. quotas of non-EU players)?

For the moment, our club alliance includes two owned clubs, French *Ligue 2 Clermont Foot 63* and Danish *1. Division Vendsyssel FF*, and the very strong advisory partnership with Austrian *1. Liga Lustenau*, where we are planning a substantial equity investment.

The choice to invest in a club is made after a thorough process, beginning naturally with the choice of the country:

- Football strength in the country: French capacity to train talent, Austrian football revival in the past ten years, Danish solidity;
- Legal aspects such as ownership rules (excluding, for example, Germany and Sweden), EU/non-EU eligibility regulations;
- The financial situation of the clubs.

At a lower level of analysis, each club had to be assessed with a 360° approach: political and social

environment, situation of the national league, legal certainty, assets in terms of the playing squad and infrastructure, capacity to ensure a smooth transition with the previous owners and, of course, financial due diligence.

Overall, CSC analyzed and looked closely at around thirty+ clubs mostly in Europe, in and around the so-called “Big-5” leagues.

The lack of a single rule applicable to MCO beyond Article 20.1 of the FIFA Statutes, the UEFA rule and subsequent case-law (*ENIC*, interpretation of the notion of “decisive influence”) did not have any impact on our decision-making process excepting that we fully respect such rules, because our clubs playing in second tier competitions do not play in the same competitions at a national level and are not - not yet? - in the situation to play at a continental level against each other.

Regarding players' quota, we fully respect and follow national rules in that matter.

What do you think of the current FIFA reform concerning the restriction of player loans between clubs?

It is necessary to regulate this activity. We cannot have competitiveness in national and continental competitions if financial inequalities and/or “financial doping” by States or private funds enable some clubs, the wealthiest ones of course, to hoard most of the best young talent, looting and depriving the education-motivated clubs of their training results, with the risk also of destroying the careers of some young players leaving their training clubs too soon due to the attraction of money and glittering fame. We cannot have clubs with

between 60 and 100 players under contract.

However, would a limit on the number of loans be sufficient to correct the current imbalance between clubs and countries? A lot of people have doubt about this.

What reform of MCO or any other related subject would you like to see in the near future? How do you see the evolution of MCO over the next ten years?

It depends on which level you position your questions. At the national level, it seems unlikely that MCO of clubs and/or “decisive influence” between them would be accepted or would remain unnoticed by a Football Association and/or a pro league.

At the continental level, the “Red Bull case” between the clubs of *Leipzig* and *Salzburg* raised some questions when the two clubs could finally play against each other in Europa League despite the absence of evidence of any wrongdoing. On other continents, some questions could also be raised in some autocratic, dictatorial or even “illiberally democratic” countries where the country's political interest and its regime may influence some transfers, some results at the national and continental levels. Just remember what happened in Spain in 1953, during *Franco's* dictatorship, when the best player in the world (at that time), *Alfredo Di Stefano*, had signed with *FC Barcelona* and was forced to sign for *Real Madrid!* All that can happen without MCO of clubs.

Finally, on a global level, the risk is nearly inexistent considering the current Club World Cup format but could increase one day if a world league were to be created.

Alexander VANTYGHEM: “I am convinced that UEFA rule could evolve to a more lenient version”



Interview with Alexander VANTYGHEM
Legal Counsel, Cercle Brugge K.S.V.
Bruges - Belgium

→ **Multi-Club Ownership (MCO) - Player loan - Player transfer - FIFA Regulations - FIFA RSTP - UEFA Regulations - Royal Belgian Football Association (URBSFA) - Club Licencing - Financial control**

Can you briefly introduce yourself?

I am a legal professional that has been working in the sports industry since 2015. After obtaining an LL.M degree in international sports law and gaining experience at specialised sports law firms in Geneva and Brussels, I have recently taken the step to join the ambitious project of the Belgian football club *Cercle Brugge*. One of the elements that triggered me to join *Cercle Brugge* is the strong connection between *Cercle Brugge* and *AS Monaco*, which allows me to work in the interesting setting of an international group of football clubs.

Could you describe the structuring of the relationship between Cercle Brugge and AS Monaco from an ownership point of view?

Contrary to various other Multi-Club Ownership (MCO) structures, no holding company directly holds the shares in both *Cercle Brugge* and *AS Monaco*. Instead, *AS Monaco* directly holds the majority of the shares of the company under which football club *Cercle Brugge* operates.

Next to *AS Monaco*, *Cercle Brugge* has various other minority shareholders with a veto right on decisions regarding the registration number, the name, the logo and the colours of *Cercle Brugge*. This is a mechanism that is often used when a foreign owner arrives at a “local” football club to ensure that the soul and identity of that club do not disappear.

AS Monaco’s vision has always been to invest in young and talented football players. However, being a top European club, it has often faced the issue of hiring some young and promising players who are not yet ready to perform at the level required to play for *AS Monaco*’s first team. For these players, *Cercle Brugge* can offer a solution as it gives them the opportunity to train with top coaches and play official matches.

Is the fact that the majority of Cercle Brugge’s shares are owned by a foreign investor/club detrimental to Cercle Brugge according to the regulations of the Belgian FA?

No. *Cercle Brugge* is currently not hindered in any way by its connection with *AS Monaco*.

The Belgian FA has implemented a strict licensing system for all professional Belgian football clubs. As part of this system, the ownership and financial basis of every club is analysed to protect the integrity of the Belgian league. As such, *Cercle Brugge* needs to demonstrate that its owners have the necessary financial means, that they are not acting as intermediaries, that they are not involved in sports betting, etc. However, these rules apply equally to all Belgian clubs that have a complete Belgian ownership structure.

It is important to note that the Belgian licensing system does prevent one entity from being linked to two Belgian professional football clubs at the same time. As such, due to the *Cercle Brugge* project, *AS Monaco* is *de facto* prevented from linking itself to other professional Belgian football clubs, even if this would be done *via* minority stakes.

What do you think about the current UEFA regulatory framework?

Currently, the UEFA club competitions regulations include an integrity rule that prevents two

clubs from entering UEFA club competitions in the same season if one individual or legal entity controls or influences both clubs. Whereas I fully support the need to protect the integrity of UEFA club competitions, I am convinced that this rule could evolve to a more lenient version without harming the integrity of UEFA club competitions.

In my view, a clear distinction can be made between the group stage and the knock-out stage of UEFA club competitions. In a group stage, third clubs can be directly affected by the result of a match played between two clubs under the influence of one party. Clearly, two clubs under the influence of a same MCO should not play in the same group during group stages. This would avoid the risk of potential match-fixing arrangement between both clubs in order to qualify them to the competition's next stage in detriment of third clubs. However, during a knock-out stage, third clubs are not impacted by the result of a match played between clubs under the influence of one party and, therefore, I see no convincing reason to ban such matches as they do not impact on the integrity of UEFA club competitions.

Consequently, I hope UEFA will - for the future - consider an integrity rule whereby two (or more) clubs under the influence of one party cannot be seeded against each other in the group stage of UEFA club competitions, but can participate in the same competition and face each other in the knock-out stage. Such a rule would be less restrictive and achieve the same goal. This raises the question of whether the current integrity rule is overly restrictive and, as such, in violation of European competition law.

What do you think of the FIFA reform concerning the restriction of player loans between clubs?

In the past year, FIFA has announced many initiatives and modifications to the FIFA Regulations on the Status and Transfer of Players that will gradually decrease the maximum amount of incoming and outgoing loans per club. The reasoning behind these initiatives, being for the protection of players' interests, is certainly laudable. Next to or instead of capping the number of loan transfers per club, FIFA could also consider different measures with the same objective.

Various international groups of football clubs make it their business model to invest in the development of young football players. Evidently, this can only be applauded. An important part of such projects is often to move players around so that, at all times, they are being trained by a club that is, at that point in their careers, the best choice for their future development. It would be a shame, and a potential violation of the players' right to free movement if certain players would be forced to stay sitting on the bench at a certain club simply because the said club has already reached the maximum amount of outgoing loans for that season.

An alternative to attain FIFA's goal could be not to cap the number of loan transactions per season, but instead to set up a system to verify whether a loan transfer always takes place in the player's best interests. Much like the current FIFA Players' Status Committee (PSC) sub-committee system that validates international transfers of minor players - and that is already functioning - a similar system could be rolled out to validate loan transfers. Also, whereas the currently envisaged loan cap can

be potentially circumvented *via* player sale and mandatory buy-back options, it would be fairly straightforward to make these constructions equally subject to the validation mechanism *via* a PSC sub-committee and that way prevent circumvention of the FIFA rules.

How do you see the evolution of MCO over the next ten years?

In the past, foreign investment in football clubs was reserved for the powerhouse clubs of European football. However, over the past few years there has been a clear trend where the ownership of medium- and small-sized clubs is shifting from purely local entrepreneurs to major foreign investors and even private equity funds.

Given that major investors and private equity are increasingly looking at controlling football clubs, there will likely be a significant increase of MCO practices. Indeed, these investors have the means to acquire important stakes in various football clubs and will not be blind to the clear advantages of economies of scale of the MCO structure (such as data sharing, scouting, expertise, other cost efficiencies and the mutualisation of sponsorship efforts).

Investing in Danish Football Clubs



By Frederik BRUHN
Lawyer, DAHL Law Firm
Copenhagen - Denmark

→ **Multi-Club Ownership (MCO) - National law - National Regulations - Player loan - FIFA Regulations - UEFA Regulations**

As with all other investments, one must understand the industry and market in which a potential investment will be completed. With a population of merely 5.8 million, Denmark is a small country and, as such, is not an obvious target for international investment. However, in terms of investing in Danish football clubs, the case has turned out to be quite the opposite.

Below is a brief overview of the Danish football industry and certain related matters of legal nature, which international investors must take into consideration before an investment is carried out.

Understanding the Football Industry in Denmark

The golden age of Danish football was sparked into life in the early eighties when Denmark, apparently out of nowhere, became a highly respected football nation through a brilliant and attack minded style of football, particularly at the national team level. Following that, and notwithstanding its smaller geographic size and population, Denmark has played a significant role in international football in recent times.

Since 1971, when the Danish Football Association finally accepted professional Danish players into the national team, there have been several significant performances that peaked in 1992, when Denmark won the UEFA European Championship with impressive players such as *Peter SCHMEICHEL*, *Brian LAUDRUP* and *Flemming POVLSEN* on the team sheet.

Taking Denmark's limited population into account, it is fair to say that Denmark, within the last 40 years, has produced a decent number of world class players, who have represented some of the biggest football clubs in the world. The most recognized and well-known players are the likes of *Allan SIMONSEN*, *Michael LAUDRUP*, *Peter SCHMEICHEL* and, most recently, *Christian ERIKSEN*.

Danish club football has also experienced significant developments in recent times, making its mark internationally with results that are gradually improving in the European competitions. *Brøndby IF* was the first club to bring home an extraordinary international result, by reaching a semi-final in the UEFA Cup in 1991 and, subsequently, followed it up with a qualification for UEFA Champions League in 1998. *FC Copenhagen* then took over as the leading Danish football club and qualified several times for the European competitions during 2000's and 2010's, including

4 times for the UEFA Champions league. Last year, *FC Copenhagen* plagued *Manchester United* through 120 minutes in the Europa League quarter final before surrendering in the final minutes of extra time.

Despite these results, the Danish *Superligaen* (the best league in Denmark) is not considered among the best leagues in international football: Denmark only ranks as number 14 on the UEFA country coefficient list¹, and Danish football clubs are, compared to countries like Sweden for instance, struggling to maintain their popularity among the Danish population. Even without COVID-19, the average number of spectators per game in the Danish *Superligaen* in the 2018-2019 season was only 6,962.² Numbers in comparable countries like Sweden are 9,143³, Norway 5,780⁴ and Holland 18,011.⁵

1 www.uefa.com
2 www.transfermarkt.com
3 www.transfermarkt.com
4 www.transfermarkt.com
5 www.transfermarkt.com

Consequently, the income for Danish football clubs deriving from box office takings, television, merchandise sales and sponsorship agreements is relatively low compared to clubs from countries of similar footballing status. Accordingly, it is no secret that Danish clubs in general are struggling to make a profit on their daily football business, and in the financial year of 2019 only 6 out of 14 clubs from *Superligaen* generated a surplus, which was mainly due to significant transfer fees.⁶

Whereas the level of football in Denmark is eventually improving and the football business is becoming increasingly more professional and commercialized, the question of gaining sufficient funding to run a club is now more relevant than ever. Until recently, many Danish clubs in the topflight, but also the clubs just below, have strived to receive funding by frequently selling their best players to foreign clubs. The business model of the majority of Danish football clubs is, to a wide extent, based on the principle of talent development and the sale of talented players, before they reach their peak of their footballing ability, with the sole purpose of cashing in on the player.

One could believe that it would not be attractive to invest in and/or own a Danish football club. In particular, foreign investors must reasonably ask themselves why they should bother carrying out investments in Danish football clubs. Nonetheless, we have seen a trend that Danish football clubs are run under the corporate structure of a public limited company (in Danish: *Aktieselskab* or *A/S*) which, by nature, has an object to carry out business activities and run a professional profit making club. Thus, Danish clubs are, in general,

from a corporate law perspective, structured as professional enterprises aimed at making a profit, and some clubs are even listed on NASDAQ Copenhagen (the Stock Exchange) as illustrated below. Furthermore, and even more remarkably, we have seen an increasingly strong interest from international investors targeting Danish football clubs. The table below shows all Danish clubs from the *Superligaen* and *1st Division* (the second-highest league in Denmark), indicating if there is a foreign ownership or if the clubs are listed on the stock exchange.

CLUB	FOREIGN OWNERSHIP	LISTED
Aalborg Boldklub		X
AC Horsens		
AGF		X
Brøndby IF		X
FC Copenhagen		X
FC Midtjylland	X	
FC Nordsjælland	X	
Lyngby BK		
Odense Boldklub		
Randers FC		
SønderjyskE	X	
Vejle BK	X	
Esbjerg FB		
FC Fredericia		
FC Helsingør	X	
Boldklubben Fremad Amager	X	

HB Køge	X	
Hobro IK		
Hvidovre IF		
Kolding IF		
Silkeborg IF		X
Skive IK		
Vendsyssel FF	X	
Viborg FF		
Næstved Boldklub	X	

The above table indicates the increasing professionalization that Danish clubs are experiencing right now.

In addition, more rumors regarding potential takeovers of Danish football clubs by foreign companies or individuals are no longer uncommon, which also underlines this ongoing trend. Within recent years, investments from international investors have been carried out in *SønderjyskE* (by American investor *Robert PLATEK*⁷) and *Vendsyssel FF* (by Swiss investor *Ahmet SCHÄFER*⁸) and *Næstved Boldklub* (*Fabian ERNST* and *Alex QUAYE*). Furthermore, the Danish press has linked *Lyngby BK* with foreign investors.⁹

Another interesting recent trend in Danish football is the introduction of multiple-club ownership. Some of the foreign club owners also own shares in football clubs in other countries. This for instance is the case for *FC Midtjylland* (the owner of the club also owns *Brentford FC* in England) and *FC Helsingør* (the club owner ultimately owns shares in other clubs). This concept of multiple-club ownership is far from

⁷ www.soenderjyske.dk

⁸ See *Ahmet SCHÄFER*'s interview in *Football Legal* # 14 (December 2020), p. XXXX; See also: sport.tv2.dk

⁹ www.tipsbladet.dk

⁶ <https://idan.dk>

unseen in international football, but it has not had a prominent place in Danish football until recently.

Investing in Danish Football Clubs

Reasons to invest in Danish football clubs and concerns

Professional international investors would not invest in Danish football, if their investment did not stand a high chance of turning out to be profitable. There are indeed good reasons to invest in Danish football clubs but also certain concerns to take into consideration.

Danish football clubs are relatively cheap

One reason is the fact that most Danish football clubs are relatively cheap. In other words, it would not require a high bid to acquire all or just a majority (typically 51%) of the shares in a Danish football club. As indicated above, only a few clubs can show a financial surplus and this will generally lead to low valuations when using well known multiple based valuation methods.

” The valuation of Danish clubs, in general, is obviously far lower than for that of football clubs playing in the more prominent football leagues around the world “

This is especially the case for the smaller clubs in the Danish 1st Division, where an investment in the range of EUR 1-3 million in most cases should make it possible for investors to obtain a controlling interest.

An example of a foreign takeover is that of *FC Helsingør* (a club in the Danish 1st Division). In 2018, American investors acquired a controlling interest (approximately 51%) in the club for nearly EUR 1 million.¹⁰

When it comes to the clubs in the Danish *Superligaen*, except from top-4 clubs, their valuation is not significantly higher. Most recently, all shares in *SønderjyskE* were acquired by American investor *Robert PLATEK* for allegedly DKK 40 million (approx. EUR 5.4 million).¹¹ Another example is the sale of *FC Nordsjælland* to *Pathway Group/Right to Dream Ltd.* In this case, the investor, with owner *Tom VERNON* in front, acquired the controlling interest in *FC Nordsjælland* by paying around EUR 13,436,000.¹²

The valuation of Danish clubs, in general, is obviously far lower than for that of football clubs playing in the more prominent football leagues around the world, e.g. *Leicester City* from the *Premier League* valued at EUR 558 million or even *Ajax* which, despite playing in a comparable league to Danish *Superligaen*, is valued at a staggering EUR 432 million.¹³ For this reason, and this is very important, only a few player sales would be required, before an investor would generate a return on their investment, as it is not unusual for even smaller clubs in Denmark to sell young football players to larger clubs for significant transfer fees. Take *FC Nordsjælland* as an example. The club has, over the past few years, sold young players to both foreign and domestic clubs for significant transfer fees, for example *Mikkel DAMSGAARD* to *U.C. Sampdoria* for around EUR 6.7 million¹⁴ and *Andreas SKOV OLSEN* to *Bologna F.C. 1909* for DKK 45 million (approx. EUR 6 million).¹⁵

¹⁰ www.forbes.com

¹¹ ekstrabladet.dk

¹² sn.dk

¹³ footballbenchmark.com

¹⁴ www.tipsbladet.dk

¹⁵ www.tipsbladet.dk

Due to COVID-19, one could argue that the valuations would decrease even further in future transactions due to the expected decrease in income caused by the current restrictions on people assembling and the expected decrease in value of non-premium players. However, other drivers may affect this and only the future can tell how this development will turn out.

Talent development – and selling on

As mentioned, Danish football clubs have developed a strong track record, when it comes to developing young players and selling them to more prominent leagues for substantial amounts - in most cases with the player achieving a reasonable degree of success in their new club.

The excellent track record of producing talented players, combined with the high level of football being played in the Danish leagues compared to, for example, Norway or Sweden (at least according to the UEFA coefficient ranking)¹⁶, has given Denmark a very good reputation around the world. Accordingly, the market value of young players increases if a young player has participated in an elite training environment in a Danish club - even if the player has not even played a single game for the 1st team. This is especially the case when it comes to players whose home country is underdeveloped in terms of its football culture and lacks the facilities necessary to develop young and skilled football players - like China for instance.

This strategy/business model of bringing young foreign players to Denmark, increasing their market value by letting them be a part of an elite environment and selling them for a profit is already proven: in 2016,

¹⁶ www.uefa.com

the majority of the shares in *Veje BK* (a club in the Danish *Superligaen*) was acquired by foreign investors. The strategy was, as described above, to buy young and cheap foreign players, develop the players, increase their market value and sell them for a profit. In this respect, it is notable that no restrictions apply as to the non-Danish players' eligibility in the teams, thus making it possible for new international owners to bring in young talented foreign players to the Danish club. This being done, most likely, with the aims of sporting development and delivering success for the team on a short-term basis, but in the end, with the ultimate goal of selling the player for a large profit to a foreign club.

“ Foreign investors have come to realize the potential of Danish football clubs in generating profits through the development and sale of young players abroad ”

This strategy turned out to be successful for *Veje BK*. The club not only managed to be promoted to the Danish *Superligaen* but, at the same time, it generated impressive financial results for the financial year of 2019.¹⁷ *FC Nordsjælland* has adopted a similar strategy and business model.

Another example is *FC Helsingør*. An integral part of the strategy to turn the club into a profitable enterprise was to attract young American football players, let them develop in an elite football environment and then sell them for a profit.

This underlies the fact that foreign investors have come to realize the potential of Danish football clubs

in generating profits through the development and sale of young players abroad.

Public aid and stadium ownership

Another element to take into consideration is Danish infrastructure, with regard to public financing and the ownership of the stadiums. It is not possible for Danish professional clubs to receive direct public aid from the Government or local municipalities. However, one way for a local municipality to aid a club is to finance and build the necessary facilities (infrastructure and stadium) and rent it to clubs on very reasonable terms.¹⁸

As for the investment in *FC Helsingør*, the new owners, immediately after investing in the club, publicly mentioned the excellent infrastructure and that the new stadium built by the local municipality was an excellent platform for developing the next generation of young American talents.¹⁹ Thus, the international investors emphasized the fact that a publicly financed stadium was built and that the infrastructure already in place around the club was an important factor in their investment decision. This is obviously of great value, even though the Danish stadiums do not – in general – have the same capacity as the stadiums in, for example, the UK. But on the other hand, such capacities are not necessarily required, due to the limited number of fans attending the games.

Attractive investment environment

Denmark is known for being an accessible and easy country to

invest in. This is illustrated by the fact that the World Bank, in its most recent study, names Denmark number one in Europe and number four in the world for ease of doing business. Also, according to *Best Countries for Business 2019*, *Forbes Business Magazine*, Denmark comes in 7th in the world on the most inviting countries for capital investment list.²⁰

Adding to this, *Transparency International* ranks Denmark as number one in terms of anticorruption, making Denmark the least corrupt country in the world in 2019, according to the aforementioned survey.²¹ The trustworthiness of Danish authorities obviously will have a positive impact on the potential risk regarding foreign investment in general.

Furthermore, the Danish school system is one of the best in the world. Combined with the fact that all types of schools in Denmark are fully financed by the State and tuition free, Denmark has one of the most well-educated populations in the world. Consequently, Danish football clubs have access to a very competent local work force.

Safe and attractive country

Denmark is generally a very attractive place to live. The narrow gap between rich and poor, combined with the fact that Denmark is one of the richest countries in the world, results in Denmark being one of the safest countries in the world, as Denmark has one of the lowest crime rates of all countries. This is also emphasized by Denmark being ranked as the happiest country in the world numerous times by the *World Happiness Report*.

¹⁸ Dansk og international sportsret, 2. udgave, Jurist- og økonomiforbundets Forlag 2017, p. 457.

¹⁹ www.tipsbladet.dk

²⁰ www.forbes.com

²¹ um.dk

¹⁷ idan.dk

Additionally, the largest cities in Denmark, Copenhagen and Aarhus especially, are cities full of culture and wealth, thus being an attractive place for young foreign football players and other types of employees to live in. Another positive is the Danes' English skills, which are superior compared to populations in other countries in Europe. This can help ease the cultural integration of foreigners.

Accordingly, Denmark is well suited for the purpose of attracting talented foreign players to come and play in Denmark, and for the club owners to on-sell the players for a profit. To further support that, a special and favorable tax rule may be applicable for foreign players, in order to attract them to come to Denmark and to work (play) for the Danish clubs.

Professionalization of clubs in Denmark and club culture and values

In Denmark, only a few of the football clubs can be classified as professional. Most of the clubs are, by contrast, based on the Danish culture of associations, meaning that these clubs are usually anchored locally and, to a large extent, connected strongly to local supporters. The clubs have historically been, and are still to a large extent, based on voluntary work from locals, often with an opinion on how to run a football club. For instance, most of the staff in the stadiums on matchdays and most of the youth coaches are working voluntarily. This may not be a legal topic to take into consideration but, in reality, an investor should pay attention to the potential noise and reactions which may come from the local fans and voluntary workforce in smaller Danish clubs, once an international investment is carried out.

However, nowadays Danish clubs are generally run under the corporate structure of a public limited company. The association holding the club license then usually owns a part of the shares in the company, to which it has granted the club a license for a certain period of time. Thus, the current corporate structure generally applied makes it possible for a potential investor to acquire the controlling interest in the club (the company), making it possible to carry out the necessary strategic and operational decisions in the football club.

“ An investor should pay attention to the potential noise and reactions which may come from the local fans and voluntary workforce in smaller Danish clubs, once an international investment is carried out ”

The simplest way to obtain majority control of the club is to acquire all the shares in the company, thus making it possible to adopt any kind of resolution at general meetings. This is, for example, the case of *Sønderjyske*.²² Otherwise, the investor may acquire a majority of the company's shares (a controlling interest), i.e. a minimum of 50 % of the shares, enabling the investor to decide on matters on e.g. appointment of board members, which can be done by simple majority of votes.

However, not all corporate decisions can be made by simple majority. For example, capital increases and other decisions require an amendment of the company's articles of association. Such an amendment requires that a 2/3rds majority of the votes in favor. Ideally, the investor should

aim at achieving an ownership of 2/3rds of the club.

If the controlling interest of a club is not acquired through the majority of the shares, other measures should be taken in order to enable the investor to steer the football club in the intended direction. In this respect the investor must keep in mind that other shareholders, e.g. the old association (holding the club license) or local fans may have interests other than those which are purely commercial in the running of the club. For this reason, the investor should explore the possibility of obtaining the necessary control through different corporate measures, such as the articles of association or a shareholder's agreement. Having said that, the investor should balance the commercial interest and decision-making in that respect, by weighing up the local interest in the club to a reasonable extent. The investor should recognize the culture and values of the club and, in general, avoid carrying out obviously unpopular decisions, without hearing the voice of the association and local shareholders of the club in advance. In the past, we have seen examples from Denmark and in particular in the UK, where new investors have executed decisions in obvious disrespect of the history, culture and values of the club, whereby the investor has put himself into a problematic position, potentially jeopardizing the corporation around the club, and ultimately putting the investment at risk.

In this respect, the investor should also pay attention to the fact that club facilities are mostly owned by local municipalities which, according to rent agreements, are made available to the clubs. Thus, the relationship with municipalities should also be considered before forcing through potentially unpopular decisions. Perhaps

²² datacvr.virk.dk

a municipality would be more engaged with helping a football club that is respectful of the local culture and who is not destroying the club history in the eyes of the local fans and club people.

Who can own a Danish football club?

When considering whether or not to invest in a football club, it is important to know the local rules and legal restrictions as to ownership of football clubs. Thus, the investor must observe such rules and make sure that they do not hinder their potential ownership in the club. The national football associations may adopt and impose rules regarding ownership of football clubs.

In 2004, *The Football Association* (FA), the governing body of association football in England, introduced the “Owner’s and Director’s Test”. The test established some fundamental requirements, which the potential investor must meet in order to own an English football club. In short, the test was introduced to ensure, that the clubs are managed properly, e.g. club owners must present a clean criminal record and have the necessary qualifications for running a football club. The test is applicable if the club owner owns more than 30% of the shares in a club. The test was in particular a subject of discussion earlier this year, when *Mohammed Bin Salman* allegedly tried to take over *Newcastle United F.C.*

In 1998, the *German Football Association* (DFB) introduced the current ownership regulation/restriction, which is known as the “50+1” rule.²³ The “50+1” rule is a lot more invasive than the Owner’s

and Director’s Test. In short, the “50+1” rule means that a German club’s member association must own a majority of the voting rights (i.e. 50% plus 1 share) in the football club, provided that the club is a public or private company (AG or GmbH). Consequently, in practice, the “50+1” rule prohibits takeovers of German football clubs by both local and foreign private investors, since such investors are only allowed to acquire up to 49.9 % of the shares. There are exceptions, but these are rarely applicable and the rules have often been criticized for preventing further development of German football.

“ There are no special rules on ownership, which potential investors should take into consideration when considering an investment in a Danish football club ”

In Denmark, however, the Danish Football Association (DBU) has not yet introduced comparable restrictions on ownership of Danish football clubs. In other words, at this point in time, there are no special rules on ownership, which potential investors should take into consideration when considering an investment in a Danish football club. However, in the spring of 2020, discussions about introducing a rule in Denmark similar to the Owner’s and Director’s Test, due to an increase in foreign takeovers of Danish football clubs, were pending.²⁴ To date, the discussions have not resulted in an introduction of an ownership rule. Nevertheless, it will definitely be interesting to see whether this will be the case in the future, as it may well have an impact on future international investments in Danish clubs.

As a curiosity, it should be noted that Danish clubs, in order to obtain a club license and compete in the best Danish leagues, must comply with the rules and regulations issued by FIFA and UEFA. Therefore, an owner of a Danish football club competing in the European tournaments is not allowed to own another club competing in the same European tournament (see Art. 5 of the regulations for the UEFA Club Competitions.)²⁵ However, these rules on multiple club ownership are well known and thus is not specific to Denmark. So far, we have not had any challenges in Denmark as to compliance with this.

FIFA’s new restrictions on loans

On 27 February 2020, FIFA took further steps towards reforming the transfer system, with the proposed introduction of new regulations aimed at limiting the number of players being loaned in and out of a club at one time.

The purpose of introducing restrictions on loans is “to ensure that they (the loans of players) have a valid sporting purpose for youth development.”²⁶ The new regulation is undoubtedly a consequence of an ongoing trend, where clubs to a larger extent make use of loan deals in order to make profits through one simple strategy: buy young and talented players, loan them out, hope they perform well, thus increasing their market value, and sell them at a profit. For instance, *Atalanta B.C.* currently have 46 players out on loan. Last season, they had up to 76 players out on loan to other clubs.²⁷

²³ See Football Legal # 14 (December 2020), p. XXXX

²⁴ www.tipsbladet.dk

²⁵ documents.uefa.com

²⁶ www.fifa.com

²⁷ www.dailysabah.com

In short, by the 2022-2023 season, there will be a limit of six international loans, in and out, of players aged 22 and older. Furthermore, there will be a maximum of three loans in and three loans out between the same clubs. This will obviously limit the possibility of succeeding with the loan strategy with regard to players aged 22 or older.

Domestically, the respective FIFA member associations must implement such restrictions on domestic loan deals before the 2022-2023 season. These rules must be in line with the principles established at the international level.²⁸ It is unclear, whether this wording forces the member associations to implement the exact same restrictions on domestic loans as well.

Among the best Danish football clubs, the loan out strategy is well-known and applied to some extent. In this respect, *F.C. Midtjylland* was under the spotlight, when they loaned out five players to second-tier-based *FC Fredericia*, according to a general cooperation agreement between the two clubs. Eventually, *FC Fredericia*, this season, was close to being promoted to the Danish *Superligaen* but failed in the end. This case obviously caused a great debate in Danish football due to the fact that the cooperation between the two clubs could potentially lead to issues regarding integrity, if the two clubs were to play in the same league. However, the dilemma never became relevant. Danish clubs still make use of loan deals. At the time of writing, *FC Midtjylland* have 14 players out on loan deals to different clubs²⁹, whilst *Vejle Boldklub* (from the Danish *Superligaen*) currently have nine players out on loan.³⁰ Obviously,

these are low numbers compared to figures seen in Italy or England but, from a Danish perspective, this is massive. However, all players out on loan from both *FC Midtjylland* and *Vejle Boldklub* are aged 21 years or younger. Accordingly, the proposed new restrictions on loans of players would not have prevented these loan agreements. In general, Danish clubs mostly loan out very young players and the potential new restriction will most likely have little or no effect on the loan strategy used by Danish clubs. That would only be the case, if the loan strategy developed to the degree of the strategy in *Atalanta B.C.*, which at current seems very unlikely.

²⁸ *Ibid.*

²⁹ www.transfermarkt.com

³⁰ www.transfermarkt.com

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Towards a New
Approach to
MCO?



Implications of multi-club ownership on the current football ecosystem



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→ **Multi-club ownership - Financial control
- Player transfer - Court of Arbitration
for Sport (CAS)**

Due to a combination of factors, the phenomenon of multi-club ownership in football is rapidly growing. In many cases, the popularity of MCOs is due to the advantages these structures offer in terms of talent scouting, player development and player recruitment. In other instances, alternative motives may be equally or even more important. Regardless of the *rationale* behind each individual case, however, there is no doubt that MCOs have multiple ripple effects on the club football ecosystem as a whole.

For players, it may be argued that any mechanism that incentivises investment in adequate scouting and development is a positive element that facilitates the creation of new professional opportunities. Nevertheless, as MCOs become increasingly common and many of them evolve into scenarios resembling those of a talent supply chain, these structures may also limit the influence they have on their own careers as well as their freedom of movement. Potentially, this may even result in a shift in the traditional relationship between management and labour in football. Already today it is not

unheard, at least in the media, of players signing with a group rather than with an individual club.

At club level, MCOs may in principle facilitate business processes optimization as well as the creation of synergies and economies of scale both on and off the pitch, with advantages that can potentially extend to all clubs involved. Even in vertically organised MCOs, where the interests of the lead club are always prioritised, smaller clubs can significantly benefit from the additional resources, both monetary and non-monetary, that usually result from having a close relationship with more established teams. Nevertheless, this type of scenario also presents some controversies. As clubs are incorporated in wider cross-national structures, the concern is that they might lose their own identity and connections with local communities. Moreover, by being subordinated to a hierarchical organisation, it may be argued that certain clubs effectively give away their autonomy. From a sporting perspective, whilst these clubs may be able to access more talented players, the fact that this is just temporary renders it difficult

for them to implement plans that go beyond the simple short term. Additionally, in cases such as that of Europe, sporting results for certain clubs may be limited *a priori* by the impossibility of two teams being controlled by the same owner, participating in the same international competition.

**“ There is no doubt
that MCOs have
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The trends discussed in this special report¹, and that led to the proliferation of MCO in football, also have a direct impact on domestic leagues and national associations. With club acquisitions becoming increasingly attractive, investors started to scout for football nations that, based on a combination of factors, would represent the ideal platform for developing young players. Eventually, this resulted in certain leagues being subject to a considerable number of club takeovers. In Belgium, half of the 26 clubs in the top two divisions are now owned by foreign investors.

¹ See Football Legal #14 (December 2020), p. 101.

In eleven of these cases, clubs are part of a wider multi-club ownership strategy. Other countries, such as Portugal and Denmark, are on similar paths. Even in this case, it may be argued that such a situation presents both opportunities and challenges. Leagues may grow in terms of overall management, by benefiting from the synergies established in the context of MCOs. However, the image and quality of certain leagues may be affected by the impossibility for most clubs to retain the best players and the loss of identity previously described at club level. Perhaps more damaging are the consequences that the above-mentioned scenario may have on the development of individual national football ecosystems. Certain leagues are identified as ideal targets for club acquisitions because of their limited or no restrictions on the number of foreign players a club can register or field. However, in a zero-sum situation, the more playing time that is granted to foreign players, the fewer possibilities there are for domestic talents. As such, countries that are overly exposed to foreign investments may potentially affect the development of their own national football systems in the future.

From a regulatory perspective, multi-club ownership in football has mostly been addressed to date in view of its potential implications on the integrity of competitions. To varying extents, both national and international football governing bodies have introduced rules trying to prevent two clubs under shared ownership to take part in the same competition. Whilst this approach tackles one of the main challenges posed by the MCO, other implications may arise from the application of this type of structures. To limit the practice of talent hoarding by the bigger clubs and ensure that temporary transfers are merely used as a means to achieve sporting purposes, football

authorities have been recently discussing the introduction of restrictions on international loans. In this context, it may be argued that MCO would present the ideal solution to circumvent the rules, as clubs may resort to intra-group transfers instead. Intra-group transactions may also provide the opportunity to settle the accounts of individual clubs in an MCO, for example, where needed to get around specific financial regulations. Potentially, this may also facilitate more serious misconducts, such as those related to tax evasion. Any regulatory effort on MCO, however, should start from a clear understanding of the ownership structure of each individual club in the first place. For certain clubs, this information appears to be still rather opaque, making it difficult to identify all the individuals or private entities effectively involved. This may generate numerous issues, including cases of Third-Party Ownership (TPO) and Third-Party Influence (TPI), amongst others. As mentioned², several indirect links between clubs at ownership level are also starting to emerge. This aspect should be adequately controlled to prevent it from undermining previous efforts to protect the integrity of competitions and any regulatory efforts more generally.

” It may be argued that MCO would present the ideal solution to circumvent the rules, as clubs may resort to intra-group transfers instead “

The increasing trend of multi-club ownership in football causes direct implications for many of the stakeholders involved in the game. As the industry starts to experience the economic difficulties generated by the

coronavirus pandemic and long periods of decreasing revenues, it is likely that new cases of MCO will arise and that existing ones will be expanded. Other specific factors, such as the introduction of new transfer restrictions in England as a result of Brexit, may also contribute to this growth. As illustrated, this scenario may present both benefits and challenges to the wider football ecosystem. Now, more than ever should multi-club ownership should be properly monitored and regulated to maximise the former and limit the latter.

² See Football Legal # 14 (December 2020), p. 101.

James JOHNSON: “The transfer of players between clubs under the same MCO structure should be an area of future regulation”



*Interview with James JOHNSON
Chief Executive Officer, Football Australia
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→ **Multi-Club Ownership (MCO) - Football Federation Australia (FFA) - National Regulations - Player transfer - Player loan - Club licensing**

Can you briefly introduce yourself?

I am the CEO of *Football Australia*. I worked at *City Football Group* (CFG) as its Senior Vice President of External Affairs from 2018-19. Prior to *CFG*, I worked at FIFA as Head of Professional Football. I have been fortunate to learn about Multiple Club Ownership (MCO) from different stakeholder angles in each capacity.

What is your experience in terms of Multi-Club Ownership?

During my time at FIFA, my then-team regulated FIFA's MCO principles as they related to competition integrity at Confederations and National levels. At *CFG*, I took a leadership role in advancing the group's ownership interests globally, including advising on compliance with the competition regulator's rules around MCO.

In Australia, the Melbourne City club is part of City Football Group? What happened at the time of the acquisition of this club? How does the Australian Football Association judge the acquisition by this type of group of Australian clubs?

The acquisition of *Melbourne Heart Football Club*, as it was previously known in 2014 acted as a “proof of concept” that *CFG*'s vision for a global portfolio of football clubs was possible. *CFG* itself would ultimately be formed upon the acquisition of *New York City FC* and subsequently *Melbourne Heart FC*, now *Melbourne City FC*. The acquisition of *Melbourne Heart FC* proved that this model could work in modern football, and since then, it has gone on to acquire interests in clubs on all continents but Africa.

Australian football has benefited since *CFG* entered the market. Its global portfolio makes it a leader and shaper of industry, and we are fortunate to have it as part of our ownership group within our professional leagues.

CFG has been an agent for positive change since it joined the Australian football family and has used its expertise in the global football industry and top-level management to lift the standard of our professional leagues. More broadly, it has also been a catalyst for change in the game. Its advocacy for improved governance in Australian football paved the way for profound governance reform of Australian football in 2018, which now sees greater representation of the Australian football community on Football Australia's Congress.

It also led to the “unbundling” of Australia's professional leagues from Football Australia - a process which is on the verge of being brought to life and should be completed by the end of 2020. The unbundling of the professional leagues will also allow the *A-League* (Australia's highest division of professional men's football) to become a full member of the World Leagues Forum. A step that will see Australian football represented through another key channel of global decision-making in world football. This helps lift

Australian football's profile and allows it to become more relevant globally.

Frequently, MCO groups are established in several countries and geographical areas. Is the lack of a single rule applicable to MCOs detrimental or, on the contrary, favourable?

Defining the meaning of MCO is difficult, given the varying rules across global football. While this may be inconvenient, it is positive that FIFA, Confederations and Member Associations are more cognisant of this area.

While there is no single rule applicable to MCO, several key elements are usually captured within the regulations of football's governing bodies across the various levels of the game: control, influence and direct *vis-à-vis* indirect involvement.

Most rules which one sees around the world are a permutation of these elements. In relation to the element of "control" for example, there is a varying degree in the way in which it is defined. This may include the ability to significantly influence the decision-making of a club, including the decision to appoint directors or employ management, as well as references to the degree of ownership *via* a certain percentage of shares/voting rights.

FIFA requires all its Members to include a provision on MCO within its Statutes as it relates to competition integrity, but this is not always reflected at Confederations and Member Associations levels. Within Europe, Belgium, Italy, and The Netherlands are countries that do not have a statutory provision on MCO. Outside Europe, Brazil, Chile, Japan, The United States and Nigeria also do not have a statutory provision for MCO.

Beyond this statutory requirement, Club Licensing regulations also play an important role in attempting to provide a standardised approach to regulating MCO across the globe. It does so by establishing a minimum criterion for licensing clubs to participate in national and/or Confederation competitions.

“ A licensing system can provides a framework for competition-organisers to obtain information about club ownership via reporting requirements which either require a club to disclose its ownership structure using the definition of “control” and declare any sources of “influence” to the competition organiser “

A licensing system will generally outline a reporting framework for club ownership and what constitutes MCO in any given competition. Importantly, it also provides a framework for competition-organisers to obtain information about club ownership *via* reporting requirements which either require a club to disclose its ownership structure using the definition of "control" and declare any sources of "influence" to the competition organiser or declare that their ownership and influence have no direct or indirect involvement in other clubs.

In Australia, Football Australia has a ban on MCO in its Statutes (Art. 6 par. 9 let. g). The Statutes also require a Club Licensing system to be implemented at the national level, of which the applicable Club Licensing regulations stipulate that clubs attest to the fact that "*no natural or legal person involved in the management, administration and/or sporting performance*

of the Club, either directly or indirectly" holds decisive influence, has majority shares, the right to hire/fire, power over club management, or is a member or involved in any capacity of another club.

At this point in time, *Football Australia* has not had to consider the question of MCO, but as *Melbourne City FC* and those other clubs which form part of the *CFG* ownership group begin to achieve success at the domestic level, this question will almost certainly arise at a continental level and will need to be addressed by the Asian Football Confederation given *CFG*'s ownership stakes now in China, India and Japan.

What reform of MCOs or any other related subject would you like to see in the near future?

Generally, clubs under the same MCO can move players within the structure with greater ease. Under FIFA's Regulations on the Status and Transfer of Players (RSTP), there is nothing preventing multi-owned clubs from sitting on both sides (*i.e.* the buying and selling club) of the transfer. This can have a direct impact on the integrity of the international transfer system, and in particular, training compensation, solidarity payments and the loan framework.

To illustrate:

- Art. 20 and Annexe 4 of the RSTP provides that training compensation is payable for players out of contract who move internationally until the age of 23. Training compensation is payable when a player is registered as a professional for the first time and then on each subsequent transfer thereafter based on the time spent at the club.

Clubs belonging to the same MCO group can manipulate the structure of the transfers of a player in such a way that would ultimately see the clubs within the group pay less training compensation than would ordinarily be expected. That is, because both the buying and selling clubs belong to the same MCO group, a player can be transferred through the group's lower categorised clubs to reduce the amount of training compensation due to a player's training clubs.

- Art. 21 and Annexe 5 par. 1 of the RSTP provides that 5% of a transfer fee shall be paid to clubs that contributed to the training and development of the player. How can competition regulators and governing bodies, however, ensure that the clubs that contributed to the training and development of the player are duly compensated when both clubs on either side of the transfer, in the event they belong to the same MCO group, are able to manipulate the transfer fee in favourable terms and ultimately the amount upon which the 5% solidarity payment is based?

- Art. 10 of the RSTP (loan provisions) treat loans in the same way as transfers. The loan transfer of players is, however, barely regulated and we have seen excessive and abusive loan practices threaten the purpose for which the loan mechanism was developed - as an opportunity to develop players or for a squad to replace an injured player. This means any club (multi-owned or not) can loan as many players as it wishes. In practice, it is common to see sometimes up to 5 players move between the same clubs *via* a loan transfer on a yearly basis, usually as

the consequence of a close working arrangement between the clubs and often for a fee. Whilst this is a broader issue of the transfer system, clubs from an MCO group, however, by their very nature, are able to move players around more freely and, therefore, these clubs are able to exploit the loan transfer mechanism with greater ease.

Hence, the transfer of players between clubs under the same MCO structure should be an area of future regulation. There is currently no material MCO regulation in the international transfer system. Each of the scenarios outlined above could operate to erode the integrity of the global transfer system. Where there is good reason to believe that a transfer does not reflect true market value or clubs from an MCO group are using its structure to undermine the integrity of the transfer system, the regulator should have the ability to look behind the transfer to investigate and sanction where appropriate.

How do you see the evolution of MCOs over the next ten years?

What we have seen over the last 15 to 20 years is the ever-increasing rate of the globalisation and commercialisation of football. Football clubs in the most popular leagues around the world are becoming global businesses and brands. This has brought with it a necessary evolution in the way football clubs are administered and business is conducted in order to maximise the global commercial opportunities available to them.

Despite a difficult year for sport in 2020, I anticipate that this trend will only continue as football continues its upward trend of globalisation.

Given the benefits of MCO, including global brand exposure, diversifying the business portfolio, and the ability to grow and recruit more efficiently, I envisage that the use of the MCO framework will continue to be utilised in what is a fierce and competitive global football market.

” Governing bodies must begin to regulate MCO as it relates to player transfers to protect the integrity of the transfer system “

As the use of MCO structures increases in football, governing bodies must continue to regulate MCO in relation to competitions, but must also begin to regulate MCO as it relates to player transfers to protect the integrity of the transfer system. The governing bodies do, however, have to find the right balance and not act to stifle growth or competition.

Re-Imagining Clubs' Sporting Model



By Ian LAING and Luca PASTORE
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→ **Multi-Club Ownership (MCO) – Player loan – Player transfer – FIFA Regulations – FIFA RSTP – UEFA Regulations – Financial control**

In the last decade, following the trend of internationalisation and commercialisation of football, many football club owners have decided to invest in the takeover of additional football clubs, based in other countries and targeted for strategic reasons, in order to create profitable synergies from both a sporting and a business perspective. Owners can be funds, clubs, companies or individual investors, and in light of the clubs' need to generate revenue and find alternative strategies of financing, Multi-Club Ownership (MCO) is becoming increasingly popular.

The MCO model is based on the internationalisation of the brand through the creation of a network of clubs, where expertise and best practice is shared, together with sponsorship strategies and sporting vision. In particular, the acquisition of new clubs results in an improved scouting network, new commercial opportunities and partnerships, new academies to develop young talent and the possibility to enhance the engagement of new fans. Such arrangements used to be on a partnership level, most prominently the partnerships between *Manchester United FC* and *Royal Antwerp FC*, or *Chelsea FC* and *Vitesse Arnhem*. However, the increasing entry into football of investors, including state-backed investment funds, has meant this model has progressed to the logical next step, multiple clubs belonging to the same ownership group.

To date, the most prominent examples of MCO are the models implemented by the *City Football*

Group and *Red Bull GmbH*. As of November 2019, *City Football Group* was valued at USD 4.8 billion¹ (approx. EUR 4 billion) and, following its latest acquisition in September 2020, now owns ten clubs on five continents (*Manchester City FC* in the U.K., *New York City FC* in the U.S., *Melbourne City FC* in Australia, *Yokohama F. Marinos* in Japan, *Girona FC* in Spain, *Montevideo City Torque* in Uruguay, *Sichuan Jiuniu FC* in China, *Mumbai City FC* in India, *Lommel S.K.* in Belgium and *Espérance Sportive Troyes Aube Champagne* (ESTAC) in France. Concerning *Red Bull GmbH*, it owns four professional football clubs on three different continents (*Red Bull Salzburg* in Austria, *New York Red Bulls* in the U.S., *Red Bull Bragantino* in Brazil and *RB Leipzig* in Germany).

It must be noted that no specific regulations are applicable at the FIFA level regarding MCO.

¹ www.forbes.com

However, Article 20, par. 2 of the FIFA Statutes reads:

“Every member association shall ensure that its affiliated clubs can take all decisions on any matters regarding membership independently of any external body. This obligation applies regardless of an affiliated club’s corporate structure. In any case, the member association shall ensure that neither a natural nor a legal person (including holding companies and subsidiaries) exercises control in any manner whatsoever (in particular through a majority shareholding, a majority of voting rights, a majority of seats on the board of directors or any other form of economic dependence or control, etc.) over more than one club whenever the integrity of any match or competition could be jeopardised.”

As a result, FIFA expressly requires its member associations to ensure that no one exercises a level of control over more than one club, which might endanger the integrity of their competitions. UEFA has also enacted regulations with the aim of ensuring integrity in their competitions.

One particularly interesting case before UEFA regarding the integrity of competitions was initiated when both *Red Bull Salzburg* and *RB Leipzig* qualified in the 2017-2018 UEFA Champions League. The connection existing between the two clubs raised concerns in respect of possible risks to the integrity of the competition, regulated by the UEFA Champions League Regulations.² Therefore, the Investigatory Chamber of the UEFA Club Financial Control Body (CFCB) investigated the relationship between the two clubs.

Concerns were raised by the Investigatory Chamber of the UEFA CFCB regarding the influence, which *Red Bull GmbH* exerted over both clubs. Matters of concern included the co-operation agreement, which the clubs were party to the loan from *Red Bull GmbH* to *Salzburg*, and the fact that *Salzburg* rented its stadium from a related company. However, *Salzburg* was able to address these concerns by terminating the co-operation agreement with *RB Leipzig* and making appropriate changes to its management structure. Following these changes, the Adjudicatory Chamber of the UEFA CFCB concluded that *Red Bull GmbH* did not have a decisive influence over the relevant decision-making bodies of *FC Red Bull Salzburg* and that neither club exercised a “decisive influence” over the other.³

This case is illustrative of the criteria, at least applicable within the remit of UEFA, that is used to determine whether a common ownership will be in breach of regulations designed to protect the integrity of competitions by prohibiting influence over multiple clubs participating in the same competition. Knowledge of this will inform how MCO structures are put in place by organisations, particularly bearing in mind the ongoing liquidity crisis affecting most of the clubs as a result of the COVID-19 outbreak and the upcoming changes to the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) and, in particular, the rules governing the loan of players.

FIFA: Reforms to the Loan System

On 25 September 2019, the FIFA Football Stakeholders Committee submitted to the FIFA Council amendments to the FIFA RSTP regarding international loans, which would limit the number of international loans permitted of players aged 22 and over.

In particular, the amendments would have set a maximum limit of eight international loans in and out of a club as from the 2020-2021 football season, which would then drop to six loans in and out from the 2022-23 football season. A period of three years would then be provided for member associations to implement similar rules at a domestic level.

These amendments were supposed to enter into force on 1 July 2020, but on 27 March 2020, the Bureau of the FIFA Council considered postponing the entry into force of these new provisions in light of the COVID-19 outbreak. A final decision was made that, for

the time being, the amendments regarding loans would not enter into force. This postponement is, at the time of writing, indefinite.

“What is already clear though is that the restrictions on loans, both international and domestic, will create a significant conundrum for top-tier clubs who rely heavily on loans in their business models” “

At the moment, some member associations already provide for similar restrictions: for instance, under the rules in the English *Premier League Handbook 2020-2021*⁴, the maximum number of loans allowed in the same season is four, and, under no circumstances shall more than one be from the same club at any one time. In addition, *Premier League* clubs cannot loan to another *Premier League* club a player they have acquired in the same transfer window and cannot loan more than one of its goalkeepers to another *Premier League* club.

FIFA has not yet set out the implementation of these new principles. Presumably, the final regulations will have further detail, which means an in-depth analysis is not possible at this time. What is already clear though is that the restrictions on loans, both international and domestic, will create a significant conundrum for top-tier clubs who rely heavily on loans in their business models.

As a matter of fact, the majority of top-tier clubs develop large numbers of footballers *via* their academies and youth sectors. Among these players, only a few are able to move straight from the youth team to the senior

² In this case, the specific regulations can be found in UEFA Champions League Regulations 2015-18 Cycle, Article 5.01 (c) (iv). See also Football Legal #14, p. XXX

³ UEFA Club Financial Control Body, case AC-01/2017.

⁴ Available here: www.premierleague.com

teams of these top-tier clubs. The majority are loaned to second or third-tier clubs, domestically or internationally, in order to further their development and get playing time.

However, loans do not concern only young talented players. In fact, with an increasing financial disparity between big clubs and medium-small clubs, more and more often, big clubs find themselves with numerous players who have employment contracts so onerous that it becomes impossible to transfer them if they fail to perform as expected. Loans have therefore become an important tool to transfer players who are surplus to requirements, in order to remove or reduce the large salaries of these players from the wage bill, to another top-tier club which is unwilling to purchase the player outright. Or, to second-tier clubs, by means of temporary transfer with a salary-sharing formula.

According to data provided by the website *Transfermarkt*⁵, at the time of writing, *Chelsea FC* has loaned-out 18 players, *Inter Milan* 30 players, *Monaco* 14 players, *Atalanta* 47 players, *Manchester City* 16 players, *Sassuolo* 31 players, *Guangzhou Evergrande* 22 players, *Lokomotiva Zagreb* 26 players, *Benfica* 14 players, *Olympiacos* 15 players, *Fiorentina* 29 players and so on.

There are also clubs, which rely on loans to shape their senior teams, by means of the acquisition of players on loan, often with an option to sign them on a permanent basis. Italian *Serie A* club *Genoa CFC* currently count in its squad 13 players on loan; *Hellas Verona* has 11 and *Spezia Calcio* has 13. This practice is, however, common not only in Italy: for instance, Dutch club *FC Twente* has nine players on

loan in its squad and Portuguese club *Boavista* counts 11.

It appears clear from such data that, at present, several clubs rely on loans in order to develop their business models and manage risks related with the acquisition of new players. This was confirmed at the *2019 Edinburgh Sports Conference* by the CEO of *Genoa CFC*, Mr *Alessandro ZARBANO*. In particular, *Genoa CFC* has 13 players currently on loan at the club and has loaned out 23 to other clubs.⁶ On a panel discussing the impact of domestic and international financial fair play rules on the transfer market, Mr *ZARBANO* highlighted how as a club operating on a comparatively small budget, the transfer market offered opportunities to increase his club's income. The ability to allow young players, who are not ready to play for the first team of a club in the Italian *Serie A*, to be loaned to clubs in other leagues to gain match experience is important for a club such as *Genoa CFC*. Loans are also an important tool in the acquisition of players. Smaller clubs are able to supplement their squads with experienced players or take players on loan with the option of a permanent transfer. This allows clubs to assess a player's integration with the existing squad, suitability to the system of the manager and any number of factors, without the risks associated with a permanent transfer.

Once the new regulations are in place, a number of players - youth players or those players under contract who are in surplus, *i.e.* who are not part of the senior team squad for technical reasons - shall therefore either be released by their clubs or transferred on a permanent basis in order to develop their careers and play regularly.

Restrictions on the number of players that clubs are able to register for competitions⁷ mean that clubs in this position will not be able to make use of these players and this will be known to new clubs interested in acquiring such players.

As such, it is unlikely that a potential purchasing club will be willing to pay market value for such players, being acutely aware that clubs with a large number of players will be seeking permanent transfers rather than being able to make use of the loan market.

The new regulatory framework will also affect the acquisition of new players: as a matter of fact, with a restricted possibility to loan out players, coupled with squad registration limits, top clubs will have no option but to limit the number of new players. The new regulatory framework will therefore oblige top clubs to sign only players ready to play in the first team and will encourage forms of agreements between top club and training clubs, aimed at granting the possibility to secure talented players for future registrations, such as option rights and pre-emption rights.

In some countries, the repercussions of the new regulations might be mitigated by the existence of the so-called "*B-teams*" (for instance: *FC Barcelona B* and *Real Madrid Castilla* and in Spain, *Juventus FC* under 23 in Italy and many others in Germany, Ukraine, United States, Portugal, etc.), whereby young players have the possibility to play regularly, although normally in less competitive leagues. Currently, Spain is the country with most B-teams, with more than 60 active reserve sides playing throughout Spain's football leagues.

⁵ www.transfermarkt.com

⁶ *Ibid.*

⁷ The English *Premier League* permits a squad of 25, with additional restrictions relating to home grown players.

The relevance of B-teams in the development of young players is confirmed by the report recently issued by *CIES Football Observatory* in relation to the clubs that trained the most players active in the big-5 leagues:⁸ among the best seven training clubs in the big-5 leagues, five are Spanish clubs, with *Real Madrid* and *Barcelona* placed in first and second position respectively. It is therefore predictable that in the foreseeable future, more and more associations will allow the constitution of B-teams, and more and more clubs will benefit from them.

The opportunity to exploit second teams has already been, however, implemented and maximised by those clubs who are part of an MCO structure.

Reforms to the Loan system: Competitive advantage for MCO?

When it comes to transfers, the advantages of MCO have already been in the spotlight in recent years.

In particular, the ownership and management of *Udinese Calcio*, *Granada CF* and *Watford FC* by Mr *Giampaolo Pozzo* and his children *Gino* and *Magda* provides an interesting case study.

The *Pozzo* family acquired *Udinese Calcio* in 1986, *Granada FC* in 2009 and *Watford FC* in 2012. This network of clubs allowed the clubs to share scouting services and to loan players between related-party clubs before transferring them to third clubs at a premium.

Since the acquisition of *Watford FC* by the *Pozzo* family, the English club concluded multiple signings

directly from *Udinese Calcio* and *Granada CF* (sold by the *Pozzo* family in 2016). However, after *Watford* benefitted from 14 loan signings from abroad during the first season, in June 2013, the Football League clubs voted in favour of rules preventing a mass influx of foreign loan players to a single team. Nonetheless, in the following seven seasons, more than 30 players moved to *Watford FC* from *Udinese Calcio* or *Granada CF*⁹ on a free transfer or against compensation, whether temporarily or permanently. The opposite journey, i.e. from *Watford FC* to *Udinese Calcio* or *Granada CF* has regularly been taken by players, such as *DEULOFEU*, *PUSSETTO* and *PEREYRA*, who moved from *Watford FC* to *Udinese Calcio* during the last transfer window, following *WATFORD FC*'s relegation from the English *Premier League*. Such a structure allowed the *Pozzo* family to retain the more valuable players within their group.

“ In the following seven seasons, more than 30 players moved to Watford FC from Udinese Calcio or Granada CF on a free transfer or against compensation, whether temporarily or permanently ”

There are, in the meantime, significant benefits to transferring players permanently between related-party clubs also from a book-keeping perspective: for instance, a club which has been operating on a larger budget in the top division, and which needs to make significant cost reductions upon relegation, will be able to transfer players permanently to related clubs, quickly and with certainty. This will remove salaries from a club's wage bill and allow

the club to receive a fair transfer fee, rather than being at the mercy of clubs seeking to pay a reduced fee to a club which prospective purchasers deem to be in a vulnerable position, and required to sell players.

Another interesting example of cooperation within an MCO can be seen within the *City Football Group* in relation to the transfer of *David VILLA*. On 1 June 2014, *David VILLA* was announced as the first signing for the newly formed *New York City Football Club*. However, given that the *MLS* season did not commence until March 2015, *VILLA* went on loan to the related club *Melbourne City* in order to retain his match fitness.¹⁰ Similarly, immediately after being announced as a *New York City* player, *Frank LAMPARD* was loaned to *Manchester City*, originally until the beginning of the next *MLS*. This was however extended to the end of the English *Premier League* season, in order to better suit the needs of *Manchester City*, the crown jewel of the *City Football Group*.

Similar transfers occurred within the *Red Bull GmbH* group: several players moved from *Red Bull Salzburg* to *RB Leipzig* - or the other way round (albeit less frequently) - despite the previously mentioned need to terminate the cooperation agreement. In each of the last four seasons, *RB Leipzig* has purchased players from *Salzburg*: *Konrad LAIMER* (2017-2018), *Amadou HAIDARA* (2018-2019), *Hannes WOLF* (2019-2020) and *Hee-Chan HWANG* (2020-2021).

MCO allows a group to secure the services of a number of talented players by signing them to different related clubs according to the level of the specific player. The transfers of *Aaron MOOY* (subsequently transferred for a

⁸ football-observatory.com

⁹ www.transfermarkt.com

¹⁰ www.abc.net.au

reported profit of GBP 8 million) and Jack HARRISON, from Melbourne City FC and New York City FC respectively to Manchester City FC, demonstrate that the City Football Group intends to follow the example of the Red Bull Group in transferring talented players to the larger clubs within the group. Transfers between clubs belonging to the same MCO group are *de facto* facilitated by the connections between the clubs - if not endorsed by a common group strategy.

Many other examples might be used to prove that MCO allows the adoption of policies that go beyond the “normal” transfer activities. In addition, related-party clubs benefit from increased exposure to the talent pool of players in new regions and the scouting expertise and network of the clubs it acquires, not to mention the potential for the increased exploitation of commercial opportunities and the expected synergies in a multi-national business structure. As a matter of fact, MCO entails not only more scouting data in a specific region, but also the opportunity to establish new academies and upgrade the existing ones, in order to improve the possibilities to produce a player for the group’s venture. In a recent interview underlining this point, Magda Pozzo said “It’s a great added value to have an international group and we try to take advantage of the best practice of each club, referencing joint weekly marketing meetings across the group’s clubs, and information sharing regarding player exchange, scouting and training practice.”¹¹

Furthermore, a network of clubs with common sporting strategies allows a unified style of playing, akin to the “Barcelona model” or

the “Ajax model”, which results in the possibility to train and play a considerably high number of players who are theoretically easily adaptable to play in all the teams of the group due to the common style of play and shared club culture. Indeed, the large number of ex-Barcelona staff employed by the City Football Group, both executives and coaching staff who have been inculcated in the principles common to both Ajax and Barcelona indicates a desire to build a staff with common principles across the group to ensure high levels of synergy. It is therefore unsurprising that two of the Head Coaches employed by New York City FC have moved from Manchester City FC, in order to instil the philosophies and style of play the ownership would like to be known for.

In fact, as long as the integrity of matches or competitions is not jeopardised - and, therefore, as long as the different clubs belonging to the MCO do not compete against each other - nothing prevents a common ownership from indicating common sporting and commercial strategies.

“ By restricting the ability of clubs to effect temporary transfers, clubs that can benefit from the synergies promoted by MCOs will have a competitive advantage in the recruitment and development of the players ”

What must be mentioned, however, is that the relationship between players and clubs belonging to MCO groups is like that of any other player/club relationship. That is, the will of the player is, of course, something to which utmost regard must be given. Indeed, it may be

that joining a club within an MCO structure is an attractive prospect for a developing player, to be seen as something of a stepping stone to a related club in a higher league or a club within another national association. Potentially a very exciting prospect. Yet while a large number of players may be registered to clubs within the MCO group, the transfer of players between those clubs must be the mutual desire of the club and the player. It was widely reported that RB Leipzig wished to purchase Erling Braut HAALAND from Red Bull Salzburg, however, the player ultimately transferred to Borussia Dortmund, a rival of RB Leipzig.

In light of the above, it appears that by restricting the ability of clubs to effect temporary transfers, clubs that can benefit from the synergies promoted by MCOs will have a competitive advantage in the recruitment and development of the players.

As and when these restrictions are put in place, without regulations that are applicable universally and outside of the scope of a specific competition or association or confederation, clubs in an MCO structure will undoubtedly benefit. Transfers which may have been made between them on a temporary basis will likely still be made on a permanent basis with an implicit agreement that the player may be transferred back at a later date, if such a transfer would serve the overall aims of the group.

The MCO structure also benefits clubs with common control in non-sporting aspects. The opportunities MCO offers by virtue of an increased presence in another region are an important aspect of the model, which guarantees increased visibility in new markets, and therefore a possible boon in terms of commercial and sponsorship opportunities.

¹¹ Offthepitch.com, 18 November 2020, “Meet the Pozzos: The Italians behind Udinese and Watford vying to be more than just a “family business”

Such aspects have become extremely important with the advent of UEFA's Financial Fair Play (UEFA FFP) and similar regulations being put in place by either member associations or leagues, which have made top clubs more and more eager to maximise their commercial opportunities and boost their income so they can have more resources to invest in the upgrading of their squads.

From a broader perspective, recent high-profile cases including *Manchester City's* alleged inflation of sponsorship agreements to above fair market value (testing the UEFA FFP Regulations), and the more recent case of *Sheffield Wednesday* and the reporting of the timing of the sale of the club's stadium to a related party (testing the English Football League profit and sustainability rules) demonstrate the difficulty that related-party transactions raise in relation to the legitimacy of such transaction. It has already been demonstrated that clubs under an MCO structure or under common control can transfer players for valid sporting reasons, or indeed to circumvent the interests of other clubs. However, so far, this has been without a backdrop of the restrictions on temporary transfers.

In addition, in order to comply with FFP Regulations and similar domestic rules, it could be that a club could make a permanent transfer to a related party club which serves not to assist either club in sporting terms, or in the development of the player, but instead assists the financial statements and the profit or loss on the trading of players: for instance, speculation exists¹² that the transfers of *Miralem Pjanic* and *Arthur* between *Juventus FC* and *Barcelona FC*, respectively (who

are however not related clubs), were made more for accounting purposes than sporting reasons, despite the two clubs being totally unrelated. Such transfers may become more common, especially between related clubs. Discussions on player valuation would then clearly follow. As has been experienced in both of the cases referenced above, the strong challenges to the rules and regulations in place have shown where weaknesses lie and have shown that Regulations are not without their issues, in particular in relation to fair values of assets.

Following on from the potential for manipulation by related clubs, there are other areas in which clubs in an MCO structure could potentially assist related clubs. Transfer agreements with third parties covering option rights set at pre-determined values for the permanent transfer, or buy-back clauses, could be thwarted by related clubs having access to information about those contracts, which should remain confidential. For example, should a club decide mid-season that they wish to retain a player currently temporarily transferred to a third club and where an option has been granted to that third club, a related party club could make an offer at an amount just above or below any predetermined level resulting in the player transferring permanently to the related club, thwarting unfairly the third party club.

The advantage to clubs involved in MCO structures was illustrated in the eventual transfer to *Leicester City Football Club* of *George Hirst*. *Hirst*, a *Sheffield Wednesday* academy graduate, was reportedly the subject of long-term interest from *Leicester City*. However, the clubs were unable to agree on a transfer fee, and *Leicester City* were unwilling to submit the matter to a tribunal

where a fee would likely be millions of pounds. The player then moved to *OH Leuven*, then in the Belgian second division, at the end of his contract, with *Sheffield Wednesday* receiving only training compensation payment of approx. GBP 150,000 (approx. EUR 170,000). *OH Leuven* share an owner with *Leicester City*. It was therefore unsurprising to see *Hirst* move to *Leicester City* after one season in Belgium, for an undisclosed fee.

While examples such as the one above may indeed open the door to other issues, including bridge-transfers, which are not the subject of this analysis, they nonetheless highlight a situation, which may well be beneficial for clubs involved in MCO.

As a final comment, the authors note that the new post-Brexit rules for the incoming transfer of non-UK nationals, announced on 1 December 2020 by the English Football Association, might entail further advantages for clubs sharing a common ownership.¹³

The new rules¹⁴ will come into force on 1 January 2021, though they will be reviewed in advance of the summer transfer period, prior to football season 2021-2022. The additional restrictions put into place on signing EU citizens mean that clubs will no longer be able to sign U18 players from outside of the UK. This prohibits English clubs from signing young players for their academy sides and further, clubs playing within the English *Premier League* will have a restriction on the number of non-UK national U21 players they can sign.¹⁵ They will be restricted to a maximum of six per season.¹⁶

¹³ www.premierleague.com

¹⁴ The Football Association Men's Players - Points Based System 2020/2021 Season (1 January 2021 Onwards), found at www.thefa.com

¹⁵ www.thefa.com

¹⁶ In the winter transfer window, during January 2021, the limit will be three.

¹² www.forbes.com

In order to be able to be registered for an English club, all non-UK nationals will be required to obtain a work permit (as is currently the case for non-EU players). To qualify for a work permit, a player will have to gain a Governing Body Endorsement (GBE). This GBE may be obtained by way of an Auto Pass, which will be granted if the Player's level of International Appearances meets the Auto Pass Percentage, set out in Table 1 of the criteria¹⁷, or else by reaching a set threshold in a points-based system. This system, by which players will be assessed, allocates more points to players who transfer to English clubs from the so-called 'Band 1' leagues.¹⁸ A player transferring from one of these leagues who has participated in 90%-100% of his club(s)'s domestic minutes¹⁹ will be awarded 12 points out of a required 15²⁰, as opposed to a player from a so-called 'Band 2' league²¹ who will receive 10²² points, and so on. 4²³ points would be allocated to players from 'Band 5' leagues²⁴, with only 2 points allocated for 'Band 6'²⁵ leagues.

While a full discussion of the application of the new rules falls outside of the scope of this article, the advantages to English clubs who are part of a MCO model in overcoming the difficulties in signing players from the so-called lesser bands are clear. For instance, a player may not qualify based on

his present circumstances (e.g. he plays in a 'Band 6' league) but the additional points allocated to a league designated a different 'Band' (e.g. a 'Band 2' league) would be sufficient, when added to points gained *via* the other criteria, such as international appearances, provided by the new rules. To enable such a player to meet the points requirement in order to be eligible to play in England, if the MCO group includes a related-party club competing in such a league (e.g. the above-mentioned 'Band 2' league), it could acquire the player and place him for one season at this related-party club, in order to allow him to achieve the points necessary to be successfully transferred to the English club.

Similarly, there are advantages to being able to sign and subsequently place U18 players with academies belonging to non-English clubs within the MCO group. This will allow them to adapt to the shared training methodology and ethos of the MCO group prior to a potential transfer to the English side within the group, upon the attainment of the age of 18.

Aside from these specific post-Brexit regulations, it is the opinion of the authors that the new regulatory framework which FIFA intends to introduce in respect of loan transfers will undoubtedly give a competitive advantage to clubs that have already adopted an MCO model. Even if new universal regulations governing MCO are put in place at the same time, there would still be the attraction for MCO clubs to push the boundaries of any regulations as has been seen in the adoption of other regulations, leaving stand-alone clubs at a competitive disadvantage. Indeed, it will not be an easy task for regulators to address the many disparate issues that MCO will present.

17 The Football Association Men's Players - Points Based System 2020/2021 Season (1 January 2021 Onwards) - Table 1.

18 The English *Premier League*, the *Bundesliga*, *La Liga*, *Serie A* and *Ligue 1*.

19 The percentage of Available Domestic Minutes the Player played in.

20 The Football Association Men's Players - Points Based System 2020/2021 Season (1 January 2021 Onwards) - Table 2

21 The Portuguese *Primeira Liga*, *Eredivisie*, Belgian *First Division A*, the Turkish *Super Lig* and the English *Championship*.

22 *Passim* 18.

23 *Ibid.*

24 The Serbian *SuperLiga*, the Danish *Superliga*, the Polish *Ekstraklasa*, the Slovenian *PrvaLiga*, the Chilean *Primera División*, the Uruguayan *Primera División* and the Chinese *Super League*.

25 Meaning all leagues not in Band 1, Band 2, Band 3, Band 4 or Band 5.

Montserrat JIMENEZ : “The development of MCO requires a lot of control, both from FIFA and from confederations, federations and competition organizers”



*Interview with Monserrat JIMENEZ
Deputy General Secretary & Legal
Director, CONMEBOL
Luque - Paraguay*

→ **Multi-Club Ownership - CONMEBOL
- CONMEBOL Regulations - TPO/TPI -
COVID-19 - Player loan**

The reform of the loan regime by FIFA will certainly change several practices within club groups. What do you think about this?

The measure adopted by FIFA aims to ensure that transfers have a valid sporting purpose for the development of footballers.

We strongly believe that this will prevent clubs with great economic power from transferring their most experienced footballers and, once they have gained enough experience, having those players returned to their original clubs to strengthen them. This will allow teams to avoid buying players. We bear in mind *Chelsea's* case, which had more than 40 players on loan.

Among the reforms that should be implemented in our regulations are the partial and temporary suspension of Article 18ter of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), which deals with the regulation of so-called “Third-Party Ownership” (TPO). The suspension of Article 18ter would minimize the financial

impact of the COVID-19 pandemic on football clubs and allow them to achieve alternative sources of income.

The possibility of entering into TPO contracts, from our perspective, should be temporary and would serve as an alternative to generate new revenue for football clubs and, in this way, those who are in very difficult economic situations can recover and do not have to be sold to billionaire entrepreneurs who probably already have other clubs.

It is a phenomenon that has been growing year by year and this trend will continue. Every day we see more situations in which “club owners” or investment groups seek to expand their market influence, even on other continents such as the *City Group*.

However, this development requires a lot of control, both from FIFA and from confederations, federations and competition organizers. The integrity of tournaments must be safeguarded so that the normal unfolding of

matches is not altered by issues not related to the game.

Andrew MERCER and Mahajan VASUDEVAN NAIR: “It would be advantageous for Leagues, Member Associations, Confederations and FIFA to coordinate their efforts in order to consolidate a consistent approach across the world”



*Interview with Andrew MERCER
Acting General Counsel & Director of
Legal Affairs - Legal Department, Asian
Football Confederation (AFC)*

*and Mahajan VASUDEVAN NAIR
Head of Club Licensing - Professional
Football Department, AFC
Kuala Lumpur - Malaysia*

→ **Multi-Club Ownership - Asian Football Confederation (AFC) - AFC Regulations - Player loan**

The reform of the loan regime by FIFA will certainly change a number of practices within club groups. What do you think about this?

One of the purported advantages of having multiple clubs under one ownership is the possibility for the relevant group of clubs to take advantage of wider and better talent identification and broaden the possibilities for player development. MCO models spanning nations and even continents increase the relevant group's exposure to larger talent pools and help it to identify and acquire talent. Similarly, the possibility of lucrative commercial opportunities and synergies are increased. With better infrastructure and with connected clubs in highly visible leagues, it is purportedly easier for such groups to attract talent.

However, this situation creates the risk of a talent drain from leagues with low visibility, and this might be seen as exploitative. There is also an ever-present fear that groups of clubs will be able to exploit the transfer and loan system in a way that will distort fair competition.

The new rules which restrict the number of loans a club can register and limit the number of players that can be loaned from one club aim to make sure that player loans are made with a valid sporting purpose, in a manner which supports rather than hinders youth development.

In this sense, the changes are welcome.

What reforms on the topic of MCO or any other related subject would you like to see in the near future?

The concept of MCO is becoming increasingly popular, with various new groups emerging across the world. However, from a regulatory point of view, there are risks involved, especially with regard to the integrity of competitions and players' rights.

For such a global trend, it would be advantageous for Leagues, Member Associations, Confederations and FIFA to coordinate their efforts in order to consolidate a consistent approach across the world.

Further, the regulatory framework must emphasise the need for more transparency on the ownership structure of groups, as well as having an eye on players' rights - noting that MCO presents unique challenges to the movement and ownership of players. The recent strengthening of the regulations regarding the control of third-party influence (TPI) and third-party ownership of players' economic rights (TPO), as well as the aforementioned reform of the player loan system, are a positive step in the right direction.

Indeed, at the AFC, we are currently reviewing the CLRs and hope to introduce reforms in 2021, including to the provisions dealing with MCO. We consider it important to evolve the regulatory framework and react to changing business and sporting practices.

Business organisations are realising the synergies involved with having MCO models in both the sporting and business aspects of football. In this sense, this model will only keep growing with more and more investors taking this road. However, we

also see that football's regulators and representative bodies are stepping up their game to control the challenges this model creates, especially regarding the integrity of the game and the rights of players.

The only thing we can be sure of now is that this trend of MCO will continue to grow, whilst regulators will work to reign in the negative aspects of the model with more refined controls and mechanisms to limit the control and influence that one entity can hold in a group of clubs.

These regulatory efforts must continue in order to protect the integrity of the game, however, it is important to keep a sense of perspective and work with stakeholders in a collaborative spirit. Transparency and engagement are key, as opposed to driving MCO underground, where it cannot be monitored effectively.

FIFPRO: “The moment to investigate the status of MCO is now”



Interview with Alexandra GÓMEZ
BRUINEWOUDE
Senior Legal Counsel, FIFPRO

and Loïc ALVES, Legal Counsel, FIFPRO
Hoofddorp – The Netherlands

→ **Multi-Club Ownership (MCO) – Player loan – Player transfer – Player contract – Salaries – Financial control – Labour law**

From a general point of view, how do you apprehend the constant increase in groups holding stakes in several clubs around the world? In your opinion, is the MCO favourable to the football market? And to the players?

At this point in time, it is still rather complex to forge a clear point of view as there is very little and meaningful information available on the clear extent of this practice, especially in smaller markets and lower tiers, where we can observe that club acquisitions and equity stakes are now increasingly taking place. However, even for the famously known global groups, it is difficult for an outsider to fully understand their operations and business practices. There is sometimes also not a lot of transparency as to their legal structure, for example.

We have come across player's contracts, in South America for instance, that revealed that MCO was also developing in this region. The way MCO was inserted in those contracts was rather concerning. It appears to be the

case that in the absence of global standards and regulations, the MCO can be used to the detriment of players' freedom of movement, for instance.

It would be premature to draw a strict line, as one has to clearly identify the impact on the labour market and the employment context of players, yet, it is somewhat dubious to believe that MCO, in a currently unregulated landscape, can be found to be per se favourable to the football market and the players.

What are the anticipated impacts, positive or negative, on the world of work of players?

On the one hand, it may provide better financial and sporting stability and (successful) players may enjoy a stable career with good working conditions within the MCO group. It also has the potential to elevate standards in regions where the football market is emerging, especially if the MCO group is willing to enter into collective agreements on

labour standards and employment conditions, which can become a catalyst to drive progressive and sustainable development of domestic football markets.

On the other hand, it opens a new realm of legal questions, particularly in connection with the impact it may have on the employment relationship but also on the entire legal architecture of the football labour market. If we take the current labour market in football, it was construed in a single club ownership market and predominantly based on fixed-term employment contracts, with the objective, at least on paper, to ensure, among other objectives, financial redistribution and contractual stability.

MCO implies the construction of dominant positions, which, if abused, can hinder a player's rights and employment opportunities.

Finally, there is a potential risk of conflicts of interest that may question the integrity of competitions and increase the risk of sporting manipulation.

These are crucial questions that football stakeholders have to collectively address.

According to FIFPRO, does the MCO have an influence on the lives of the players playing in these club structures?

The answer is yes. Some players have signed contracts of questionable validity by means of which they already waive their right to oppose any future move to one of the club's branches, giving the club unilateral discretion as to the player's future. Not only does this have implications on a player's professional career, as there is often no specification in the contract with regard to the destination or even the sporting level of the other branch, but it also has wide-ranging consequences on the player's personal life as it will imply a relocation of her/his family, a new school for children, a new culture and environment for the partner.

Also, from a strictly contractual and labour law perspective, a club's or group's unilateral decision to move a player from entity A to entity B likely constitutes a variation of essential conditions of the employment contract for which the player's express and specific consent and approval would legally be required.

From FIFPRO's point of view, it is clear that any clause in a contract that would state that the player consents to play in any of the club's branches is abusive and should therefore be deemed null and void. There is already too much uncertainty in the labour market to keep on adding factors to the detriment of the football players. What an MCO entity should focus on is having the best player conditions in all their branches, so that when the time comes, and

the MCO entity wishes to have a player playing in another one of its branches, the player will happily consent to the transfer, because he/she knows his/her playing and employment conditions stay identical or could become even better.

To sum up, for most football players, their career is already often uncertain, highly susceptible to factors outside of the player's control and, by its very nature, short and seasonal. They operate in an extremely fluid, competitive and precarious labour market, and it means that the potential for them to slip through the cracks is high. It is therefore paramount that MCO does not increase the precariousness of players' working environment and conditions.

If MCO must not be blindly criticized, it must also not become a blanket approval for clubs to consider players as mere commodities.

Does the player generally have the option of refusing to play for another club in the same group?

At first glance, we would submit that the player has the option to refuse to play for another club in the same group if the player has not expressly consented to this at the moment of his/her supposed change of club. As mentioned above, a change of club is likely to constitute a variation of the essential conditions of the employment contract.

As to the player's employer, we believe that it should in principle be the club, as the player plays for the club and not for the group.

There is probably a need for a regulatory framework. From this perspective, at this stage, regulations in place with regard

to MCO have a limited scope, both in terms of territoriality and substance, let alone the fact that these rules are sometimes conflicting. Indeed, existing sets of rules cover the domestic and/or European level while being limited to a review of the ownership structure and of the degree of influence of one entity over another. Such regulatory frameworks are not designed to establish safeguards and certainty in the context of the employment relationship between entities and players.

Do you think the reform of the loan regime by FIFA will change practices within club groups?

This is a positive step going forward as it finally puts a framework on a phenomenon that had been misused by some clubs to hoard players and, too often, to move them at their own discretion with little consideration for the player's personal development. We must remember that the original aim of the introduction of the loans in the system was to enable the development of young players, who would otherwise not be able to play, since they were not mature enough for the team they were contracted with. Therefore, the justification of loans is development, and not financial gain. We consider that with the limitations that are being introduced in the number of possible loans, this problem will be partially tackled.

However, it will not solve the entire issue, especially in light of the MCO; what may happen is that groups will diversify and intensify their acquisitions of clubs to maximise the possibilities allowed under the regulations. This is a matter that needs to be tracked and solutions need to be found so that the system is not misused.

What reform on the MCO or any other related subject would you like to see in the near future?

Before calling for any specific reform, we should better understand the extent of this model and the implications and consequences it may have not only on the integrity of competitions, but also on the players' career and working conditions. International labour standards are essential mechanisms and must be put in place to ensure that the growth of the global economy provides benefits to all. Although sport often assumes a position of exceptionalism in the global political economy, it is in fact no outlier. Professional football is first and foremost an economic activity. The establishment and enforcement of labour standards are therefore just as relevant in the MCO context.

The economic signals in the football industry, where the gap between rich and poor clubs and leagues keep increasing, coupled with the impact of the global pandemic of COVID-19 for which long-term knock-on effects are expected, will probably reinforce the interest of investors in the MCO model. Indeed, clubs and leagues will/are turning towards external investors, confirmed for instance by the emergence of private equity.

The moment to investigate the status of MCO is now. When the information is there, stakeholders should sit together and discuss the best way to improve the labour conditions of players and the financial conditions of clubs.

Foreign Club Ownership: Blessing or a Curse for Local Supporters?



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→ **Multi-Club Ownership (MCO) – Supporters – Competitive balance – Player transfer – Financial control – Governance**

The purpose of this article is first to examine the main underlying motivations which inform an investor's desire to purchase a football club. Thereafter, it shall proceed to consider the potential benefits and drawbacks that local fans often tend to associate with takeovers by foreign entities. Finally, this article shall focus specifically on how the needs of both foreign owners and local fans can be reconciled going forward.

Introduction

The international football market has, in recent years, demonstrated somewhat of a trend towards what many are calling a “foreign capital revolution”. The primary driving force behind this revolution being football's recognized status as one of the most popular sports in the world, as well as its resultant potential to generate large amounts of revenue for investors. Furthermore, the growing influences of globalization, consumerism, and mass media have also played a role in expanding the appeal of owning a football club beyond traditionally domestic markets.

However, despite having the potential to enhance a club's international profile, not all takeovers initiated by foreign entities are received by local fans with open arms. In recent years, problems such as: buying a club purely to generate a

return on investment; a lack of financial transparency; poor communications and relationships with staff and fans; and ignorance of the club's history and traditions, amongst others, have contributed to a growing sense of disconnection between local fans and foreign owners.

Examining an Investor's Underlying Motivations

According to a report compiled by the professional services firm KPMG, various categories of club owners can be identified within world football. They range from well-known local businessmen/ women to foreign billionaires and from local supporters' groups to multi-national private equity firms, each with their own distinct set of motivations.

Takeovers initiated by local business personalities and/

or supporters' groups, usually with strong connections to their local communities, are generally motivated by the acquisition of “cultural capital” and/or “social capital”. It is undeniable that football clubs play a major role in their local ecosystems, especially those situated in smaller communities, as they often assume responsibility for driving employment and undertaking social responsibility initiatives in their area. Here, the possibility of owning a football club represents more than the opportunity to make a profit. Rather, it is a platform that allows a club's owners to take on a broader societal role and give back to their respective communities.

For example, when local Lancashire-based businessman Andy HOLT purchased Accrington Stanley FC, he repeatedly remarked that he did not view the club as a mere business venture. Additionally, club affiliation and fandom are also strong motivators

behind the desire to own a football club, particularly with regard to local supporters' groups.

” The possibility of owning a football club represents more than the opportunity to make a profit “

In terms of foreign owners, one of their primary motivators is the potential to use the club to improve their public image and/or to engage in brand building. In other words, they are motivated by the desire to acquire a form of “*strategic capital*”. Football clubs are unique assets in the sense that they offer their owners a lot of visibility and the possibility to attract large audiences. Thus, football clubs have the potential to have a significant impact when they function as communication channels and media platforms, not only with regard to conveying information about the team but also with regard to messages from commercial partners and sponsors. The best examples being that of *Paris Saint-Germain* and *Manchester City FC*, who are often regarded as ambassadors for the respective countries of their owners (*i.e.* Qatar and the UAE).

Aligned with the above motivation is the unique advertising opportunity afforded to club owners, whereby they can use the club's advertising space to promote and grow their other companies/products. For example, *Mike ASHLEY* often exploits the private advertising space of his club *Newcastle United FC* to promote his sporting apparel business, *Sports Direct*.

It is also not uncommon for certain club takeovers to be motivated by the aspirant owner's desire to acquire a form of “*soft power*” which, in turn, can be used to attain certain political standing and/

or more advantageous business positioning within the world's fast-growing economies. This soft power is usually acquired through the network of high-profile contracts that can be established due to one's ownership of a particular club. It is thus no surprise that a lot of relationships have been developed through the ability to access the boardrooms of the world's top football clubs, and provide owners with an impressive entertainment platform for the famous and powerful people who wish to attend matches at their club.

Another strong motivator that informs a foreign investor's desire to purchase a football club is maximizing financial gains and generating a return on investment. Otherwise referred to as the acquisition of “*economic capital*”, the investor's goal is to operate the club as a business in order to gain dividends and capital growth. In recent years, booming broadcast revenues, coupled with a sense of financial sustainability fostered by the introduction of Financial Fair Play Regulations, are seen as key reasons behind the growing foreign investment in European club football. Furthermore, with clubs reaching saturation points in their domestic markets, it makes sense for them to investigate alternate ways in which they can monetize their connection with foreign fans in order to create multiple diverse revenue streams. According to *Roy MILLER*, a lecturer at *Liverpool University*: “*For the most part, [football clubs] are seen as trophy assets. As long as a football club keeps performing on the pitch at the same level as when you bought it, then it will hold value and likely increase its value. It's a long-term asset that you hope will appreciate.*”

Further motivators for foreign owners include optimization of the owner's tax burden by

strengthening the ties between their profitable companies and a loss-making football club, speculation on future returns based on promotion to a higher division, as well as the possibility to engage in multi-club ownership, as has happened with the *City Football Group* and their strategic acquisition of various other teams from around the world.

As should be clear from the preceding paragraphs, there is a large gap between the motivations of local individuals/supporters' groups and those of foreign billionaires/private equity funds when it comes to owning a football club. These differing priorities are not easy to bring together, as they are often mutually exclusive. For example, the maximization of financial returns, which is usually the main priority of foreign investors, is not something that can be easily reconciled with spending money on things like social responsibility initiatives, as is often the case with local owners. It is thus understandable that local fans become nervous at the news of a takeover, as there is currently no middle ground approach that seeks to balance the needs of the respective parties.

Perceived Benefits for Local Fans

Regardless of an owner's underlying motivation, the main benefit which local fans tend to associate with foreign club ownership is that of increased sporting competitiveness through investment in the playing squad. For example, when *Roman ABRAMOVICH* completed his takeover of *Chelsea FC* in 2003-2004, his investment enabled the team to go from being in and around the top 6 to winning the *Premier League* and *UEFA Champions League* within

a matter of years. Without this investment, it is highly unlikely that a success of this magnitude would have been achieved, let alone within such a short period of time. Similarly, with regard to *Sheikh MANSOUR's* purchase of *Manchester City FC* in 2008, the move resulted in a team coming from relative obscurity to being one of the most financially powerful and dominant sporting teams in Europe, if not the world. *Manchester City's* success has been achieved, not only through investment in the playing squad and coaching team, but also through infrastructure initiatives such as the *Etihad Campus* project as well as the development of the area surrounding the *Etihad Stadium*.

However, neither of the above examples compare to the takeover of *Leicester City FC* by the late Thai billionaire *Vichai SRIVADDHANPRABHA*. When he purchased the club in 2010, they were struggling in the Championship and faced mounting debts, which he proceeded to clear by loaning the club more than GBP 100 million (approx. EUR 110 million) within his first four years of being at the helm. A further two years later, the team went on to achieve what many thought was impossible and, in doing so, authored one of the greatest sporting stories of any generation by winning the *Premier League* title despite the 5000-1 odds.

Notwithstanding the team's miraculous achievements on the football pitch, what truly makes Mr *SRIVADDHANPRABHA's* takeover of *Leicester City FC* so impactful is the remarkable generosity that he showed towards the city of Leicester as a whole. Before his untimely death, Mr *SRIVADDHANPRABHA* made donations of GBP 1 million (approx. EUR 1.1 million) each to *Leicester University's* medical department and the *Leicester Royal Infirmary*, as well as a further donation of GBP 2

million (approx. EUR 2.2 million) towards the construction of a new children's hospital. Additionally, he memorably gave fans free beer, scarves and cakes on route to the club's title win in 2016 and arranged free busses to assist fans with travelling to away games. Not to mention the fact he bought every player a new car after they won the League. Unfortunately, success stories like this are few and far between, as it is highly unlikely that foreign owners will go to the same lengths to engrain themselves in their local community as Mr. *SRIVADDHANPRABHA* did.

Perceived Drawbacks for Local Fans

Loss of Connection with local fans (Fan Alienation)

On the other side of the coin, one of the main drawbacks associated with foreign club ownership is a loss of connection between the owners and local fans, thereby resulting in their alienation. This can usually occur in a number of ways, including: (i) where an owner's motivations are not aligned with those of the club's supporters; (ii) where fans are charged unreasonably high prices in order to purchase season tickets; (iii) where an owner fails to recognize the importance and long-term value of a local fanbase and/or fails to communicate with local fans; and (iv) where owners are generally ignorant of the club's history and traditions. It is also important to bear in mind that this happens to teams at all levels of competition, regardless of their wealth and success.

Two prominent examples of this alienation include *Vincent TAN* at *Cardiff City* and *ASSEM ALLAM* at *Hull City*, both of whom attempted to

rebrand their clubs in order to make them more appealing to foreign markets. Mr *TAN* felt that changing *Cardiff's* kit from blue to red and playing on the Welsh dragon would make the club more interesting to the Asian market, whilst Mr *ALLAM* thought that rebranding *Hull City* to make them the *Hull City Tigers* would be better as "*in marketing, the shorter the name, the more powerful*". In both instances, these decisions were not well received, as they were met with protests from local fans.

” One of the main drawbacks associated with foreign club ownership is a loss of connection between the owners and local fans “

Similarly, with regard to multiple club ownership structures, the rebranding of certain clubs, thereby resulting in a complete loss of their identity, may also result in local fan alienation. For example, with *SSV Markranstädt* being rebranded as *RB Leipzig* and *Melbourne Heart* being rebranded as *Melbourne City*, both clubs lost their traditional badges and were required to change their names, which were important elements in their history. Accordingly, a club's history and traditions are important aspects of what makes it appealing to local fans. Thus, by erasing that history, many fans may find it difficult to identify with the club in its new form.

Furthermore, there is a potential for fans to become disenfranchised with their local clubs if the latter is used merely as a vehicle for moving the best players to other more prominent clubs who are part of the same group. This situation may also give rise to potential conflicts of interest, as fans can not be certain whether a transfer fee paid to buy/sell a player to another club within the group was genuine or a sham.

“Sports-washing”

This term refers to the process by which corrupt or authoritarian regimes use sport to either mask or improve their poor international reputation and/or gloss over their record of human rights abuses. Accordingly, many of these authoritarian regimes have been heavily investing in football in order to project more positive images of themselves than is accurate. This is, however, nothing new, as sport has always been a powerful force that has the potential to be abused in order to achieve nefarious ends.

One of the best examples of an oppressive government trying to rebrand itself through sport is that of Qatar, where the Government has spent millions not only buying a *Paris Saint-Germain* (PSG) but also bankrolling its record transfers, founding a sports TV channel and obtaining the rights to host the 2022 FIFA World Cup. However, behind the scenes, the country has been accused of numerous human rights violations, especially with regard to its treatment of migrant workers. Despite pressure from the international community, Qatar’s appalling human rights record endures, as its financial muscle has caused many countries to look the other way.

During the course of 2020, issues relating to sports-washing were once-again raised during the attempted takeover of *Newcastle United FC* by a consortium of investors led by *Amanda STAVELEY* and backed by the Crown Prince of Saudi Arabia, *Mohammed BIN SALMAN*, and *Saudi Public Investment Fund* (PIF). While news of the takeover brought delight to many long-suffering *Newcastle* fans, there were serious doubts raised by *Amnesty International* as to the prospective owner’s true intentions, especially in light of Saudi Arabia’s connection with

the murder and dismemberment of journalist *Jamal KHASHOGGI* in October 2018. While the proposed takeover did eventually fail, many suggested that it was primarily due to the country’s lenient approach towards “*BeOutQ*”, a parody of *BeIN*, a company which holds TV rights to the *Premier League*, rather than its dubious record of protecting fundamental human rights.

With Chinese investment in football becoming more and more prominent in recent years, sports-washing issues may once again come into focus, as this is, unfortunately, another country with a questionable human rights record.

Tapering off Investment

It is often said that running a football club is not a very profitable endeavor, especially due to high costs and low margins associated with delivering success on the pitch. Thus, in order to sustain and increase fan interest, clubs must always perform at the highest level, and that often means continually having to invest large sums of money in bringing in the best players. However, it is not uncommon for foreign investors to lose interest and/or grow impatient with the lack of return on their investments.

For example, when *Sheikh Abdullah BIN NASSER AL-THANI* bought out *Malaga* in 2010, things seemed promising initially, as he cleared EUR 36 million worth of debts and purchased high-profile players such as *CAZORLA*, *MATHIJSEN*, *RONDON* and *VAN NISTLEROOY*. There were also plans drawn to build a state-of-the-art ‘Sports City’ together with a new stadium and training complex. However, nothing materialized, as the Sheikh decided to stop spending money. This resulted

in unpaid wages, a reduction in transfer spending and ultimately a ban from European competitions due to financial problems. While it has not been disclosed why the Sheikh lost interest, it has been suggested that the reasons could revolve around TV rights money and/or a lack of support from the Spanish Authorities.

Similarly, in England, *Manchester United* is widely recognized as one of the most powerful and dominant clubs in the country. However, when the club was purchased by the American-based *GLAZER* family in 2006, by means of a leveraged buyout, the club itself was forced to shoulder most of the debt. Currently, the *GLAZER*’s are still using the club’s own profits to pay off the debts and mounting interest while limiting the amount of money they are willing to invest in improving the playing squad post Sir *Alex FERGUSON*’s retirement. This has made them extremely unpopular with local fans, who have been very vocal in condemning the *GLAZER* family perceived lack of sporting ambitions, and fans have even organized a protest using green and gold scarves, the colours of the club’s original founders *Newton Heath*, as a symbol of their displeasure.

The Influence of Black Money

According to an article published in *The Guardian*, international criminals view football clubs as the perfect vehicles to conduct their money laundering activities. This was said to be due to the influence of globalization, the financial needs of various clubs, huge cross-border money transfers and obscure accounting methods.

For example, there have long been question marks surrounding the

legitimacy of *Roman ABRAMOVICH'S* wealth. As was stated in *The Times*, "*Abramovich famously emerged triumphant after the 'aluminium wars', in which more than 100 people were believed to have been killed in gangland feuds over the control of lucrative smelters.*"

Thus, despite one of the criteria required to pass the *Premier League Owners & Directors Test* being the absence of past criminal convictions, local fans can never be entirely certain as to how and by what means the owners of their preferred club have acquired their wealth.

Possible Solution

In light of the above conflicts between foreign owners and local supporters, one possible solution to this conundrum could be the adoption of the "50 +1" rule as applied in Germany. According to this rule, it is not possible for a prospective owner, whether foreign or local, to purchase 100% of a club's shares, as they are limited to a maximum 49% stake. The consequence being that 51% of a club's remaining shares are reserved exclusively for fans who are members of the club.

This effectively means that German clubs are true clubs for their members. Accordingly, German fans are able to enjoy the best of both worlds by owning their football club alongside a rich owner, who is still able to inject the club with funds where necessary. Democracy, at its finest, allows members to vote who will be on their club board, and elections allow them the opportunity to replace those deemed to be mismanaging the team.

Even though this model does the best job in holding football to

its roots, as well as helping fans have their voices be heard, there is obviously no such thing as a perfect model. In line with the saying that "*with massive money, comes massive egos*", doubts remain as to whether investors would be happy only owning a 49% stake, as it is highly likely that they would not want to answer to football fans who will not look at business decisions in the same light as successful business people. Accordingly, this has deterred multiple takeovers from happening in the *Bundesliga*.

Conclusion

According to *Bill SHANKLY*, a man considered by many as the modern-day father of *Liverpool FC*: "*At a football club, there's a holy trinity - the players, the manager and the supporters. Directors don't come into it. They are only there to sign the cheques.*" In the current day and age, however, that statement cannot be further from the truth, as the owners/directors of a football club play a massive role, not only with regard to investing money in the playing squad but more importantly with regard to steering the club's direction as a whole.

Whether or not wealthy foreign owners are good for a football club will depend on who the owner is and which football club they are taking over. Unfortunately, the motives behind the purchase of a football club are not always straight-forward, and fans should thus be wary that new owners are attempting to use their club for a PR boost or simply for an exercise in asset-stripping.

While the introduction of an equivalent to the German "50+1" rule appears to be the best long-term option going forward, as it

gives fans the opportunity to own over 50% of a given club while still leaving plenty of room for private investment, it is nonetheless bound by certain limitations which may be unescapable.

Ultimately, the best-case scenario would be for foreign owners to try and replicate the template used by *Vichai SRIVADDHANPRABHA* at *Leicester City FC*, where they are able to win over local fans by demonstrating a commitment not only to their football but also to their community as a whole.

Antonia HAGEMANN: “These groups will bring about the end of the transfer system and the end of players’ agents as we know them”



Interview with Antonia HAGEMANN
CEO, SD Europe
Cork - Ireland

→ **Multi-Club Ownership (MCO) - Supporters - Competitive balance - Player transfer - Financial control - Governance**

Can you briefly introduce yourself?

Antonia HAGEMANN, CEO of SD Europe. I run the organisation, which works in over 50 countries and four continents, together with a team of six, which is spread across Germany, the UK, Sweden, Greece and the US.

Could you describe the activities of SD Europe?

SD Europe is a non-profit organisation, representing supporter organisations and a number of amateur and professional member-run football clubs across Europe, Africa and Asia.

We want to encourage more football clubs into supporter ownership, have more institutions take action towards supporter involvement and fan dialogue and improve solidarity between the top and grassroots levels of football.

We instigate increased dialogue between fan groups across Europe

and UEFA and its stakeholders, including its member associations and other football organisations, the European Commission and European Parliament. We help democratic supporters groups across Europe gain and increase their influence in the game and gain ownership of their clubs. We also advise local and national supporter groups, clubs and governing bodies on governance and ownership models and implement the Supporter Liaison Officer (SLO) licensing requirement on behalf of UEFA and provide SLO training to its Member Associations in partnership with UEFA Academy.

Currently, we also run three projects funded by the European Commission:

- **Fans Matter!** Teams up national fan organisations, national associations and member-run clubs and improves skills around volunteer management, communications and membership;

- **Kick-off!** It is a kind of partner therapy for national associations and national fan organisations, which aims to establish long-term structural change;

- **Transferaims:** Ensures safety in and around football matches in Europe by investing in professional development and capacity-building of Supporter Liaison Officers (SLOs) and Safety and Security Officers (SSOs) through novel transnational role-sharing learning.

There are four main principles that we and our members have identified as prerequisites for better football in the future and which form the bedrock of all our projects and programmes:

1. We believe football needs to be more democratic. Football fans need to have a say in the running of their clubs through democratic structures and by upholding a community focus. More football clubs should be

member-run and, if not possible, supporters should have shareholding rights and board representation. Supporters need also to be represented at football governing bodies.

2. We strongly believe in the power of cooperation or co-creation. Fans, football clubs and football governing bodies need to work closely together by being partners in dialogue. The relationships between national supporter organisations and football governing bodies need to be improved and provide the necessary platform for fans to self-organise and create representative bodies that positively contribute to the development of domestic football. At the club level, the role of SLOs is key to ensuring cooperation.
3. We need more solidarity. There must be a fair redistribution of revenue across the football pyramid, from the top to the grassroots and across leagues. It is essential to ensure that football remains a fair competition.
4. Sustainability is key! Licensing regulations need to help clubs to increase their financial, social and environmental capital in a sustainable way. Given its stature and influence in the world, football needs to lead as an example to other sectors by taking meaningful responsibility for its structural, financial, social and environmental sustainability.

How do you perceive the increase in the number of groups holding stakes in several clubs around the world?

Owners with controlling and non-controlling shares in more than one club, which could be involved

in the same competition, create an obvious conflict of interest.

They are creating new rules and a whole new structure, which benefits the groups on the back of local, national and European competitions. It undermines the principle of competition and cooperation, which the European model of sport is built on.

These groups are creating a system of feeder clubs, which serve as training grounds for higher-level endeavours - a super league at the top and “franchises” at the bottom. With it, they will bring about the end of the transfer system and the end of players’ agents as we know them.

From the business perspective of an investor, these developments make sense and are highly profitable. From improved scouting setups, offerings to players and dividends.

However, from our perspective, these groups further undermine an already unfair competition. Leagues across Europe are already suffering from a lack of competitive balance and a growing gap between the big and smaller clubs. The accumulation of wealth within such groups only speeds up these developments.

Do you think that MCO can, in some ways, represent a threat to the local culture of clubs acquired by a group or to the fans?

The interests of MCOs and the local communities are very different. The local community wants their (one and only) club to win trophies and exist for the benefit of its fanbase. The dream is to win the top prize and/or be a successful social project contributing to the development of the city or region. But feeder clubs, and clubs not involved in such groups or owned

by resourceful owners, should not even dare to dream anymore - if they still were to do so.

On the other hand, the MCO model wants the most successful and profitable business to succeed (parent clubs), often at the expense of another subordinate business (feeder clubs). Multi-club owners see clubs as a group of companies, creating new brands and changing club identities by adding them to their portfolio and, ultimately, their brand strategy. Suddenly, we are not football fans anymore, but customers. And in some of the worst cases, we lose our football club because the owners prefer to keep it a “closed shop” using its assets for the development of the group.

Do you think fans should be more involved in the process of club acquisitions by MCO groups?

The question we should ask is, what would the benefit for the fans be? Fans from parent clubs would probably see their clubs’ profitability grow and their chances to win trophies increase. For fans of feeder clubs, the chance or the dream of winning anything would be diminished. Clubs depending on transfers would suffer, as the expected growth of MCO would end the transfer system as we know it.

These groups decide about the future of the clubs they purchase and it might not be the future the local community has hoped for.

For fans, is the move of players between clubs belonging to the same group a good or bad practice?

I can see that it is attractive for players to train at one club with the aim of moving up to the parent club. The same counts for coaches

too. The increase of transfer fees leads to an increase of MCOs, as it will allow clubs to implement different scouting models and develop their own talent. Of course, fans want their clubs to win but not at any cost. With players being entangled in such MCO schemes, they will not be available to other clubs. The way players are developed and sold between these clubs or within these groups harms the competition. The system groups talent within a network of clubs with negative effects for those not involved.

What reform regarding the MCO system or any other related subject would you like to see in the near future?

The MCO system contributes to the drastically growing gap in the football pyramid, as the richer clubs maximise their income and profits at the expense of the medium-sized and small clubs.

Football as we know it is changing and these developments are leading to a two-tier system in football made up of parent and feeder clubs. The system further adds to a reality in which fans of many clubs won't be seeing their clubs competing against the bigger ones anymore.

We should question if these groups of clubs should even play in the same leagues as the rest. What does it do to competitive balance and the credibility of competitions?

We need to be realistic about where football is heading. But does this mean we need to say goodbye to the sport as we know and love it? As it has developed and contributed to shaping our European identity for the past nearly 150 years?

There is an opportunity in all of this too. We should face reality and look at alternative league models. Is it enough to pick up the crumbs falling off the head-table or is there a better way of organising competitions? One which is based on more solidarity, cooperation and more sustainability.

Until these questions are answered and new systems of solidarity agreed upon, FIFA needs to provide a clear and dedicated regulatory framework for MCO in order to regulate these business models consistently and globally. There is also a clear need for a sustainable legal framework at the national level, by governments, and at the European level, by the European Parliament and the European Commission.

Football is a sport and part of our European and national culture and it needs to be protected by everyone with the power to do so!

The international web of MCOs will grow further and will change football as we know it. The system as it currently is, is rotten and the governing bodies need to implement regulations that help to reduce inequality among clubs by introducing rules for sharing revenue, limit player wages and make the game more competitive. I doubt this can happen within the existing structures. Fans need to come together and play their role in developing a more community-friendly football. There is a chance for a better football.

— World in Review — International News

Time to Reform the Turkish Football Arbitration System



By Emin OZKURT
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→ **Turkish Football Federation (TFF)
- Arbitration - European Court of
Human Rights (ECHR) - European Law
- Fundamental rights - Independence/
Impartiality**

The European Court of Human Rights (ECHR or Court) rendered a very important decision in the Ali Rıza and others v. Turkey case, involving a former professional footballer from Arsenal and Trabzonspor among others, by declaring that the Arbitration Committee of the Turkish Football Federation (TFF) was not considered to be independent and impartial.

Introduction

In a recently published decision¹ of the ECHR, five different applications were reviewed in the form of a Pilot Judgment, as they shared the same issue, which was the structural problems associated with the Arbitration Committee of TFF. The Court decided that there was a violation of Article 6 § 1 of the European Convention on Human Rights (Convention) and gave clear instructions to the Turkish Government to resolve these systematic problems.

In its decision dated 28 January 2020, the Court found in particular that the Board of Directors of the TFF, which had always largely consisted of members of football clubs, had too strong an influence over the organisation and functioning of the Arbitration Committee. It was also underlined that the regulations of the TFF do not provide appropriate safeguards to protect members

of the Arbitration Committee from any outside pressure.²

The ECHR ordered the Turkish Government to take measures to ensure the structural independence of the Arbitration Committee, by reforming its football dispute resolution system.

The ECHR also confirmed that sport arbitration bodies must uphold the basic fair trial guarantees within a system of compulsory sport arbitration, such as the right to an independent and impartial tribunal, by introducing strict normative safeguards against any conflicts of interests.

This decision is an important one, as it will have a wider significance than just with regard to the Turkish Football Arbitration system, as it *has the potential to lead to a lot of structural changes all over the sport sector*. This ECHR decision may also trigger significant structural changes in the composition of other sports arbitration panels, especially with regard to the selection of arbitrators.

In this article the author will examine:

- The facts of the case;
- The current Turkish Football Arbitration system;
- The key findings of the ECHR; and,
- Recommendations for a new system.

Facts and Claims of the Parties

Ömer Ali Rıza

Facts

Ömer Ali Rıza, (Player), a professional football player with both British and Turkish citizenship, signed an employment contract with *Trabzonspor Kulübü Derneği* (Club) effective from 17 January 2006 until 30 June 2008. On 4 January 2008, the Player left

¹ [ECHR, 28 January 2020, nos. 30226/10 and 4 others, Ali Rıza and Others v. Turkey](#)

² See also [Football Legal # 13, p.186](#)

Turkey and returned to England, despite having a valid contract with the Club.³ The very next day, his agent notified the Club by fax, stating that the Club had breached the terms of the contract and thus his client would no longer play for them.

Subsequently, the board of the Club fined the Player TRY 184,000 (approx. EUR 20,000) in terms of the decisions it had taken on 8 and 14 January 2008, due to the Player's failure to notify the club about his departure, as well as the fact that he had missed a number of training sessions without permission, and for not returning to the Club.⁴ This fine was sent to the Player through notary on 14 and 15 January 2008.

Subsequently, the Player filed a statement with FIFA on 18 January 2008, in which he claimed that the Club had defaulted on its payment obligations several times and that certain payments had been made with delays of more than four months.⁵

A written notice was sent to both the Club and the TFF, by the Player's representative, stating that the Player had terminated the contract for just cause since payment of his March salary had not yet been received.

Later, the Club lodged an application with the Dispute Resolution Committee of the TFF (TFF DRC), in which it stated that the Player had breached the terms of his employment contract without just cause. The Club sought to recover an amount of TRY 291,973 (approx. EUR 31,000) as compensation for termination of the contract, as well as payment of the fines issued by the board

of the Club. Furthermore, the Club requested that a playing ban be imposed on the Player, due to the fact that he breached the provisions of the Professional Football and Transfer Regulations which governed the termination of his contract at the time.⁶ The Player, in response, sought to recover his outstanding salary for the months of January, February, March and April 2008, as well as his overdue match appearance bonuses from the first half of the season. The TFF DRC did not find any grounds to uphold the Player's claims and partially granted the Club's claim, holding that the Player had terminated his contract without just cause. The Player was thus ordered to pay the Club an amount of TRY 233,758.75 (approx. EUR 25,000) for termination without just cause and fine. In addition, a playing ban of four months was also imposed on the Player.

Next, the Player lodged an appeal before the TFF Arbitration Committee (Arbitration Committee) against the decision of the TFF DRC. The Arbitration Committee upheld the TFF DRC's finding, holding that the Player had terminated the contract without just cause. The Arbitration Committee further held that the Club had failed to terminate the contract within the time stipulated by the former Transfer Regulations. Therefore, the total amount to be paid by the Player was reduced to EUR 61,596 and the playing ban imposed on the player was lifted. According to the Turkish Law in force at the time, decisions of the Arbitration Committee are final, binding and cannot be appealed to ordinary domestic courts.

In November 2009, the Player appealed the Arbitration Committee's decision before the Court of Arbitration for Sport

(CAS). The CAS held that the application was inadmissible for lack of jurisdiction, since the dispute had no international dimension.

Claims of the Parties in the ECHR

The Player, among the other applicants, claimed that the proceedings before the Arbitration Committee had failed to satisfy the requirements of independence and impartiality stipulated under Article 6 § 1 of the Convention.⁷ The Turkish Government objected to this claim, on the basis that the Article 6 § 1 was not applicable in the dispute, since it did not contain any determination of the Player's civil rights and obligations, nor any criminal charge against him. In opposition, the Player contended that the dispute in question had arisen out of an employment contract concluded between him and his former club, and that the sporting sanction imposed on him by the TFF DRC had an adverse impact on his professional football career, as he could not sign for another football club, nor could he play in any matches for a specific period. The Court held that the Article 6 of the Convention was admissible in the Player's application, since the rights in dispute have an actual of pecuniary basis, and arise from a contractual relationship between private persons, thus, it considered the rights in question are civil rights in the context of Article 6.⁸

⁷ "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice [...]"

⁸ *Ibid.*, p. 32, par. 159.

³ *Ibid.*, p. 4, par. 10.

⁴ *Ibid.*, par. 12.

⁵ *Ibid.*, par. 3.

⁶ *Ibid.*, par. 15.

With regard to exhaustion of domestic remedies, the Turkish Government claimed that the Player could have requested the re-opening of the proceedings, as per the rules of civil procedure. Accordingly, they submitted, as evidence, the legal committees' decisions in which the TFF granted re-opening the proceedings. However, the Player argued that an application to re-open the proceedings before the Arbitration Committee could not be deemed to be an effective remedy, as such applications are only be accepted if there were valid grounds justifying the re-opening proceedings.

In view of the foregoing claims, the Court held that resorting to re-opening the proceedings was an extraordinary remedy which did not need to be exhausted in this case, since the Arbitration Committee's decisions are final and there were no circumstances warranting the re-opening of the proceedings. In addition, the Court added that the supporting documents submitted by the Turkish Government for re-opening the proceedings included favorable changes in the relevant rules, which enabled a reduction in the maximum and minimum length of the sanctions imposed on the related individuals. However, in this case, there were not any favorable developments concerning the Player. In conclusion, the Court dismissed the Government's non-exhaustion of domestic remedies claim.⁹

Serkan AKAL

Facts

The second applicant, *Serkan AKAL*, was a top-level assistant referee between 2000 and 2015. In July 2015, the Central Referee Committee (CRC) of the TFF downgraded him from top-level assistant referee to "regional referee".

The criteria used to determine the levels of referees, in line with CRC Regulations, were specified by the decision of CRC on 21 July 2015.¹⁰ Accordingly, a list of top-level assistant referees was drawn up for the 2015-2016 season, which contained 70 top-ranked referees names. *Serkan AKAL* was 78th out of 83 in the assistant referees list. By putting him in 78th position, Mr *AKAL* was downgraded from top-level to regional referee for the 2015-2016 season.

Mr *AKAL* lodged an appeal against the CRC decision before the Arbitration Committee, in which he argued that assistant referees had to be twice the number of top-level referees, and because 39 top-level referees had been selected for the 2015-2016 season, the number of assistant referees must have been 78. Furthermore, Mr *AKAL* claimed that CRC's decision limiting the number of referees to seventy was contrary to the former CRC Regulations in force at the time. Finally, he requested the Arbitration Committee to hold a hearing in order for him to comment on the submissions of the CRC.

The Arbitration Committee found no compelling reason to hold a hearing and thus dismissed the application. However, in dismissing the application, the Arbitration Committee explained that the wording used in the former CRC Regulations meant "up to", and thus it could not be assumed that the number of top-level assistant-referees had to be "exactly twice" the number of top-level referees. Instead, the Regulations actually set the maximum number of top-level assistant referees, and enabled the CRC to decrease the number as it deemed necessary.¹¹

Following the dismissal of Mr *AKAL*'s first application by the Arbitration Committee, he lodged a subsequent application before the Arbitration Committee. In this fresh application, he requested that the Arbitration Committee review its decision and reopen the proceedings. This subsequent application was also dismissed, since the Arbitration Committee found no reason to justify the reopening of the proceedings.¹²

Claims of the Parties in the ECHR

Mr *AKAL* claimed that the proceedings before the Arbitration Committee had not satisfied the requirements of independence and impartiality, stipulated under Article 6 § 1 of the Convention. The Turkish Government objected to this claim, alleging that Article 6 § 1 was not applicable to the dispute, since it did not contain a determination of the applicants' civil rights and obligations, nor any criminal charge against him. Mr *AKAL* further argued that, by virtue of the CRC decision, his professional life was adversely affected, since he was made not to act as a referee in the top two professional leagues and this significantly affected his future income. The Court considered that these claims were admissible under Article 6 of the Convention for following reasons:

- The decision unquestioningly affected the applicant's professional career in a negative manner;
- The decision also resulted in the applicant losing part of his livelihood.

¹⁰ *Ibid.*, p. 8, par. 39.

¹¹ *Ibid.*, p. 9, par. 42.

¹² *Ibid.*, par. 44.

⁹ *Ibid.*, p. 33, par. 167.

Fatih ARSLAN, Şaban SERİN and Mehmet ERHAN BERBER

Facts

The three applicants were amateur football players, who played at *İçmeler Belediyespor Kulübü*, the amateur football club of *Muğla*, playing in the Super Amateur League.

İçmeler Belediyespor Kulübü and *Yeni Milasspor* were competing against each other to win the league championship and to be promoted to an upper league. Since both teams were competing for the championship, the TFF scheduled both matches at the same time. Nevertheless, on the match day, the game between *İçmeler Belediyespor* and *Armutalan Belediyespor* started with a 15-minute delay, because the previous match played on the same field had finished ten minutes late due to the injuries. At the 75th minute of the match, it was announced that *Bodrumspor* had beaten *Yeni Milasspor*, while *İçmeler Belediyespor* had a two-goal lead against *Armutalan Belediyespor*. After the news of *Yeni Milasspor*'s defeat, *İçmeler Belediyespor* scored three more goals and won the match 6-1. This result ensured *İçmeler Belediyespor* going ahead of *Yeni Milasspor* on goal difference.¹³

Dalyan Belediyespor, competing in the same league as above two clubs, as well as *Yeni Milasspor* lodged a complaint to the TFF, in which they claimed that the match between *İçmeler Belediyespor* and *Armutalan Belediyespor* had been unlawfully fixed. The claims of both clubs were referred to the Ethics Committee of the TFF, by the General Secretary of the TFF.¹⁴ The Ethics Committee decided on 28 April 2010 that the players of both clubs acted in a way which

constituted “match-fixing” after hearing the result of the other match from the announcement.

The decision of the TFF Ethics Committee was subsequently referred to the Amateur Football Disciplinary Committee (AFDC) of TFF. The AFDC decided that *Fatih ARSLAN*, *Şaban SERİN* and *Mehmet ERHAN BERBER* had committed the disciplinary offence of “influencing match results” and banned them from participating in any football-related activity for a year, pursuant to Article 55 of the former Football Disciplinary Regulations.

Subsequently, the three players lodged an appeal against the decision of the AFDC before the Arbitration Committee. The Arbitration Committee dismissed the players’ appeal and published a brief decision on TFF’s website. *Mehmet ERHAN BERBER* requested a reasoned decision, but the TFF dismissed the request since the decision had not been yet drafted.¹⁵

Claims of the Parties in the ECHR

The three players also claimed that the proceedings before the Arbitration Committee had not satisfied the requirements of independence and impartiality, stipulated under Article 6 § 1 of the Convention. The Turkish Government objected to the claim that the Article 6 § 1 was not applicable to the dispute since it did not contain the determination of the applicants’ civil rights and obligations, nor any criminal charge against them. The applicants claimed that their careers as amateur football players were in danger, because of the decision of the Arbitration Committee, which amounted to a criminal charge within the meaning of Article 6. In appraising the parties’ claims, the Court applied the “*Engel criteria*” and concluded that the three players failed to illustrate that the

dispute in question was pecuniary in nature, and thus dismissed their complaints.¹⁶

Structure of TFF and Relevant Domestic Rules



The Law on the Establishment and Duties of the TFF (the former TFF Law) - amended form of no. 3813, 17 June 1992 - was in force at the time *Ali Rıza* initiated legal proceedings against the TFF. However, the Law on the Establishment and Duties of the TFF (the current TFF Law) - no. 5894, 5 May 2009 - repealed the former TFF Law. Therefore, all of the applicants, except for *Ali Rıza*, initiated legal proceedings under the current TFF Law which was in force at the time.

The main distinction between the former TFF Law and the current TFF Law was that the current TFF Law provided a broad legal framework, as well as detailed provisions governing the TFF’s bodies, as set out in the Statutes of the TFF (TFF Statutes). In addition, the TFF Statutes were supplemented by the Regulations issued by the Board of Directors, whereas the former TFF Law provided elaborated provisions regarding the TFF’s bodies themselves.

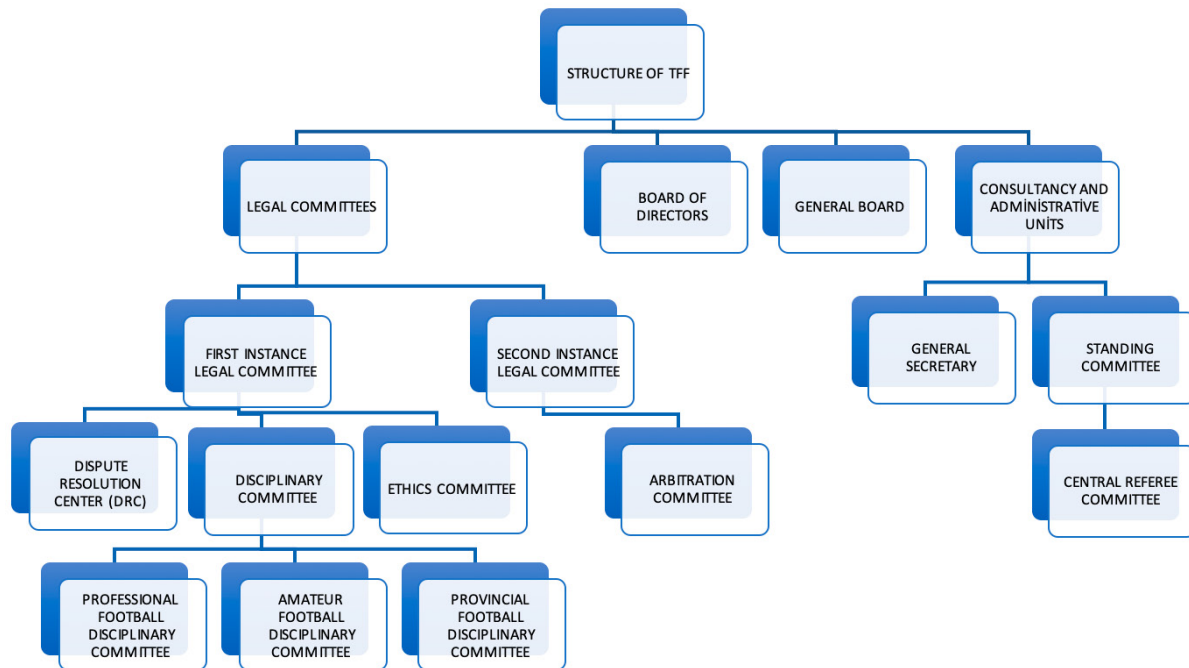
The relevant provisions of both laws will be provided below, however, it is important to provide a scheme of the TFF’s bodies before going into further detail.

¹³ *Ibid.*, p. 7, par. 27.

¹⁴ *Ibid.*, par. 29.

¹⁵ *Ibid.*, p. 8, par. 37.

¹⁶ *Ibid.*, p. 30, par. 153.



General Board

The General Board is the main decision-making authority of the TFF. It is authorized to amend the TFF Statutes. It also has the power to elect members of the Board of Directors as well as the president of the TFF.

Article 5 of the former TFF Law sets out the individuals who are eligible to be a member, whereas this was previously dealt with under Article 9 of the TFF Statutes. In addition, a list of members of the General Board and its delegates were provided in terms of Article 22 of the TFF Statutes. The TFF Statutes were amended on 29 June 2011 and, since then, it also includes the following provisions regarding membership of the General Board:

- five individuals who are retired football players and who have been capped most for the senior national team;
- five individuals who have coached the national team the longest;

- five individuals who are retired referees and who have refereed the most matches in the UEFA Champions League, except for the qualifying rounds, or before that league was established, in the corresponding organizations.

Board of Directors

The Board of Directors is the TFF's executive body consisting of 14 members and the President, who are elected by the General Board. The powers of the Board of Directors are as follows:

- To appoint some or all members of the legal committees, standing committees upon the recommendation of the President;
- To issue and enforce regulations governing the functioning of the bodies of the TFF;
- To review and approve decisions of the CRC.

Legal Committee

- a. *Dispute Resolution Committee:* The TFF DRC is the first-instance legal committee of the TFF and was established by Law no. 5719, which took effect on 4 December 2007, to review football disputes arising from contract.

At the time of the events giving rise to *Ali Rıza's* application, Article 12/A of the former TFF Law, as well as the former Dispute Resolution Committee Regulations (the former TFF DRC Regulations) were in force. According to the former TFF DRC Regulations, the Chairman was chosen by the Board of Directors and its members were appointed by the relevant football associations.¹⁷ In addition, members had to be law graduates, with at least five-years of professional experience. On the other hand, the decisions of the TFF DRC were taken with one Chairman

¹⁷ (i) the Football Clubs Foundation (Kulüpler Birliği Vakfı); (ii) the Professional Footballers Association; and (iii) the Football Coaches Association of Turkey.

and two members, chosen by the Football Clubs Foundation, as well as two members nominated by the relevant associations subject to the nature of the dispute.

Under Article 14 of the former TFF DRC Regulations, applicants can object against the decisions of the TFF DRC before the Arbitration Committee.

- b. *Ethics Committee*: The underlying reason for the establishment of the Ethics Committee was to protect the ethical values, as well as the brand value of Turkish football and to preserve its reputation in the eyes of the public.

It is composed of a chairman, four principal and four substitute members, all of whom are appointed upon the recommendation of the President. Members must be law graduates with five-years of professional experience.

- c. *Disciplinary Committee*: the Disciplinary Committee is composed of the AFDC, the Professional Football Disciplinary Committee (PFDC) and the regional Disciplinary Committee. The AFDC is authorized to decide upon disciplinary offences committed by amateur football clubs, their players, coaches, executives and other individuals, as well as referees and other officials involved in amateur football matches, whereas the Professional Football Disciplinary Committee is only competent to decide on offences committed by professionals. The members of those committees are appointed by the Board of Directors, upon the recommendation of the President. Appeals against the decisions of the Disciplinary Committee can be made to the Arbitration Committee.

Central Referee Committee

The CRC is a standing committee of TFF, which appoints referees and observers for all official and friendly football matches, as well as determines the levels of professional referees. In addition, it submits the list of referees and recommends the top-level assistant referees to the Board of Directors. CRC members are appointed by the Board of Directors, upon the recommendation of the President.

Arbitration Committee

The Arbitration Committee is legal committee that decides on disputes falling within its jurisdiction, as a final authority. It acts as final and is the highest authority on directives issued by Sports Federations, regarding management and discipline of sports actions.¹⁸ The Arbitration Committee is entitled to decide upon appeals made against the decisions of TFF DRC and the Disciplinary Committees of the TFF. It also has power to annul regulations that are incompatible with the current TFF Law and/or the TFF Statutes. The Arbitration Committee consists of a chairman, six principals and six substitute members. Members are appointed by the Board of Directors, upon the recommendation of the President. Moreover, Members must be law graduates with at least five years of professional experience.

Members serve for the same term as the Board of Directors and the President. They may not be removed from office, unless they resign or withdraw from membership. According to Article 13 of the former TFF Law as well as Article 6 of the current TFF Law, members are under a duty to decide independently and impartially.

The Arbitration Committee's decisions are final and not subject to any judicial review by domestic courts.

The ECHR's Assessment in the Scope of Independence and Impartiality

The right to a fair trial, as mentioned above, is provided for under Article 6 of the Convention. The right to a fair trial provides everyone the right to be heard by an independent and impartial tribunal, when they are faced with criminal charges or their civil rights are at stake. Therefore, this issue is of particular importance and has been dealt with in many cases over the years. However, this does not necessarily mean that this right is not without limitation, as there may be some limitations by virtue of the regulations that are made by State governments. Thus, those regulations should be scrutinized and reviewed carefully, since they may restrict the access to fair trial or impair the essence of the right.

The ECHR, in dealing with appeals against the independence and impartiality of the Arbitration Committee, separately examined the following issues:

- The manner of appointment of the Arbitration Committee's members;
- Their term of office;
- The existence of guarantees against outside pressures; and,
- The question of whether the body presents an appearance of independence.¹⁹

¹⁸ Turkish Constitution, Art. 59/2.

¹⁹ "Justice must not only be done, it must also be seen to be done."

In addition, the ECHR also took into consideration the structure of the TFF's bodies, as well as the selection types of their governing bodies, the manner in which committees are appointed and the composition of the legal committees.

With regard to the manner of appointment of the Committee members, according to law in force at the time, the Arbitration Committee members were appointed by the Board of Directors, upon the recommendation of the President, so long as the candidates possessed the qualifications specified under the TFF legislation.²⁰ However, the Court was of the view that, the mere fact that the members were chosen by the Board of Directors did not create doubts as to their independence and impartiality, as long as those claims were not subject to outside pressure, nor members receiving any instructions. In addition, since the applicants did not complain about the Arbitration Committee's members receiving instructions or being subject to pressure from the Board of Directors, the ECHR decided to examine whether there were sufficient safeguards in place to ensure the independence of members of the Arbitration Committee.

With regard to the term of office of the members of the Arbitration Committee, the Court analyzed the TFF's legislation, according to which there is no fixed term for the Arbitration Committee, however it provides that the duration of their mandate is the same as that of the Board of Directors and the President. Although the current TFF Law stipulates that, unless the members of the Arbitration Committee resign or withdraw from membership, they cannot be replaced prematurely nor removed

from the Arbitration Committee, the fact that their mandate is the same term as the Board of Directors and the President, gives rise to questions regarding the guarantees of independence and impartiality set out under Article 6 of the Convention.²¹

On the other hand, the current TFF Law provides that the arbitrators are to decide independently, and by referring to civil and criminal procedures, the parties can request the removal of the arbitrators. However, the current TFF Law does not provide for specific challenge procedures, nor the competent authority to decide upon such requests. In addition, the current TFF Law does not oblige arbitrators to disclose any circumstances that may affect his/her independence and impartiality.

Given the aforementioned deficiencies in the Turkish Sports Arbitration System, the Court discerned the existence of a number of strong organizational ties between the Board of Directors and the Arbitration Committee.

“ The applicants had a legitimate reason to doubt that the members of the Arbitration Committee, in the absence of adequate safeguards protecting them against outside pressures, would be independent and impartial ”

Next, the Court went on to examine the composition of the Arbitration Committee, with regard to whether or not the members can be regarded as independent and impartial. *Ali Rıza* claimed that there was an explicit bias shown by the members of the Arbitration Committee towards

football clubs, because of the structural inequality between clubs in the composition of the General Board and the Board of Directors. The fact that the members of the Arbitration Committee who decided on the applicant's case, at the time, were appointed by the Board of Directors, which was predominantly composed of former members or executives of football clubs, gave rise to serious doubts.

With regard to *Serkan AKAL*, he submitted that there were two reasons as to why the Arbitration Committee could not have been expected to decide in an independent and impartial manner:

- The Board of Directors had a considerable amount of influence over both the CRC and the Arbitration Committee;
- The roster of referees drawn by the CRC were submitted to the Board of Directors for approval.

Considering the fact that the Board of Directors are authorized to set the rules governing the composition, principles and procedure of the functioning of the CRC, the Court was of the view that those actions could give rise to doubts in terms of the appearance of independence and impartiality of the arbitrators.

In light of the foregoing findings, the Court concluded that the applicants had a legitimate reason to doubt that the members of the Arbitration Committee, in the absence of adequate safeguards protecting them against outside pressures, would be independent and impartial, particularly from the Board of Directors, and thus, concluded that there was a violation of Article 6 § 1 of the Convention.²²

20 TFF, no. 9, p. 42, par. 208.

21 *Ibid.*, p. 44, par. 213.

22 *Ibid.*, p. 46, par. 223.

Recommendation on Steps to be Taken

Pursuant to Article 46 of the Convention, the Court does not only impose on the respondent State the obligation to pay the sums awarded against it, but it also selects the appropriate measures, if necessary, to be taken by the respondent state. In this case, the Court held that the violation indicates that the Arbitration Committee has not been organized in such a way as to ensure its independence from the Board of Directors. Furthermore, it was held that the current TFF Law does not provide appropriate safeguards to protect members from any external pressures.

- In order for the TFF to ensure the independence of Arbitration Committee, the author submits that the following steps should have been taken:
- The Arbitration Committee should immediately be detached from the Board of Directors;
- The members of the Arbitration Committee should not be appointed by the Board of Directors, on the contrary, a roster of arbitrators, as in CAS, should be drawn up, comprising law graduates who have good knowledge on both contractual issues and sports law;
- The general board should include more retired football players and referees, since it does not reflect that players and referees are represented as equal to the clubs;
- The term of Arbitration Committee members should not be the same term as that of the Board of Directors and the President;

- Disclosure obligations and challenge procedures, as well as a competent authority to decide upon such requests, should be included in the relevant rules;
- The CRC should not submit a list of referees to the Board of Directors for approval, as it should also be detached from TFF; and,
- The financial structure of the Arbitration Committee should be completely detached from TFF and it should be attached to the relevant Ministry for financial independence.

Conclusion

To conclude, the ECHR decision demonstrates that there are a number of structural deficiencies in structuring the TFF, which adversely affects an individual's right to a fair hearing before an independent and impartial arbitral tribunal. In dealing with this issue, the Court took into account the composition of arbitral tribunals, TFF's structure, arbitrators' remuneration, decisions of itself and also the Turkish Constitutional Court. Ultimately, it concluded that there was a violation and that the Turkish Government must restructure the TFF's bodies, so as to ensure the independence and impartiality of adjudicators in the relevant processes of the TFF. However, the decision did not specify the measures to be taken and thus, in this article, in dealing with the case of *Ali Rıza and others v. Turkey*, recommendations are provided. However, it is important to state here that these recommendations are not limited and can be expanded.

Selected Case-Law of the Swiss Federal Tribunal in Football Matters



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→ **Swiss Federal Tribunal (SFT) – Swiss Law – Court of Arbitration for Sport (CAS) – CAS proceedings – Match-fixing – Intermediaries / Agents – Right to be heard – Public policy – Res judicata**

This article provides an overview of selected recent case-law rendered by the Swiss Federal Tribunal (SFT) in

relation to civil law appeals against arbitral awards of the Court of Arbitration for Sport (CAS). These decisions of the SFT concern cases of match-fixing, contracts involving agents/intermediaries and procedural rules in contractual disputes.² They cover topics such as possible public hearings before CAS, public policy, the right to be heard as well as res judicata.

Sports law practitioners all around the globe are, as always, well-advised to follow carefully recent developments concerning SFT case-law in order to understand the full extent of the parties' rights and the legal remedies available in the context of arbitration proceedings.

Decision 4A_486/2019 of 20 August 2020

Overview and Facts

The matter at the centre of this decision was a match-fixing scandal with implications and

consequences across Europe, including the outcome of a national football championship.

The parties involved in the dispute were two football clubs, their respective National Federation and the Fédération Internationale de Football Association (FIFA).

While various criminal and disciplinary investigations and proceedings were conducted at national and international levels against the club accused of match-fixing (Club A), the second club involved in these proceedings before the SFT (Club B) in principle sought to amend the final league table in its favour. Club B believed that the respective national championships had been awarded incorrectly (to Club A instead of Club B), despite the proven match-fixing allegations. For this reason, Club B filed various requests to its National Federation, UEFA and FIFA in order to be awarded the championship titles instead of Club A.

Club B's requests to FIFA were at the heart of this matter: after its request had not been satisfied at the national level, Club B requested the FIFA Disciplinary Committee (FIFA DC) to initiate a disciplinary investigation into the match-fixing activities that occurred during the 2010-2011 season. It further requested that FIFA:

- declare that the National Federation failed in its duty to prosecute all involved clubs;
- impose sanctions against the National Federation for violating the FIFA Statutes; and,
- order the National Federation to impose sanctions on Club A and award the 2010-2011 league title to Club B.

Through various communications, the FIFA DC informed Club B that it was not competent to handle this case. The subsequent appeal before the FIFA Appeals

¹ The authors are all members of the Sports Law Department at Bär & Karrer, Zurich, Switzerland. This article relies exclusively on the information published by the Swiss Tribunal Federal and/or by the CAS. Any views expressed in the article are the personal views of the authors only. Finally, the authors are as ever grateful for the excellent English translations provided by the team at www.swissarbitrationdecisions.com.

² The present article relies exclusively on the information published by the Swiss Tribunal Federal and/or by the CAS. Any views expressed in the article are purely personal views of the authors.

Committee was also unsuccessful, as it denied Club B's standing to appeal.³

Against this final decision, Club B filed an appeal before the CAS. The appeal was directed against the National Federation, Club A and FIFA. Club B, in essence, requested CAS to:

- annul the decision of FIFA refusing to rule on its request;
- declare that the National Federation failed to prosecute the infringements committed by Club A; and,
- amend the 2010-2011 league rankings so that Club B was ranked first and thus awarded the league title, including all economic and symbolic benefits.

Following the request of Club A and the National Federation, the CAS Panel decided to bifurcate the proceedings, hold a hearing and render a preliminary decision on the admissibility of the appeal, the jurisdiction of CAS and on Club B's standing to appeal.

Following a hearing that was not held publicly⁴, the CAS Panel declared the appeal admissible in principle. Nevertheless, it dismissed the appeal of Club B for lack of standing to appeal, without further examining the merits of the case.

Appeal in Civil Law matters

Against this CAS decision, Club B filed a Civil Law Appeal before

the SFT. The pleas raised in the appeal were: (i) the violation of substantial (material) Swiss public policy, (ii) the violation of the right to be heard, and (iii) the violation of procedural public policy.

First Plea: Substantial Public Policy

At the outset, the SFT recalled the meaning and scope of public policy⁵ and reiterated that it is not sufficient that a reasoning contained within an arbitral award conflicts with public policy, but that in all cases, the result of the award must be incompatible with public policy.⁶

*"There is a violation of procedural public policy when fundamental and generally recognized principles have been violated, leading to an unbearable contradiction with the sense of justice, so that the decision appears incompatible with the values recognised in a state governed by the rule of law."*⁷

Article 6 par. 1 ECHR

Club B claimed that the CAS, by not conducting a public hearing, violated the principle of public hearings guaranteed in Article 6 par. 1 of the European Convention on Human Rights (ECHR). Club B argued that Article 6 par. 1 ECHR would constitute a *sui generis* grievance, implicitly added to the grounds for appeal set forth in Article 190 par. 2 of the Swiss International Private Law Act (PILA).

According to the SFT⁸, the present dispute fell outside the scope of Article 6 par. 1 ECHR.

A party to an arbitration agreement cannot directly invoke an alleged violation of Article 6 par. 1 ECHR before the SFT, since the grounds for an appeal against an award of an international arbitral tribunal are set out exhaustively in Article 190 par. 2 PILA.

The SFT further considered that Club B was excluded from the application of Article 6 par. 1 ECHR, as it was not affected in its "*rights and obligations in a civil matter*", nor subject of a criminal charge. According to the SFT, Club B could not be compared to athletes who are parties to a dispute concerning their rights and obligations or who are charged with disciplinary sanctions. The SFT considered Club B to be a mere whistle-blower, which was not affected in its right, since there was no right *per se* to have disciplinary proceedings opened against another club.

Finally, the SFT concluded that even assuming that Article 6 par. 1 ECHR was applicable, the CAS Panel had sufficiently explained why it refused to hold a public hearing in accordance with the principles set out in Article 6 par. 1 ECHR. The SFT agreed with the CAS Panel's conclusion that, due to the preliminary nature and the purely legal and highly technical content of the hearing, the conditions for an exception to the principle of public hearings within the meaning of the ECHR were met.

The Principle of Good Faith

Club B further argued that the National Federation and FIFA acted contrary to good faith, within the meaning of Article 2 Swiss Civil Code (CC), and therefore also in a manner incompatible with material public policy (Art. 190 par. 3 lit. e PILA).⁹ Given the vertical nature of the relationship between a sports

³ The FIFA Appeal Body considered that the applicable procedural rules only confer standing to appeal to a party that participated in the first instance proceedings

⁴ Due to the only legal and highly technical issues that were to be discussed at the hearing, the CAS Panel rejected Club B's request to have a public hearing and/or to have it audio-visually broadcasted.

⁵ [SFT 4A_486/2019](#), consid. 3.

⁶ [SFT 4A_486/2019](#), consid. 3.2, with other references.

⁷ [SFT 4A_486/2019](#), consid. 3.3.

⁸ [SFT 4A_486/2019](#), consid. 4.1 et seqq.

⁹ [SFT 4A_486/2019](#), consid. 6.1 et seqq.

club and a sports federation, the latter's behaviour shall be measured in light of the legitimate expectations created towards an affiliated sports club. According to Club B, there was a legitimate expectation in a certain application of the pertinent rules and regulations enacted by national and international federations, and not applying them in line with this expectation violated Article 2 CC.

According to the SFT, Club B failed to demonstrate any serious violation of Article 2 CC or any violation of material public policy. Nevertheless, the SFT stated¹⁰ that in the application of the different rules, the CAS Panel concluded that Club B would not have automatically obtained the title in case of a possible sanction against Club A and that the FIFA Statutes provide for a discretionary right but without the obligation of FIFA to intervene in national federations. Furthermore, the SFT reiterated that the process of interpreting a statutory provision of a sports federation does not fall under the scope of material public policy.

Moreover, the SFT reconfirmed its jurisprudence¹¹ according to which it is not for it to review whether an arbitral tribunal correctly applied the law when denying the standing to appeal. Therefore, Club B did not benefit from the protection of Article 2 CC in its expectation that FIFA would have intervened in the national affairs of the National Federation.

Corruption

Club B further argued - with reference to the case-law of the SFT - that, if proven to be true, promises to pay bribes contravene public policy.¹² Club B referred to rules for

the fight against the manipulation of sports competitions which have been enacted at the international level and it highlighted the socio-economic menace caused by corruption. In Club B's view, the CAS award would allow corruption to go "*unpunished*" and that those responsible retain the league title in question.¹³ This, according to Club B, would violate public policy.

The SFT rejected Club B's argument, since the subject of the appeal before the SFT was not the act of corruption itself, but whether Club B was entitled to challenge FIFA's decision at issue. Accordingly, it was logical that once the CAS Panel found that Club B did not have standing to appeal, it did not address Club B's various other pleas.

Second Plea: Right to be heard

Legal Standing and Right to be heard

Club B claimed that FIFA abused its discretionary power, and in so doing, rendered Article 70 par. 2 of the FIFA Disciplinary Code¹⁴ pointless. In the view of Club B, CAS supported FIFA's refusal by not examining Club B's grievance in this regard even if it had the power to do so *de novo*¹⁵.

The SFT rejected these arguments. Firstly, the SFT considered that the CAS Panel thoroughly examined Club B's standing to appeal. Secondly, a bifurcation of proceedings was considered a matter of procedural economy and common in proceedings before state courts. Furthermore, the SFT stated that the CAS was not obliged to address all arguments presented

by the parties and that it could ignore those which became moot in light of the (other) considerations in the award. According to the SFT, the right to be heard furthermore does not confer any right, for example, to an *obiter dictum*.¹⁶

Article 75 CC and the Right to be heard

Club B further contested the content of the arbitral award in relation to the interpretation of various rules by the CAS Panel. Club B argued that, as an indirect member of FIFA, it benefited from the protection of Article 75 CC. In having considered that a disciplinary sanction on Club A would not have automatically awarded Club B the championship title, with the consequence that its standing was denied, the CAS Panel prevented Club B from having reviewed FIFA's decision by an independent judicial body. According to Club B, this narrow interpretation deprived it from the legal protection guaranteed by Article 75 CC, in violation of the right to be heard (Article 190 par. 2 lit. d PILA).

The SFT also rejected this argument: it considered that rather than invoking a violation of its right to be heard, Club B was, in reality, criticising the reasoning of CAS in the merits. This, however, is not possible within a Civil Law Appeal.¹⁷

Third Plea: Procedural Public Policy and Standing to Appeal

Club B finally claimed that the restrictive interpretation of the right to appeal would render decisions of FIFA immune against judicial review. Therefore, Club B argued that the Swiss procedural public

¹⁰ [SFT 4A_486/2019](#), consid. 6.2 et seqq.

¹¹ [SFT 4A_428/2008](#).

¹² [ATF 119 II 380](#), par. 4b, judgment 4P.208/2004 of 14 December 2004, par. 6.1.

¹³ [SFT 4A_486/2019](#), consid. 7.1.

¹⁴ This provision grants FIFA the right to intervene at national level in case of serious violations of the FIFA Statutes.

¹⁵ [SFT 4A_486/2019](#), consid. 8.1 et seqq.

¹⁶ [SFT 4A_486/2019](#), consid. 8.3.

¹⁷ [SFT 4A_486/2019](#), consid. 8.4.

policy was violated because the possibility of an effective remedy and to a fair trial were denied.

The SFT also rejected this argument. Once again, the SFT took the view that Club B was, in reality, seeking an indirect re-evaluation of its standing to appeal by the SFT, which is not possible as it would transform the SFT into a mere court of appeal.¹⁸

Decision 4A_272/2019 of 4 September 2019

Overview

The decision 4A_272/2019 concerns procedural aspects of lodging a civil law appeal before the SFT.

In particular, it shows the importance of precisely stating and substantiating the correct grounds for appeal. In case an Appellant fails to do so, the SFT will deem the appeal inadmissible.

Underlying facts and procedural history

Proceedings before FIFA

In 2016, a contractual dispute arose between a Player and his Club (Parties). Due to the premature termination of the contract by the Club, the Player filed a claim with the FIFA Dispute Resolution Chamber (DRC). The latter passed a decision on 21 September 2017.

The operative part of the decision was communicated to the Parties on 27 September 2017. On 11 October 2017, more than ten days after the operative part of the decision was communicated, the Club requested to be provided

with the motivated decision. Nonetheless, this request was denied by FIFA on 23 October 2017, based on Article 15 par. 1 of the Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber (Procedural Rules). The relevant provision read as follows:

*"The Players' Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal."*¹⁹

First proceedings before CAS

On 15 December 2017, the Club lodged an appeal with CAS, requesting CAS to order FIFA to issue the motivated decision. The Appellant directed its appeal exclusively towards the Player, not involving FIFA as a party in the proceedings.

On 7 August 2018, the Sole Arbitrator dismissed the appeal due to the Player's lack of standing to be sued and clarified that FIFA should have been the Respondent in proceedings of such a type and content.

It is however noteworthy that the Sole Arbitrator commented on the

merits of the case, stating that FIFA's denial to provide the motivated decision was not justified.²⁰

FIFA's subsequent notification of the motivated decision

On 9 August 2018, based on the abovementioned CAS award, the Club requested - once again - the grounds of the decision of 21 September 2017 from FIFA.

On 31 August 2018, FIFA notified the grounds of the said decision, reviving the 21-day time limit to file a Statement of appeal at CAS.

Second proceedings before CAS

On 8 September 2018, the Club filed an appeal with CAS against the newly motivated decision.

In its award of 15 April 2019, the CAS Panel declared the appeal inadmissible as it concluded that since the Club's first appeal with CAS was dismissed, "*FIFA's decision of 23 October 2017 not to issue the grounds of the Appealed Decision remained fully in force and became final and binding upon the parties and FIFA.*"²¹

The Panel emphasized that FIFA "*was wrong*"²² to issue the grounds and reconsider the decision which has previously become binding.

In this regard, the Panel found that FIFA "*could not revive the 21-day time limit to lodge an appeal*"²³ as this "*would endanger the legal certainty pursued with a statutory time limit to appeal.*"²⁴

²⁰ CAS 2018/A/5524 Football Club Irtysh Pavlodar v. Sadat Bukari Ghana Boris Kolev, par. 118.

²¹ CAS 2018/A/5898 Football Club "Irtysh" v. Bukari Sadat, par. 61.

²² CAS 2018/A/5898 Football Club "Irtysh" v. Bukari Sadat, par. 63.

²³ CAS 2018/A/5898 Football Club "Irtysh" v. Bukari Sadat, par. 67.

²⁴ CAS 2018/A/5898 Football Club "Irtysh" v. Bukari Sadat, par. 67.

¹⁸ SFT 4A_486/2019, consid. 9.

¹⁹ The current version reads: "*Following the notification of the findings of the decision, the parties are entitled to request the grounds of the decision within ten calendar days as from the notification of the findings of the decision. Failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their right to file an appeal.*" (Art. 15 par. 2 of the Procedural Rules (June 2020)).

The civil law appeal filed by the Club

As generally known, in cases of international arbitration proceedings under the PILA, a civil law appeal with the SFT can be lodged under the conditions set forth in Article 77 of the Swiss Federal Tribunal Act (SFTA) in conjunction with Articles 190-192 PILA.

Article 190 par. 2 of the PILA specifies the *numerus clausus* of the grounds to appeal. In this context, it is important to note that, in line with Article 77 par. 3 SFTA, regardless of the power of review of the SFT, the latter will only review the duly raised and reasoned grievances. Hence, it will not correct wrongly invoked legal provisions nor apply the law *ex officio*.²⁵

In the case in question, the Club sought the annulment of the arbitral award, based exclusively on the violation of Article 190 par. 2 lit. b PILA, claiming that CAS wrongly denied its jurisdiction.

The SFT dismissed the appeal and considered it “*manifestly inadmissible*”.²⁶ In this regard, the SFT provided the following reasoning:²⁷

- The Club wrongly alleged the violation of Article 190 par. 2 lit. b PILA, as CAS explicitly considered itself as competent;²⁸
- The reason why CAS decided not to rule on the merits of the matter at hand was that it considered the appeal inadmissible, referring to procedural rules limiting the time to request the motivated decision;

- Correctly, this case would have concerned the problem of *res judicata*, hence should have been treated under Article 190 par. 2 lit. e PILA, *i.e.* procedural public policy;
- Since the Club did not substantiate its reasoning and legal arguments under Article 190 par. 2 lit. e PILA, it did not comply with the requirements under Article 77 par. 3 SFTA;
- Finally, the SFT stressed that a question of application of rules and regulations of a sports’ association does not fall under the grounds of appeal foreseen in Article 190 par. 2 PILA.

Decision 4A_536/2018 of 16 March 2020

Overview

In decision 4A_536/2018, the SFT dealt mainly with the topic of *res judicata*.

The question of whether an arbitral tribunal is bound by the interpretation of the same agreement, concluded by another arbitral tribunal in previous proceedings concerning a new claim, arose.

Firstly, the SFT reiterated that a decision on admissibility does not have the effect of *res judicata*. It continued with the abovementioned analysis and concluded that the chronologically second tribunal is not strictly bound to the contractual interpretation of the first tribunal.

Furthermore, the SFT had to analyse whether the arbitral tribunal sufficiently examined the arguments presented by the appellant, in light of the right

to be heard. It referred to its jurisprudence about the standard clauses in arbitral awards, guaranteeing that the right to be heard was ensured and reiterated that such clauses do not have a full legal meaning. Respectively, the SFT can freely examine if the arbitral body sufficiently looked at the arguments presented by the Appellant.

Underlying facts and procedural history

Facts of the case

On 28 April 2014, an agent agreement (Agent Agreement) was signed between a Club and an Agent (Parties). In exchange for the Agent’s assistance in contractual negotiations, the Parties agreed upon the following remuneration:

“2.(a): for having rendered the services as defined in Art.1 of the Agent contract leading to the conclusion of a renewed contract between the Club and the Player (“Players’ [sic!] Contract”), the Agent would receive a commission of up to EUR 800,000 net, under the following conditions:

(aa) EUR 400,000 payable within five working days of the signing of the Player’s Contract with a contractual period extending from 1.7.2015 to 30.6.2017;

(bb) EUR 400,000 payable within five working days of the signing of a further contract extending, replacing or amending the Player’s contract or any other agreement establishing the working relationship between the Club and the Player as an adult, on condition that this contract was signed during the

²⁵ The so called “*streng Rügepflicht*” is applicable in the SFT appeal proceedings against arbitral awards.

²⁶ [SFT 4A_272/2019](#), consid. 4, English translation.

²⁷ [SFT 4A_272/2019](#), consid. 3.

²⁸ See also CAS 2018/A/5898 Football Club “*Irtys*” v. Bukari Sadat, par. 57.

2014/2015 season and that its expiry reached at least June 30, 2020. The parties expected this contract to be signed on November 29, 2014 or around this date, that of the Player's 18th birthday.

2.(b) As additional remuneration for rendering the services as defined in Art. 1, leading to the conclusion of a contract with the Player ("a Players' [sic!] Contract"), the Agent would participate financially in any future transfer of the Player. In all cases where the Player is transferred from Club A. to a third Club, A. should pay the Agent a net amount representing 10% of the amount payable or paid to A. as compensation in connection with the future transfer of the Player."²⁹

On 24 April 2014, the Club signed an employment contract with the player concerned (Player). In line with clause 2(a)-(aa) of the Agent Agreement, the Club paid EUR 400,000 to the Agent.

On 28 November 2014, the Player and the Club signed a new employment contract. On 8 April 2015, a third employment contract was signed, valid until 30 June 2021.

In January 2017, the Player was transferred to a third Club for the fee of EUR 29,015,323.

First proceedings before CAS

In June 2015, the Agent filed a claim before CAS, requesting the payment of EUR 400,000 based on clause 2(a)-(bb) of the Agent Agreement. Equally, the Agent requested a declaratory judgement with regard to the future transfer of the Player in light of clause 2(b) of the Agent Agreement.

²⁹ [SFT 4A_536/2018](#), Facts A.a.

The Panel ruled on the merits exclusively regarding clause 2(a)-(bb) of the Agent Agreement, as it rejected the request for the payment of EUR 400,000.

With regard to clause 2(b) of the Agent Agreement, the Panel did not enter into the merits for the declaratory judgement as the necessary prerequisites were not met. Consequently, the Panel declared the claim inadmissible.

Second proceedings before CAS

In July 2017, in view of the transfer of the Player to a third club, the Agent filed another appeal with CAS, requesting the payment of EUR 2,960,000 based on clause 2(b) of the Agent Agreement.

The Panel partially accepted the Agent's claim, ordering the Club to pay the Agent the amount of EUR 2,861,532.30.

The civil law appeal filed by the Club

The Club sought the annulment of the second arbitral award based on the violation of procedural public policy, as it alleged that CAS breached the principle of *res judicata* (Art. 190 par. 2 lit. e PILA), as well as violated the right to be heard (Art. 190 par. 2 lit. d PILA).

Res judicata

In its first plea, the Club argued that the second arbitral tribunal violated *res judicata*, because it ruled contradictory to the first CAS award with regard to the interpretation of the Agent Agreement. The Club considered the interpretation provided in the first proceedings a preliminary ruling for the second proceedings as it deemed that it had settled the

main substantive question already in that first award.

It is noteworthy that the SFT reiterated the principles of *res judicata*, referring to its longstanding jurisprudence on the matter.

These principles can be summarized as follows:³⁰

- The principle of *res judicata* prohibits an identical claim that has already been decided to be heard in new proceedings between the same parties.
- Whereas decisions on the merits of a dispute are vested with the *res judicata* effect, decisions on admissibility are not.
- Furthermore, only the operative part of a decision has *res judicata* effect, not the motivated part.
- This applies equally to partial claims: the motivation of the first arbitral tribunal is not binding for the subsequent arbitral tribunals.
- In the context of international arbitral proceedings, Article 190 par. 2 lit. e PILA would be violated if the deciding body omits to consider a decision with *res judicata* effect, or, when, in its final award, it deviates from the opinion expressed in a preliminary or partial award, in so far as it settles a preliminary substantive question therein.³¹

Taking the above-listed principles into consideration, the SFT rejected the argumentation of the Club based on the following arguments:³²

³⁰ [SFT 4A_536/2018](#), consid. 3.1.1.

³¹ Reference is made to: [ATF 141 III 229](#), consid. 3.2.1 p. 234; [ATF 140 III 278](#), consid. 3.1 p. 279, in particular, [SFT 4A_606/2013](#), where the arbitral tribunal decided on a substantive preliminary issue in a partial award; the same tribunal was subsequently bound by its interpretation in light of *res judicata*, see [SFT 4A_606/2013](#), consid. 3.

³² [SFT 4A_536/2018](#), consid. 3.3.

- The first CAS award ruled on the merits with regard to the payment of EUR 400,000 when it rejected the claim. Nonetheless, the Panel did not enter into the merits of the claim based on clause 2(b) of the Agent Agreement when it declared it inadmissible. Accordingly, no situation of *res judicata* arose regarding the latter claim.
- According to the SFT, the first award cannot be automatically considered as a preliminary ruling for the second award as the two cases are subject to two different arbitral proceedings.
- Moreover, the SFT pointed out that to benefit from a previously settled substantive question, it is not sufficient to establish that such a question has arisen in the previous arbitral proceedings.
- Therefore, the SFT concluded that, even though there is a similarity between the two proceedings, the second Panel was not bound by the interpretation of the agreement offered by the first Panel.

Nonetheless, when reviewing the award in question, the SFT took the view that the Panel had sufficiently dealt with the arguments presented by the Club as it not only summarized the Club's defence, but also explained why it rebutted those arguments.³⁴

Right to be heard

The Club's second argument concerned the allegedly insufficient examination of arguments supported by the witness statements.

The SFT remarked that a standard clause in an arbitral award, stating that an arbitral body has taken all allegations, arguments and evidence duly into consideration, is in itself insufficient to safeguard the right to be heard.³³

³³ [SFT 4A_536/2018](#), consid. 4.2.

³⁴ [SFT 4A_536/2018](#), consid. 4.2.

A Football Rarity – An Article 15 RSTP (sporting just cause) Case at the CAS!



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→ **Player contract – Breach of contract – Just cause – FIFA RSTP – Court of Arbitration for Sport (CAS) – Player transfer**

Article 15 of FIFA RSTP provides that in an international context, if an established player features in less than 10% of a club's official matches in a season, a window opens through which the player can look to go and end his contract with "sporting just cause". A few months ago, the Court of Arbitration for Sport (CAS) handed down the decision in [CAS 2018/A/6017](#). Prior to that, the leading case in this area dated back to 2008.

It is no surprise that these cases are so rare, most clubs these days would prefer to transfer a player (usually by loan) or settle his or her contract rather than have a fit player sitting in the stands watching the team play whilst still being paid in full.

To most players' credit, they too would rather be playing than having to watch part of their short enough career being wasted away on the side-lines.

However, where there's an international dimension (and possibly domestic, if a mirror regulation exists), if an established player features in less than 10% of a club's official matches in a season, a window opens through which the player can look to go and end his contract with "sporting just cause".

Article 15 of FIFA's Regulations on the Transfer and Status of Players (RSTP) provides as follows:

"An established professional who has, in the course of the

season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the Player's circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered."

A few months ago, the Court of Arbitration for Sport (CAS) handed down the decision in [CAS 2018/A/6017 FC Lugano SA v. FC Internazionale Milano S.p.A.](#) Prior to that, the leading case in this area dated back to 2008, namely [CAS 2007/A/1369 O. v. FC Krylia Sovetov Samara](#).

The CAS 2007/A/1369 case split out from Article 15 of the RSTP four issues that needed to be considered:

- was the player an established professional?;
- had the player appeared in less than 10% of the official matches?;
- what were the player's circumstances?; and,
- was the termination given within the 15-day window?

Neither of the cases cited above accepted that the requirements for sporting just cause had been met, so we will need to wait (perhaps some time) for another case that examines matters such as how compensation under Article 15 of the RSTP would be calculated. Further, neither case dwelled on whether the 10% of official matches criteria had been satisfied, nor in any detail on what constituted an "official match". Instead, the focus was on whether the players

concerned were “*established professionals*” and whether the right to claim sporting just cause was automatic, or whether a warning was required.

The CAS 2007/A/1369 case did overturn FIFA’s view that it was the number of matches, not the time spent playing that mattered. The Sole Arbitrator accepted the fact that the player in that case had featured in less than 10% of the available minutes played by the club in the season as meeting the requirement.

CAS 2007/A/1369 O. v. FC Krylia Sovetov Samara

This case concerned a Nigerian player who had signed a four-year contract with a Russian club. At the end of the 2006 season, the player’s agent claimed that the player could leave, pursuant to Article 15 of the RSTP. However, the claim was doomed from the outset as the 15-day window was missed.

However, the Sole Arbitrator did also consider whether the other key requirements of Article 15 of the RSTP had been met or not.

“When considering what was meant by an “established professional”, the Sole Arbitrator considered the player’s age on the termination date, the FIFA system and also his playing record”

When considering what was meant by an “*established professional*”, the Sole Arbitrator considered the player’s age on the termination date (he was 22 years old), the FIFA system (for example, pursuant

to Article 1 annex 4 of the RSTP, training compensation is normally incurred by players up to the age of 21, indicating a presumption that this is when the training phase ends for professionals), and also his playing record (he had played 27 matches in Bulgaria in 2004 and 19 matches for the club in Russia in 2005). The Sole Arbitrator determined that the player was an established professional.

The Sole Arbitrator considered the player’s circumstances as well. This included matters such as his position (for example, a goalkeeper that was hired as a backup might expect to feature in less than 10% of a club’s games), whether the player had integrated into the team, and crucially whether he had ever complained about the lack of playing time. In the specific case, there was no evidence that the player had ever complained or given the club a warning, so that the club could address the lack of opportunity to play. The lack of any complaint was seen as the player accepting his situation, and so he could not avail himself later of Article 15 of the RSTP.

CAS 2018/A/6017 FC Lugano SA v. FC Internazionale Milano S.p.A.

This more recent case involved a player of Ivorian nationality. *Inter Milan* (Inter) had acquired him at age 16, and he had been featured in their youth team for a couple of seasons and then signed a three-year contract at age 19. The player was then loaned to the Italian club *FC Crotone* (Crotone) for free. The player participated in 33 official matches (30 in the Serie B and 3 in the Italian Cup), of which 30 were in the starting eleven, helping *Crotone* to achieve promotion to the Serie A for the first time in its history. Despite this, *Crotone* did

not exercise its option to acquire the player, but it did receive some “*development fees*” from *Inter*, as the player played 5, then 10, and finally 15 matches.

Before the start of the 2016-2017 season, *Inter* looked to loan the player to a top-level French side, but at the last minute, the player turned the move down to remain at *Inter*, stating that he had not had the time to evaluate the option properly.

The player was often on the bench for *Inter* during that season but never played. Equally, during that season, he never complained about his lack of opportunity to play.

At the end of the season and within the 15-day window, the player looked to terminate his contract, citing Article 15 of the RSTP sporting just cause. Both parties turned to FIFA, and eventually, the dispute arrived at the CAS.

The player looked at a couple of options but ended up at *FC Lugano* (Lugano). The eagle-eyed amongst you may have spotted that the case at CAS did not actually involve the player. The case before FIFA did, along with *Inter* and *Lugano* (as the next club to register the player). The FIFA Dispute Resolution Chamber determined that Article 15 of the RSTP had not been triggered and, as such, the player breached his contract with *Inter* without just cause, and the compensation was calculated under Article 17 of the RSTP. *Lugano* was held jointly liable under Article 17.2 of the RSTP and appealed against that decision to the CAS.

The parties focused their submissions on whether or not the player was an “*established professional*”. *Lugano* noted that there was no definition within the RSTP for such a term, but, as

FIFA had considered the player's age, his salary in comparison to his age, his playing record, and his experience compared with that of other players at *Inter*, so did *Lugano*. *Lugano* also drew the Sole Arbitrator's attention to the level of the option fees both *Crotone* and *OGC Nice* (Nice) were willing to pay and the *Nice* loan fee. *Lugano* downplayed the fact that the player was not an international player. In summary, the position of *Lugano* was that the player was over 21 when he terminated and his playing season whilst at *Crotone* and his six years as a professional player at *Inter* demonstrated that he was an established professional.

Inter, on the other hand, pointed out that Italian clubs do not have a reserve league, so it is common to develop and train their younger players by loaning them out to *Serie B* clubs, as had happened here. *Inter* had actually agreed to pay *Crotone* money if it played the player - the more games, the more money. These payments were termed "development fees." *Inter* had arranged for the player to go to *Nice*, where he would get more opportunity to play, as there were already four more senior players (all internationals) at the club in the same position as the player. If he stayed, he was accepting the role of a substitute. *Inter* also pointed out that *Crotone* declined to exercise its option to acquire the player's services in *Serie A*, and *Lugano* itself only started the player in 7 matches the next season. Finally, *Inter* stated that the player never expressed any dissatisfaction about remaining as a substitute at *Inter*.

The Sole Arbitrator determined that there was a three-part test (as the player's circumstances were to be considered when assessing whether the player was an established professional or not) and that the 10% of matches and

the 15-day notice components had been satisfied.

When considering this, he stated:

"Since the termination of a contract shall only be available as an ultima ratio, the threshold cannot be set too low. Only players that have a legitimate expectation to be (regularly) fielded may avail themselves of Article 15 RSTP. This, however, is not the case for players that have not yet finished their training. Accordingly, unless exceptional circumstances require determining otherwise, players under the age of 21 cannot be considered 'established professionals.'"

The Sole Arbitrator looked at age in particular - the player here was aged 21 and a when he terminated. With reference to Article 1.1 of Annex 4 of the RSTP, the Sole Arbitrator noted that whilst the training compensation regime runs to 23, it only looks at training up to the age of 21. There is a training phase up to 21, then a development phase to 23. Only after 23 would there be a presumption that a player is an established professional. As such, it was necessary to examine the player's circumstances, and such matters as his playing record whilst at *Crotone*, his choice to refuse (as he was entitled to do) the potential loan to *Nice*, and the level of others at his club.

Ultimately, the Sole Arbitrator left the question unanswered, as there was no evidence that the player ever complained about being a substitute:

"a termination for 'sporting just cause' is not one of the categories of contractual breaches that are of such severity that no prior warning is required."

As with the CAS 2007/A/1369 case, this lack of warning was fatal to the Article 15 of the RSTP claim.

One gets the impression that the Sole Arbitrator had doubts as to whether the player was an established professional. Perhaps the biggest hurdle for the player would have been the fact that he knew there were four extremely experienced international professionals ahead of him at *Inter* and that he was likely to remain their substitute for that season. But we will never know.

We also do not know how a Panel might deal with the issue of compensation, should it decide that the 3-part test in Article 15 is one day met.

At the present rate, we might have to wait ten years for another case to answer to that.

In the Hot Seat: Expert Witnesses and Testimony at CAS



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→ **Court of Arbitration for Sport (CAS) - CAS proceedings - Code of Sports - Related Arbitration**

Arbitration procedures at the Court of Arbitration for Sport (CAS) lend themselves to a number of interesting and challenging situations for legal practitioners. One example of such a situation is a party's use of expert witnesses and testimony.¹ As much as any good attorney may pride themselves on being able to study and become extremely well-versed in the subject at hand for a case, sometimes there is no substitute for having someone who is truly and intimately familiar with the subject to discuss it before the Panel, someone who can ideally offer technical knowledge that can only be acquired through years of specialization.

When it comes to proffering expert witnesses and testimony at CAS, it falls upon the attorney(s) to be aware of what rules do (or do not) apply, whether there are certain practices established through the jurisprudence regarding taking of evidence, and how to navigate some of the situations one can expect to encounter when you put your expert, who may or may not be an attorney themselves, in the hot seat.

An Overview of the Applicable Rules

As far as the applicable rules are concerned, the authors note that there is no defined body of rules of evidence at CAS to express what does or does not constitute an expert, what does or does not constitute expert testimony, or precisely how a Panel should treat it. The third paragraph of Article R44.1 of the Code of Sports-related Arbitration (CAS Code) introduces the possibility of relying on expert witnesses and their testimony, requiring the party who offers such evidentiary measure to state the expert witness's area of expertise and, as with factual witnesses, to provide a brief summary of the expected testimony in its written submissions. Article R44.2 states that the Panel may limit or disallow an expert's appearance during a

hearing and/or their testimony on the basis of relevance. However, no further guidance may be found in the CAS Code.

Naturally, the conclusion from the above should not be that, if the Panel fails to provide specific instructions for the experts, the subject of expert witnesses and testimony is a free-for-all. One must give due consideration to Swiss Law² and other sources readily relied upon in CAS arbitration, such as the International Bar Association (IBA) Rules on Taking of Evidence. Yet the text of Article 184 of the Swiss Private International Law Act simply establishes in this respect that the taking of evidence shall be conducted by the arbitral tribunal, who can request the assistance of a state judge at the seat of the arbitral tribunal in order

to do so. Conversely, Article 5 (2) of the IBA Rules on the Taking of Evidence presents more specific requirements for an expert and their report: information on any relationship (past or present) with any of the parties, legal advisors and/or the arbitral tribunal and a statement of independence, a description of the expert's background, qualifications, training and experience, a description of the instructions given in order to provide an opinion, a description of facts relied upon, methodology applied, and evidence used in arriving at the expert's conclusions, etc.

It should be noted that, under the Swiss Code of Civil Procedure, private expert opinions by a party are not considered official means of evidence but merely party submissions or allegations.³ Thus, in view of the above, it would

¹ Tribunal-appointed experts are a separate matter and outside the focus of this article.

² See [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 47 & 65 et seq.

³ Art. 183 par. 17 of the Swiss Civil Code of Procedure. See also www.lalive.law

seem we still have somewhat of an incomplete picture of what can and should be expected when it comes to experts delivering testimony at CAS hearings.

Further Insight from the CAS Jurisprudence

In order to assess expert witnesses and their testimonies in CAS proceedings, CAS Panels (or Sole Arbitrators)⁴ have shown that they are inclined to admit the limits of their knowledge over certain specific topics related to other fields of knowledge (e.g. blood testing and analysis of certain substances, handwritten appraisals, judgement of data collected, or even applicable national laws that are different from their own) and have accepted the conclusions of experts in each specific field, as long as such experts meet some factors or general requirements. This assessment made by the Panel will be of the utmost importance since it would be the decisive element in accepting the expert's conclusion and its application to a particular case.

In this regard, CAS Panels have commonly established that the evaluation of expert witnesses and testimonies, or expert reports, shall be limited to analyzing *"whether the expert had considered the correct issues and exercised his/her expertise in a manner which did not appear to be arbitrary or illogical,"*⁵ because of their lack of expertise in the specific field of expertise.

Nonetheless, the aforesaid does not entail that a CAS Panel will unquestioningly follow what has been concluded or determined

by an expert in the dispute they are judging. Instead, it is widely accepted in CAS jurisprudence that, while CAS Panels recognize that they do not *"stand in the shoes of the Expert (...) nor [do they] seek nor should"*, a Panel shall duly consider that *"any Tribunal faced with a conflict of expert evidence must approach the evidence with care and self-awareness of its own lack of expertise in the area under examination. Nonetheless, notwithstanding these caveats, it cannot abdicate its adjudicative role (cf. Kumho Tire Co. Ltd v Patrick Cormichael US Supreme Court 23 March 1994); Roman Law put the matter pithily: "iudex peritus peritorum" (the judge is the expert on the experts)."*⁶

In light of the above-quoted approach, CAS jurisprudence shows us that, in order to reach a conclusion on whether the expert's evaluation should be considered as a valid means of proof (i.e. reliable evidence), the judging body ought to bear in mind the prescribed provisions as to the burden and standard of proof to determine whether such evaluation *"is soundly based in primary facts, and whether the Expert Panel's consequent appreciation of the conclusion be derived from those facts is equally sound."*⁷ In carrying out such an assessment, the CAS Panel will evaluate if the expert's testimony or report has been *"persuasive"*⁸ enough to vouch for the required *"level of certainty"*⁹ and to meet the aforesaid threshold and, as a consequence, the standard of proof applicable to each particular case at CAS (which, as the reader may be surely aware, is commonly

expressed as *"comfortable satisfaction"*).¹⁰ Indeed, the circumstances that Panels tend to take into consideration are *inter alia* the expert's standing, experience and cogency of their evidence in analyzing their report.¹¹

“ One of the main aspects taken into account by CAS Panels when evaluating expert testimonies or reports in CAS proceedings is so as to determine whether an expert actually may be reliable or not, is the expert's qualifications and/or experience ”

In some CAS cases, however, a lower threshold - balance of probabilities - has been set to consider whether a Panel was convinced by the conclusions reached by an expert. An example can be found in [CAS 2010/A/2193 Cagliari Calcio v. Olimpia Deportivo](#) (par. 16) where a Panel concluded the following regarding the report of a handwriting expert: *"(...) As regards the evidence that the signature of a document is genuine, a one hundred percent proof is not always possible. In the present case, even if the expert mentions that the hypothesis of a forgery is not fully excluded, the conclusion of the expert report is that it is more likely that the questioned signature is the one of M. As a matter of fact and of evidence, the Panel is convinced by the conclusion of the expert report."*

4 Any subsequent mention to CAS Panel(s) shall be also understood as referring to a Sole Arbitrator.

5 [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 81.

6 [CAS 2010/A/2235 UCI v. T. & OCS](#), par. 28.

7 *Ibid.*; See also [CAS 2014/A/3488 WADA v. Juha Lallukka](#), par. 97; [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 81.

8 [CAS 2014/A/3488 WADA v. Juha Lallukka](#), par. 97.

9 [CAS 2017/A/5195 Cruzeiro EC v. FC Zorya Luhansk](#), par. 101.

10 [CAS 2010/A/2235 UCI v. T. & OCS](#), par. 43; [CAS 2014/A/3488 WADA v. Juha Lallukka](#), par. 98; [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 112.

11 [CAS 2010/A/2235 UCI v. T. & OCS](#), par. 28; [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 81.

Returning to the elements, one of the main aspects taken into account by CAS Panels when evaluating expert testimonies or reports in CAS proceedings is so as to determine whether an expert actually may be reliable or not, is the expert's qualifications and/or experience; among the features assessed by the judging bodies are the reputation¹² of the expert(s), their position or role in that specific field,¹³ the years of experience or even whether the expert has a background in presenting scientific examination in Court.¹⁴ These are decisive factors to overcome a first assessment of the expert made by the Panel to consider his or her opinion "*credible and reliable*".

Another relevant factor taken into account, in cases where it is applicable, is the source of information, data or the scientific studies that the expert's conclusions relied upon. CAS Panels evaluate if a particular report or testimony is based on convincing, long-established and proven studies in order to give weight (or not) to that expert's

report or testimony and hence, to consider such conclusion as a reliable means of proof. The aforesaid can be easily identified, for instance, in [CAS 2014/A/3488 WADA v. Juha Lallukka](#) (par. 98): "(...) *this study is based on a considerable and large dataset, which has been peer-reviewed and accepted for publication. Third, the study is said to establish decision limits with a 99.99% specificity.*"¹⁵

In addition to the above, some CAS Panels have also been tasked with solving another less recurrent but nonetheless important issue: the independence of a party-appointed expert. In [TAS 2010/A/2308 Franco Pellizotti c. CONI & UCI & TAS 2011/A/2335 UCI c. Pellizotti, FCI & CONI](#), the Panel had to address the athlete's argument alleging the lack of independence of the experts appointed by Union Cycliste Internationale (UCI), which were remunerated by the UCI itself, and also the fact that such experts did not provide a document regarding a potential conflict of interest. In this particular case, the Panel responded to, and rejected, such allegation as follows: "*La circonstance que les experts soient rémunérés par l'UCI pour leur prestation professionnelle n'affecte pas l'indépendance de leur avis, qui est dans la phase initiale rendu sur la base de dossiers anonymes. Il en est par ailleurs de même quant au fait qu'ils n'auraient pas signé l'accord sur les conflits d'intérêts.*"

On the contrary, the Panel in [CAS 2011/A/2403 World Anti-Doping Agency \(WADA\) v. Fédération](#)

[Internationale de Gymnastique \(FIG\) & Anastasiya Melnychenko](#), was not as categoric as the one in the above-mentioned case when it established that "[w]hen appraising conclusions raised by experts working on the account of one of the parties, a panel takes into consideration the fact that such persons are not acting as independent experts in the case" with regards to the conclusion reached by the Research Manager from WADA (i.e. the Appellant in such proceedings).

Cases such as *Pellizotti* and *Melnychenko* can thus raise questions as to how to best safeguard against so-called "*hired guns*." We would be remiss not to highlight this common circumstance in CAS cases, when the core of the dispute rests on what an expert may conclude, with this conclusion being fundamental to resolving the dispute at stake. Naturally, the parties will submit or call their respective experts, whose conclusions will most likely be favorable to the party who appointed the particular expert and, as a consequence, the experts may contradict one other on some points. In these cases, the Panel properly assesses which of the experts has been "*more persuasive*"¹⁶ or "*convincing*"¹⁷ based on the criteria referred to above, or, for instance, the inconsistencies found in one of the expert's testimonies at the hearing during questioning.¹⁸ In the end, then, persuasiveness may not always be just an objective assessment of "*what is presented*" but also a subjective assessment of "*who presented it best.*"

¹² CAS 2012/A/2857, par. 216: "*The Panel finds no reason to believe that the expert witnesses summoned by the [National AntiDoping Agentur] were biased in the [latter's] favour. These experts heard by the Panel are of international reputation as directors of WADA-accredited laboratories or scientist in the relevant area or, with regard to those who developed the hGH Test, as scientists in leading universities. There is no indication that, in the dispute before the Panel, these experts would put their reputation at stake.*"

¹³ [CAS 2014/A/3488 WADA v. Juha Lallukka](#), par. 98: "(...) *the Joint Publication Paper on which WADA relies is the fruit of a collaborative effort by two independent teams of experts, drawn from McGill University in Montreal, Canada, and from the University Descartes in Paris, France.*"

¹⁴ [CAS 2015/A/4177 Hapoel Haifa FC & Ali Khatib v. Football Club Jabal Al Mukabber](#), par. 82: "*Dr Giles delivered the expert opinion. She is a Bachelor of Science, a Doctor of Philosophy and a Member of the Chartered Society of Forensic Sciences. Dr Giles has nearly 40 years of experience in all areas of the scientific examination of documents and handwriting and has wide experience in presenting evidence in court. Her report was clear and was based on the samples provided. It convincingly explains how she reached her conclusions. Therefore, the Sole Arbitrator finds that Dr Giles' opinion is credible and reliable.*"

¹⁵ See also [CAS 2011/A/2403 WADA v. FIG & Anastasiya Melnychenko](#), par. 11: "(...) *The FIG Disciplinary Commission did not have conclusive scientific evidence in relation to degradation rates of Furosemide in an athlete's body. (...)*"; or CAS 2012/A/2857, par. 214: "(...) *these statements essentially were made due to the fact that "not enough data" were available. Dr. Pitsch stated that it was not more than 'likely' that an ADRV was committed.*"

¹⁶ [CAS 2014/A/3488 WADA v. Juha Lallukka](#), par. 97.

¹⁷ CAS 2012/A/2857, par. 215.

¹⁸ CAS 2015/O/4052, par. 66.

Means of Taking of Evidence at Hearings

We turn now to how expert evidence is presented. Considering that, as stated above, certain technical matters or highly scientific concepts may sometimes escape even the most learned of arbitrators, a practitioner's case can at times rely or heavily depend on the expert testimony presented in a written report and later teased out at the hearing. In view of the relative procedural flexibility that characterizes CAS arbitration proceedings, this can take several forms.

The most common dynamic appears to be the employment of direct and cross-examination of the expert witnesses, with questions from the Panel often arising as well. This process for the taking of evidence is the most demanding for attorneys, who must carefully craft their line of questioning in order to establish their expert's credibility and reliability, extract the most pertinent testimony from their witness in a clear and convincing manner on direct examination, find ways to effectively discredit the opposing party's expert on cross-examination, and ensure that their expert is prepped and ready to adequately respond to opposing counsel's questions.

As such, one of the concerns with direct and cross-examinations of experts as a means of testing their expert testimony is the amount of time these efforts consume during a hearing. In highly complex or technical cases, especially those confronting a large number of experts on multiple subjects, it can become a tedious affair to take the expert through each of the contested assumptions and, depending on how the questions are phrased, it may prove difficult to elicit responses that explain the key issues in a useful manner for

the arbitrator(s) without getting bogged down in the details.

Another timing-related issue that often arises with direct and cross-examinations is the subject of translations. Contrary to a procedure before a national court, where the same language is usually common across all participants, international sports arbitration brings many different nationalities to the same hearing room. The need for translation of expert witness testimony does not automatically represent an obstacle to effective direct and cross-examinations if done swiftly and accurately, but this is not always the case. Translation that is not simultaneous, for example, can significantly reduce the amount of time an attorney has to get through a line of questioning, and it is possible that incomplete answers or insufficient time to cover the relevant points in a particular expert's testimony can lead to that testimony appearing unreliable. The foregoing was recently discussed in relation to some of the witnesses heard during the *Sun Yang*¹⁹ hearing, which some practitioners have criticized as an example of translation issues leading to substantially unequal amounts of time dedicated to each side's witnesses, thus negatively impacting the athlete's right to be heard in that crucial anti-doping case.²⁰

Despite its potential shortcomings, it is safe to say that direct and cross-examination is quite standard practice at CAS. However, one must remember the CAS Code affords the Panel broad powers when conducting a hearing, including the discretion to do away

with direct and cross-examination and diminishing or altogether removing the attorneys' ability to guide the discussion at the hearing (a rather unnerving situation for some). Indeed, some arbitrators have employed the process of concurrent expert evidence, sometimes referred to colloquially "*hot-tubbing*," in cases where each party has offered up its own expert testimony.²¹ The foregoing evidence-taking strategy attempts to avoid the pitfalls of evidence provided in a sequential manner and subjected to adversarial questioning (*i.e.* each expert alone in the stand facing questioning) in the hopes of encouraging a more open, peer review-like discourse between the appointed experts regarding the matter(s) at hand. Thus, it could be said the guiding principle is to encourage consensus-building and provide an arguably easier path for objective and relevant truths to emerge.²²

Article 5(4) of the IBA Rules on Taking of Evidence describes one manner in which to proceed with concurrent evidence taking: "*The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.*" In other

¹⁹ CAS 2019/A/6148 *World Anti-Doping Agency v. Sun Yang & FINA*.

²⁰ Dr Ben KOH and Tracey HOLMES, 'Are you being heard? How the Sun Yang public hearing exposes a gap in athletes' rights,' LawInSport, 3 January 2020, available at www.lawinsport.com. See also Zhao Kuo, 'Are you allowed to be heard? How the Sun Yang case reveals the systematic prejudice against athletes in sport arbitration', Sports Integrity Initiative, 7 July 2020, available at www.sportsintegrityinitiative.com

²¹ Much has been written about "*hot-tubbing*," a practice which appears to have originated (or at least been greatly developed in Australia).

²² Giovanni DE BERTI, Chapter II: 'The Arbitrator and the Arbitration Procedure - Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?', in Austrian Yearbook on International Arbitration, Vol. 2011, p. 53-63 (Christian Klaussegger, Peter Klein et al. eds., Manz'sche Verlags- und Universitätsbuchhandlung, 2011), available at www.dejalex.com

words, the experts convene in a sort of *caucus* to try to find common ground. Alternatively, Article 8(3) (f) of the same Rules proposes that the arbitral tribunal may arrange for testimony to be given at the hearing organized “*by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing)*.” Under this scenario, there have been cases where Panels have asked counsels to provide a list of questions prior to the hearing organized by key issue so that such Panels could synthesize a final list of questions and direct them to the experts for discussion amongst themselves at the hearing.²³ Experts can be allowed to respond directly to each other and challenge each other’s points of view in order to tease out pertinent points or potential flaws in their logic.

In the authors’ humble opinion, the effectiveness of concurrent expert evidence, be it *via caucus* prior to the hearing or witness conferencing at the hearing, is highly contingent upon both the quality and integrity of the experts put forward and the arbitrators’ preparedness. There is a question as to whether concurrent evidence, as opposed to a counsel-driven examination, would allow an opportunity to elicit testimony from any given expert directly about their credibility and reliability and that could potentially reveal, for example, that the expert in question is, in fact, a “*hired gun*.” The quality of the expert put forward also determines how well such an expert is able to stand his or her ground in the face of a challenge from a peer during witness conferencing, instead of questions from a Panel or attorney who quite possibly

have only recently become more knowledgeable on the subject being discussed. Furthermore, concurrent expert evidence appears to be more demanding upon the decision-making body as it certainly requires a Panel who has sufficient understanding of the matter to guide the expert discussion themselves, steering the conversation away from irrelevant or immaterial details and focusing on the heart of the case.

“ The effectiveness of concurrent expert evidence, be it via caucus prior to the hearing or witness conferencing at the hearing, is highly contingent upon both the quality and integrity of the experts put forward and the arbitrators’ preparedness ”

Therefore, putting aside the curious mental picture this might evoke, is it better to have your expert by themselves in the hot seat or amongst fellow experts in a hot tub? As with most things in the practice of law, the answer seems to be “*it depends*.” Each of the above-described methods of evidence taking has its merits, and one method may be better suited than the other for cases dealing with complex scientific evidence not usually discussed in the sporting context such as, for example, questions of national law and its interpretation.

Conclusion

Experience has taught us that the flexibility CAS arbitration offers in presenting expert evidence and testimony has many virtues; because CAS hears such a wide variety of issues, Panels

must be able to adapt quickly to the circumstances of each case. Moreover, because not all parties that appear before CAS are similarly situated, they must be allowed room to maneuver when it comes time to produce expert witnesses in support of their case. However, that is not to say that it would be impractical to incorporate certain explicit standards into the CAS Code on what does or does not constitute an expert or expert testimony, or precisely how a Panel should treat it. Such standards could simply reflect some of the lessons the jurisprudence has provided, such as imposing due consideration for the expert witnesses’ respective standing, experience and publications, the expert’s ties to the appointing party, whether an expert’s opinion is soundly based on the facts, if the conclusions derived from those facts are sound, correct and logical, and whether the expert’s opinion is consistent with published research on the subject.²⁴ These standards could also provide some baselines for the process of taking of evidence, preserving the aforementioned flexibility while still outlining the methods that may be at a Panel’s disposal and how they may be employed, so that whether your expert is in the hot seat, the hot tub, a *caucus* or otherwise, there will be certain guarantees in place to promote the integrity and effectiveness of expert witnesses and their testimony.

²³ CAS 2018/O/5794 Mokgadi Caster Semenya v. IAAF & CAS 2018/O/5798 Athletics South Africa v. IAAF. See also CAS 2020/A/7019 Olympiacos FC v. HFF & PAOK FC & Xanthi FC & CAS 2020/A/7035 PAOK FC v. HFF (unpublished award).

²⁴ In line with what the esteemed CAS arbitrator, Massimo Coccia, developed in his article ‘International Sports Law Justice: The Court of Arbitration for Sport’, European Sports Law and Policy Bulletin 1/2013, p. 63, available at www.peacepalacelibrary.nl

CAS rules that the *Rangers de Talca* precedent cannot be applied as a blanket rule to sporting succession cases



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→ Court of Arbitration for Sport - Sport entities – Bankruptcy – FIFA Disciplinary Committee (FIFA DC) – FIFA – FIFA Regulations – Overdue payables

CAS 2019/A/6461 Tartu Jalgpallikool Tammeka v. FIFA¹

The precedent in CAS 2011/A/2646 Club Rangers de Talca v. FIFA has become pivotal for the FIFA Disciplinary Committee (FIFA DC) decisions concerning sporting successor clubs under Article 15 of the 2019 FIFA Disciplinary Code (FDC) and Article 64 of the 2011/2017 FDC. The FIFA DC has often relied on Rangers de Talca to rule that the creditor did not show the required degree of diligence, just because he/it did not register his/its claim in the insolvency/bankruptcy/liquidation proceedings of the original debtor. CAS recently overruled that approach by saying that there is no blanket rule, and the assessment of the degree of diligence should be made based on the specific circumstances of each particular case. Further, CAS deemed that the value of the debtor's liquidated assets plays a crucial role in assessing the creditor's diligence.

Brief facts

The creditor club sought to enforce a FIFA Dispute Resolution Chamber (DRC) decision on training compensation before the FIFA DC against the potential successor club.

The FIFA DC determined that, based on the argument and evidence on file, the new club was the sporting successor of the original debtor and, as such, was liable for the debts incurred by the latter - particularly the one stemming from the DRC decision. Therefore, the sporting successor was found to have breached Article 64 of the 2017 FDC.

The new club did not raise the issue of the creditor's diligence when claiming its debt during

the original debtor's liquidation proceedings in front of the FIFA DC club, and the latter did not consider this matter *ex officio* (as it did in other known cases).²

CAS Panel's considerations

Although the new club did not challenge the finding of sporting succession, the CAS Panel deemed it necessary to briefly address that issue. The key findings from the decision on the succession were:

- The name of the two clubs are confusingly similar, in fact identical, when used in initials, and both clubs had the same offices, contact details, sporting venues, facilities, and

similar logos and colors. In other words, all elements of a club's organization and public profile were common;³

- Also, quite importantly, the new club was granted a license to participate directly in the top division - and not at a lower division - immediately after this had been denied to the original debtor club, "so as to create a distinct impression of continuity";⁴

- Overwhelming evidence suggested that this was a situation of succession at a sporting level. The mere fact that the two clubs appeared as two separate legal entities operating simultaneously over a certain period was not a decisive factor to rule out sporting succession. On the contrary, all other facts

¹ CAS 2019/A/6461 Tartu Jalgpallikool Tammeka v. FIFA, award of 14 July 2020 (the Award).

² For e.g., FIFA DC, no. 170174 PST HUN ZH (pending in front of the CAS - CAS 2020/A/6846 Dimitar Makriev v. FIFA & Pécsi MFC).

³ Cf. par. 51 of the Award.

⁴ Ibid.

indicated that the new club had substituted the original debtor by participating in its place in the top division and “by using its identity, in such way as to be perceived as the same club”;⁵

- Finally, it did not appear to matter which FIFA body decides on sporting succession, so long as one does. In the case at hand, the FIFA DC had taken that decision and, as such, the matter did not need to go to the DRC, as FIFA maintained based on the precedent in *CAS 2017/A/5460 Iván Bolado Palacios v. FIFA, Bulgarian Football Union (BFU) & PFC CSKA Sofia*.⁶

“The mere fact that the two clubs appeared as two separate legal entities operating simultaneously over a certain period was not a decisive factor to rule out sporting succession”

The above decision proposes an objective test to determine sporting succession between two football clubs, namely whether the successor aims to create a clear impression of continuity so as to be perceived as the same club.

Further, the CAS Panel found that “it was within the purview of the FIFA Disciplinary Committee to consider whether the Appellant bears responsibility for the debts incurred by the Debtor club” and “the successor club is bound by the debts of its predecessors and should bear the consequences of its failure to pay.”⁷

Finally, the CAS Panel, while upholding the general stance that, in such instances, “no disciplinary sanctions can be imposed on a new club as a result of succession, should the creditor fail to claim his credit in the bankruptcy proceedings of the former club, as there is a theoretical possibility he could have recovered his credit, instead of remaining passive,” and, thus, “it is necessary to examine whether a creditor has shown the required degree of diligence to recover the amounts he is owed,” ultimately resolved that there is “no merit in the allegation that the Creditor club did not show the required degree of diligence, just because it did not register its claim in the liquidation proceedings of the Debtor club” and “there is no blanket rule, and this assessment should be made based on the specific circumstances of each particular case.”⁸

An eminent CAS Arbitrator recently upheld the latter two conclusions in *CAS 2020/A/6745 Predrag Vujovic v. Andijon Futbol Sport PFK & FIFA*, award of 1 December 2020, par. 86, 89-90.

Moreover, independently of whether the creditor has registered its claim in the liquidation proceedings (which, in this case, was found impossible due to the timeline of events)⁹, the CAS Panel, most importantly, stated that the debtor’s liquidated assets’ value plays a crucial role in assessing the creditor’s diligence. In particular, the following considerations are worth citing *expressis verbis*:¹⁰

“Besides, the Appellant did not submit any information in relation to the value of the liquidated assets of the Debtor club. To the understanding of the Panel the Appellant did not

even suggest, let alone prove, that the liquidated assets resulted in sufficient surplus in a way that the recovery of the debt would have been feasible via this procedure. In addition, the Panel finds important that in the case at hand there is no indication that the Appellant had made any prior payments to its predecessor, i. e. the original Debtor, in order to acquire the use of its facilities and logo. This raises valid concerns as to what the liquidated assets actually involved.”

For these reasons, the CAS Panel decided that the creditor’s conduct has not contributed to the new club’s failure to comply with the DRC decision.

⁵ Cf. par. 52 of the Award.

⁶ Cf. par. 56 of the Award.

⁷ Cf. par. 58 of the Award.

⁸ Cf. par. 59 of the Award.

⁹ Cf. par. 60 of the Award.

¹⁰ Cf. par. 61 of the Award.

CAS ruled that, to validly invoke a buy-out clause, the terminating party must strictly comply with its terms



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→ Court of Arbitration for Sport (CAS) – Buy-out clause – Liquidated damages clause – Breach of contract – Just cause – Player contract – Compensation – Deadline for appeal – Football Union of Russia (FUR) – Time limit – Contractual stability

CAS 2019/A/6246 Ruslan Zaerko v. FC Nizhny Novgorod & Football Union of Russia

The dispute between Ruslan ZAERKO (Player, picture) and FC Nizhny Novgorod (Club) arose after the Club terminated the employment contract with the Player on the basis of a buy-out clause. Interestingly, the Club paid the pre-agreed amount only partially. On this basis, the Sole Arbitrator found that the Club failed to validly invoke the buy-out clause and therefore terminated the employment contract without just cause. In addition, the consequences of a late filing of a Statement of Appeal due to a fault of a courier post service were also examined.

Facts of the case

On 1 February 2018, the Player and the Club signed an employment contract (Employment Contract) for a fixed period until 5 June 2019.

The following clause was implemented into the Employment Contract, regulating its premature termination:

“11.6. The Employee has the right to terminate this Labor Contract without sport sanctions being imposed on it and take a job with another professional football club, provided that the Employee carries out a monetary payment in the amount of 2 500 000 (two million five hundred thousand) rubles (‘buy-out clause’) in favor of the Employer. This payment is made by the Employee or another person on its instruction, or with its consent, on the last working day, unless otherwise

agreed by the Parties. In case the Labor Contract termination was initiated by the Employee (of its own volition) without just cause (save as provided in the first paragraph of this clause), as well as in case the Labor Contract termination was initiated by the Employer in case of wrongful acts or omissions of the Employee, the Employee shall carry out the payment in the amount of 2 500 000 (two million five hundred thousand) rubles (‘liquidated damages’) in favor of the Employer. The specified payment is to be made within 2 (two) months from the date of termination of the Labor Contract. The stipulated payment does not exempt the Employee and his new football club from the sports sanctions that may be imposed on them according to the regulatory documents of FIFA and the FUR.

11.7. The Employer has the right to terminate this Labor Contract by giving the Employee a one-month notice about such termination in the written form, without sport sanctions being imposed on it, provided that the monetary payment in the amount equal to 3 (three) months fixed official salary envisaged in clause 8.1 of this Contract is carried out in favor of the Employee. The specified payment is carried out on the last working day of the Employee. The entire Employer’s liability towards the Employee (‘liquidated damages’) is limited to 3 (three) months fixed official salary, envisaged in clause 8.1 of this Contract. The implementation of dismissal in accordance with this paragraph shall be executed by the order of the General Director of the Employer on grounds envisaged in paragraph 1 of part 1 of Article 77 of the Labor Code of the Russian Federation (agreement of the parties). At the same time, drafting and signing of an agreement to terminate the Labor Contract are not mandatory due to the achievement of such an agreement between the Parties in this clause.”

On 11 July 2018, the Club sent an email to the Player, notifying him of the termination of the Employment Contract, referring to Clause 11.7.

On 27 November 2018, the Player filed a claim with the Russian Federation Dispute Resolution Chamber (FUR DRC), requesting the FUR DRC to recognize the Employment Contract as terminated without just cause and oblige the Club to pay compensation calculated on the basis of the residual value of the Employment Contract.

On 20 December 2018, the FUR DRC issued the decision ordering the Club to pay the Player the

compensation for termination of the Employment Contract in the amount calculated based on clause 11.7 of the Employment Contract.

The Player filed an appeal before the Court of Arbitration for Sport (CAS).

Timeliness of the Appeal

A separate issue within the procedure was the timeliness of the Player's appeal.

The Player sent his Statement of Appeal *via* the Russian courier post service, *Gepard*, within the 21-day time limit (on 12 March 2019). However, as *Gepard* had no means to deliver the envelope to Switzerland by itself, it used *FedEx's* services, who delivered the correspondence to the CAS on 26 March 2019 only, *i.e.* two weeks later.

On this basis, the admissibility of the Statement of Appeal was contested by the Club.

The Club questioned the way-bill and argued that there was no credible evidence that the Statement of Appeal was filed on or before 12 March 2019 and that the Player did not provide sufficient proof of the transfer from *Gepard* to *FedEx*. The Club also argued that a search of the tracking number on the way-bill (93556) did not lead to a match.

The Player in turn, submitted an Operation Check of his bank of 12 March 2019 and a statement of Ms *KONDRATOVA*, General Director of *Gepard*, both evidencing that the correspondence was handed to *Gepard* and the delivery was paid by the Player on 12 March 2019.

In addition, the Player provided the CAS Court Office with the *Telegram* address of Ms *KONDRATOVA*, by means of which she was invited

to participate in the hearing as a witness. However, Ms *KONDRATOVA* did not show up at the hearing.

In such circumstances, the Sole Arbitrator noted that despite there being an unanswered question of why the delivery took so long, the Player had submitted the way-bill and the Operation Check that showed that the Statement of Appeal had indeed been handed over on 12 March 2019 to *Gepard* and that the shipment was paid for on the same day by bank transfer. Ms *KONDRATOVA's* witness statement confirmed both facts.

Despite the fact that Ms *KONDRATOVA* failed to show up at the hearing, the Sole Arbitrator established that the Player had invited Ms *KONDRATOVA* by *Telegram* to the hearing. However, as Ms *KONDRATOVA* was not involved in the substance of the proceedings and was not affiliated to or related to the Player, *i.e.* the latter had no control or authority over Ms *KONDRATOVA*, her failure to show up at the hearing could not be held against the Player because sufficient effort had been made to invite her as a witness.

On this basis, the Sole Arbitrator concluded that the Statement of Appeal was filed on 12 March 2019 within the deadline of 21 days, and therefore, the appeal was admissible.

Positions of the Parties

The Player believed that the termination was carried out without just cause because clause 11.7 of the Employment Contract conflicted with Articles 77, 81 and 341.11 of the Labor Code of the Russian Federation, according to which an employer has only limited ("*exhaustive*") grounds to terminate a contract, which was not the case. Moreover, the right to terminate the contract at any time was against the principle of contractual stability.

As to the amount to be compensated, the Player believed that the stipulated amount of three monthly salaries was disproportionate and only in favor of the Club, especially considering that the amount that had to be paid by the Player in the case if he had terminated the contract without just cause was 11 times higher.

In this respect, the Appellant requested the amount of compensation be determined based on the residual value of the Employment Contract.

The Club in turn, alleged that the terms and conditions of the Employment Contract, including the ones related to premature termination, were voluntarily agreed by the parties and were not in contradiction with the applicable law and rules, which do not expressly prohibit such clauses and do not require reciprocity.

Considerations of CAS

First of all, the Sole Arbitrator decided that the FUR Regulations were applicable principally, while Russian labor law had to apply subsidiarily.

Next, the Sole Arbitrator's most important considerations on the merits of the case were as set out below.

The Sole Arbitrator noted that it was undisputed that the Employment Contract was terminated without motivation by the Club.

However, the Club believed that it had the right to terminate as this right was expressly stipulated by the Employment Contract, while the Player had the opposite view.

Nevertheless, according to the Sole Arbitrator's considerations, clause 11.7 of the Employment Contract referred to a buy-out

clause in the first paragraph and a liquidated damages clause in the second paragraph.

The Player questioned the validity of the buy-out clause, however, before deciding on the validity of the buy-out clause, it had to be established whether or not the buy-out clause could validly be invoked by the Club.

According to the Sole Arbitrator, this could only be the case if the Club strictly respected the terms of the buy-out clause. However, the Club did not.

According to the buy-out clause in 11.7 of the Employment Contract, the Club had the right to terminate respecting one month's notice and the payment of "*3 (three) months' fixed official salary envisaged in clause 8.1 of this Contract [...]*", while according to the following part, this payment had to be: "*[...] carried out on the last working day of the Employee.*"

As the FUR DRC decided in the Appealed decision that the Club had to pay arrears of compensation to the Player, the Sole Arbitrator concluded that the Club obviously did not comply with the terms in the buy-out clause by not paying for the full three months' salary in time. Therefore, it had not fully complied with the terms of the buy-out clause.

On this basis, the Sole Arbitrator found that the Club did not validly invoke the buy-out clause and, therefore, a judicial review of this clause under Russian labor law was therefore no longer necessary. Thus, the Club had terminated the Employment Contract without just cause.

As to the second paragraph of clause 11.7, according to the Sole Arbitrator's considerations, it was a standard liquidated damages clause, *i.e.* a provision by means

of which the parties quantify the damages resulting from a breach of contract, as an exception to the regulatory regime that is ordinarily applied to calculate the damages incurred, as it clearly stated that "*The entire Employer's liability towards the Employee ('liquidated damages') is limited to 3 (three) months' fixed official salary, envisaged in clause 8.1 of this Contract.*"

The Sole Arbitrator found that there was no reason to decide that the liquidated damages clause was void because the buy-out clause was invalid, as both clauses had a different *rationale*, as it was clear that they were different clauses with separate objectives.

The Player submitted that clause 11.7 of the Employment Contract was invalid because it was unbalanced and disproportionate. At the same time, the Club argued that, pursuant to Article 8 of the FUR Regulations on the Status and Transfer of Players, parties may agree on the consequences of a premature termination at any time and any conditions and that the argument the Player was using followed CAS and FIFA DRC jurisprudence, which did not apply to the matter-at-hand because this was a domestic Russian dispute.

The Sole Arbitrator agreed with the Club that before referring to CAS and FIFA DRC jurisprudence, the legal norm had to be established. The aforementioned norm was found in Russian labor law and FUR Regulations; Article 8 of which let the parties agree on an amount of liquidated damages and that the disparity between the amount of damages did not lead to clause 11.7's invalidity.

But even from a CAS and FIFA DRC perspective, the case did not necessarily have to be judged differently. When there is a disparity

between the amount of damages set out in a liquidated damages clause, this does not necessarily lead to the invalidity thereof. In this respect, the Sole Arbitrator subscribed to the views expressed in CAS 2016/A/4826, paragraphs 105-107.¹

It might well be that the disparity was compensated for by other more favourable provisions in the Employment Contract which benefited the Player. According to the Sole Arbitrator and on the face of the evidence, it did not appear that there was an overall disparity.

Furthermore, there was no evidence on file that the autonomy of the parties was impaired in the case-at-hand or that one of the parties exercised undue influence on the other.

In view of the above, the Sole Arbitrator found that the liquidated damages clause in clause 11.7 was valid. The Player was entitled to a liquidated damages compensation of RUB 225,000 (approx. EUR 2,500) and the Club in case of a termination by the Player of RUB 2.5 million (approx. EUR 27,300), and the Sole Arbitrator found that the difference between these amounts was not of such a level that it should lead to the invalidity of clause 11.7.

Conclusion

On this basis, the Sole Arbitrator concluded that the calculation of the compensation due to the Player, which was made by the Club based on clause 11.7 of the Employment Contract, was correct.

In light of the foregoing, the Sole Arbitrator dismissed the Player's appeal and confirmed the decision of the FUR DRC.

¹ CAS 2016/A/4826 Nilmar Honorato da Silva v. El Jaish FC & FIFA

TAS 2020/A/7096 Club Atlético San Martín de Tucuman c. Asociación del Fútbol Argentino (AFA)



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→ Court of Arbitration for Sport (CAS)
- COVID-19 - Argentine Football
Association (AFA) - Relegation -
National Regulations - FIFA Regulations

TAS 2020/A/7096 Club Atlético San Martín de
Tucuman c. Asociación del Fútbol Argentino (AFA)

This is the third CAS award challenging a decision from the Football Association of Argentina (AFA), following the acknowledgment of CAS's jurisdiction in the Statutes AFA approved in 2017.

In this case, *Club Atlético San Martín* (San Martín) challenged the decision issued by the AFA Executive Committee (later ratified by the General Assembly) in relation to the early termination of the 2020 season due to the COVID-19 pandemic and the consequences thereof.

On 28 April 2020, the AFA Executive Committee decided to terminate the season due to the COVID-19 pandemic. As to the consequences for such termination, it was decided that no club would be relegated for that season. Concerning the upcoming season, which will start in January 2021, no team would be relegated. In relation to promotions, it was decided that a playoff tournament was going to be played whenever possible in the second half of the year. For the qualification to continental tournaments, most spots (that originally corresponded to the best-placed teams in the first division) were awarded based on the club's standings until the date of the suspension of the 2020 season, while the two remaining spots (corresponding

to the winners of the Argentine Cup and the League Cup) were also deferred waiting for a chance to play the aforementioned competitions in the second half of 2020.

San Martín was, at the time, the best placed team in the second division. The second-tier tournament's original format included two zones with two promotions to first division to be decided in a final match between the winners of each zone and a playoff between the 2nd, 3rd and 4th best-placed teams in each zone.

The winner of that final would be promoted, and the runner-up would have a second chance to enter the playoffs' semi-final stage.

San Martín challenged the AFA decision and requested CAS to immediately promote it to the first division. The club argued that the decision to defer the promotions for the second half of 2020 had violated its right to equal treatment because other consequences of the termination

of the season had already been decided for certain (no relegation and Cup qualifications).

The club further stated that, since no final match could take place before the second semester and most of its players would terminate their contracts with *San Martín* in June 2020, any match after that date, with a different team roster, would be against the integrity of the competition.

The Appellant also argued that a deferral of the promotion was against the principle of promotion and relegation established in Article 9 of the FIFA Regulations for the application of its Statutes and Article 65 of the CONMEBOL Statutes. These rules require a decision on promotion and relegation to be taken immediately after the end of the season.

For these reasons and arguing that it was the best-placed team overall considering both second division zones, *San Martín* stated that it should be immediately promoted to the AFA first division.

Notwithstanding *San Martín's* arguments, CAS rejected its appeal.¹ Accepting AFA's arguments against the appeal, the Panel first decided that the appeal should have been directed against the federation and also against other clubs with the same expectation of being promoted. In this concrete case, at least the team that was in the first position of the other zone at the time of the termination of the season should have been called to the appeal.

Nevertheless, the Panel analyzed the substance of the appeal and rejected *San Martín's* pleadings. The Panel mainly stated that *San Martín* never had a right or a legitimate expectation for promotion since when the season was canceled, there were still 30% of the games to be played. Even after that, the playoffs were due before a club can get promoted. Therefore, no club had a "*promotion right*" or legitimate expectation of it, and AFA was within its rights to decide how and when the promotion would take place due to its right to run its own affairs, especially in cases of *force majeure*. Only the prohibition of arbitrariness limits the aforementioned right. If AFA was within its right even to cancel promotions if necessary, it was also within its right to defer any decision in that regard for the second semester of 2020.

As to the alleged unequal treatment, the Panel explained that *San Martín* was not in the same position as the other clubs saved from relegation or who had qualified for CONMEBOL-organized competitions.

As to the maintenance of the squad for the second half of 2020, the award stated that the termination

of some contracts is a possibility even during the season and, as explained in the FIFA COVID-19 guidelines, while maintenance of the squad is desirable, it cannot be imposed and is certainly not an absolute right.

The Panel further rejected the alleged violation of the FIFA and CONMEBOL Statutes concerning the promotion and relegation rules. For the Panel, the mere deferral of the decision related to promotions for the second half of 2020 did not violate these rules since the new season was only scheduled to begin in 2021.

Finally, the arbitration court ruled that any alleged financial damages were a consequence of the COVID-19 pandemic and not of AFA's decision. The principle of sporting merit was not affected since no club had the merits to be promoted at the time of the cancellation of the season.

¹ The operative part was issued on 1 October 2020, while the grounds were published on 3 November 2020.

CAS upheld *Nogoom FC*'s Appeal for *Ibrahim Hassan* transfer case



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→ **Court of Arbitration for Sport (CAS)**
- Player transfer - Player contract -
Penalty clause - Breach of contract -
Egyptian Football Association (EFA)

CAS 2019/A/6187 *Nogoom FC v. EFA & Ismaily SC*

Brief facts

In 2012, the Egyptian Player *Ibrahim Hassan* (Player) transferred from *Nugoom FC* to *Ismaily SC* and the three parties signed a three-party contract, by virtue of which *Ismaily SC* was obligated to notify *Nugoom FC* of any offer to purchase the services of the Player, whereafter the two clubs would discuss the offer in order to make a bilateral decision of accepting or rejecting the offer, so as to ensure the best interests of the three parties, on the basis that each club would get 50% of the net profits of that offer. The contract included a penalty clause of an amount of USD 500,000 (approx. EUR 410,000) to be paid by any party who was found to be in breach to the contract.

In 2017, *Nugoom FC* approached *Ismaily SC* and informed them that there was an offer of EGP 12 million (approx. EUR 623,000) from *Zamalek SC* (one of the top Egyptian clubs) and invited *Ismaily SC* for a meeting to discuss the offer, with the aim of asking *Zamalek SC* to raise the proposed amount in order to maximise the potential benefits from the deal.

Ismaily SC replied, and informed *Nugoom FC* that the offer from *Zamalek SC* was rejected, as the Player was one of the main players for *Ismaily SC*, and it intended to keep its main players for the longest possible duration. Furthermore, *Ismaily SC* had no other players who play in the same position and have the same abilities and quality.

Nugoom FC was not satisfied with *Ismaily SC*'s response, and reminded them that the contract obligates the two parties to discuss any offer together and pay attention to the interest of all parties, not to interests of an individual party. Further, *Nugoom FC* offered to sign the Player itself, for a fee of USD 1,55 million (approx. EUR 1,25 million), and after taking into account their right to equally share the proceeds of any transfer, *Ismaily SC* would only get USD 750,000 (approx. EUR 620,000).

Ismaily SC did not respond to *Nugoom FC*'s offer, and subsequently accepted an offer to sell the Player to *Zamalek SC* in 2018 for an amount of EGP 5 million only (approx. EUR 260,000).

The procedures before the Egyptian Football Association (EFA) and its decisions

Nugoom FC lodged a complaint against *Ismaily SC* and the Player before the Egyptian Football Association (EFA), and proposed that both *Ismaily SC* and the Player should pay the penalty clause of USD 500,000 (USD 1 million USD in total), in addition to obligating *Ismaily* with paying USD 750,000 as 50% of the best offer put on the table; on the basis that the contract stipulates that if *Nugoom FC* referred an offer to *Ismaily SC*, and the latter rejected it without justifying its rejection within 15 days, then it would be obligated to pay 50% of that offer.

Through its Players' Affairs Committee, the EFA decided that *Nugoom FC* was entitled to an amount of EGP 2,5 million (approx. EUR 130,000), as 50% of the transfer amount of the Player from *Ismaily SC* to *Zamalek SC*, in addition to an amount of USD 500,000 as agreed upon penalty clause.

Both *Ismaily SC* and *Nugoom* appealed against the

aforementioned decision. *Nugoom FC* reiterated its requests of having USD 500,000 from *Ismaily SC*, and USD 500,000 from the Player, as per the penalty clause, as well as a further USD 750,000 from *Ismaily SC*.

On the other side, *Ismaily SC* submitted that the said contract should be deemed null and void since Article 18bis of the FIFA Regulations on the Status and Transfer of Players states that:

"No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams."

The EFA, through its Appeals Committee, rejected the two appeals and upheld the decision rendered by the Players' Affairs Committee.

The two clubs' appeals before the Court of Arbitration for Sport (CAS)

Nugoom FC's Submissions

The two clubs were not satisfied with the Appeals Committee's decision and therefore challenged it before the CAS. *Nugoom FC's* submissions can be summarized as follows:

- The Player was transferred to *Zamalek* in consideration of allegedly EGP 5 million, but this was not true, the actual value should have been approx. EGP 30 million (approx. EUR 1.6 million). *Nugoom FC*

submitted *Zamalek's* budget to prove the falsification of the said transfer value (EGP 5 million);

- *Ismaily SC* intentionally breached its obligations by unilaterally rejecting the offer submitted by *Zamalek SC* (EGP 12 million), and also by not responding to the other offer proposed by *Nugoom FC* (USD 1.5 million);

- *Ismaily SC* breached its obligation by unilaterally accepting the offer from *Zamalek SC*, which did not satisfy *Nugoom FC*.

Ismaily SC's Submissions

On the other side, *Ismaily SC's* submissions, among others, can be summarized as:

- The actual transfer fee for the Player paid by *Zamalek SC* was only EGP 5 million;
- *Ismaily SC* complied with its contractual obligation when it offered *Nugoom FC* to collect their share (50%) of the transfer amount (*i.e.* EGP 2.5 million);
- *Ismaily SC* reiterated the argument that the contract should be deemed null and void;
- As for *Nugoom FC's* offer of USD 1.5 million, the offer was not genuine, and *Nugoom FC* was not financially capable of paying such a high amount. In addition, the Player did not accept to transfer to *Nugoom FC* (and submitted a written document from the Player, signed by him, clarifying his rejection of the offer from *Nugoom FC*), and that the date of the document was within the 15-day period stipulated in

the contract as per the grace period to disclose the offer.

The EFA's Submissions

The EFA submissions can be summarized that the budget of *Zamalek SC* that was submitted by *Nugoom FC* to prove that the amount of EGP 5 million was not the actual transfer fee was not approved by *Zamalek SC* nor the Egyptian Olympic Committee, and therefore should be disregarded. In contrast, *Ismaily SC* presented the receipt of the cheque regarding the amount of EGP 5 million, so this should be considered as the actual value. However, *Ismaily SC* failed to prove that the Player refused to move to *Nugoom FC*, and therefore it was deemed in breach of the contract.

The CAS Findings and Award

The CAS Findings

In its Award, the CAS, among other things, found that:

- *Ismaily SC* failed to prove that *Nugoom FC's* offer was not genuine. In addition, the EFA assured that the contract was valid;
- *Ismaily SC* failed to satisfy the Panel that the aforementioned contractual provision, on which it relies to argue the annulment of the contract can be applied to the present situation;
- *Nugoom FC* failed to prove why the Player should be ordered to pay the penalty of USD 500,000, as *Ismaily SC* was the breaching party;
- Comparing the two offers (*Ismaily SC's* and *Nugoom FC's*

ones), it is clear that *Nugoom FC*'s offer (of USD 1.5 million) should prevail, as it is of a higher amount, and financial dues need to be calculated accordingly;

- The Player's alleged rejection to transfer to *Nugoom FC* cannot be considered as a justification for *Ismaily SC*'s failure to respond to *Nugoom FC*'s offer.

The CAS Award

Consequently, the CAS partially granted *Nugoom FC*'s requests by obligating *Ismaily SC* to pay an amount of USD 750,000 in addition to an amount of USD 500,000 as compensation for the breach.

Ismaily SC challenged this CAS Award before the Egyptian Center for Sports Settlement & Arbitration and requested the annulment of the said Award. The two parties are awaiting the Center's Award to grant or reject the annulment request.

FIFA's Third Package Reform



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→ **FIFA Regulations - FIFA RSTP - Player transfer - Minors - Tax - Tax law - Loans**

As part of the reform process initiated by FIFA since 2018, a third Reform Package is under consideration and under discussion. It concerns minor players, transfer windows, squad size limits and tax issues.

In February 2020, FIFA announced its vision for the period 2020-2023 by publishing its interesting paper *"Making Football Truly Global"*.¹



This must-read document identifies different problems affecting the current football landscape, amongst which the author highlights: (i) the widening financial disparity in global club football and (ii) the increasing competitive imbalance in both national team and club competitions.

FIFA has set itself 11 challenging goals for the years to come. For the purposes of this article, we will focus on the ones which are specifically addressed at tackling the above two problems:

➡ The very first goal is to *"Modernise the football*

regulatory framework" by reforming the transfer system: *"Key objectives of the transfer system are to protect minors, reward training clubs, promote investment in youth and safeguard the integrity of competitions while ensuring that money stays within the game for the purposes of reinvestment. The reform of the transfer system will focus on these objectives, as well as achieving greater transparency"*; and,

➡ The second goal is to *"Increase global competitiveness"*. In order to achieve this, *"FIFA should work to reform the current competition landscape and provide playing opportunities at a global level for national teams and clubs, while keeping in mind the well-being of players and the interests of all stakeholders."*

Even though these objectives are part of a plan for the future of the game, the truth is that the reform of the transfer system started some time ago.

➡ Indeed, since 2018 we have been assisting to made a number

of unprecedented changes to all of FIFA's regulations, not only to the Regulations on the Status and Transfer of Players (RSTP) but also to the FIFA Statutes, the Rules governing the Procedures before the Players Status Committee and the Dispute Resolution Chamber, as well as FIFA's Ethics and Disciplinary Codes;

➡ The first wave of significant changes came into force in June 2018 and included several amendments to the FIFA RSTP in relation to the execution of monetary decisions (Art. 24bis), overdue payables (Art. 12bis), abusive conduct by clubs (Art. 14.2) and clarifying the method of calculating the compensation payable in cases of termination without just cause (Art. 17.1).

Shortly after, in September 2018, the Football Stakeholders Committee (composed of representatives of FIFA, the European Club Association [ECA], FIFPRO, the World Leagues Forum, Continental Confederations and National Associations) endorsed *"a set of recommendations to*

¹ Available at resources.fifa.com

increase the transparency of the system, protect its integrity and reinforce solidarity mechanisms for training clubs.”²

The key points of the principles approved, which have been developed in two separate Transfer Reform Packages, are:

- The creation of a “*Clearing House*” to process all transfer-related payments that is set to start functioning in January 2021, with the processing of all payments related to training compensation and solidarity mechanism;
- The mandatory implementation by all Member Associations of an electronic domestic transfer system in line with the principles of the ITMS and an electronic player registration system at the national level (required since 1 July 2020);
- The application of solidarity contribution to domestic transfers with an international dimension, already in force since 1 July 2020;
- A new and controversial regulation for agents/intermediaries which is expected to come into force next September 2021;
- A progressive limitation of international loans of players aged 22 and older³, whose entry into force, which was approved for this current 2020-2021 season, has been put on hold due to the COVID-19 crisis.

In addition to all these reforms (and the recent one on football coaches and female players)⁴, FIFA announced a Third Reform Package that will address four main

topics: minors, transfer windows, squad limits and tax issues.

The COVID-19 pandemic has delayed discussions among football stakeholders as well as the implementation of these future amendments. So, it may be a good time to ask ourselves: what can we expect from this new reform?

An even better question might be: what changes could FIFA introduce in relation to these four topics to achieve its goals of modernizing its regulatory framework and increasing global competitiveness?

Minors

There is no doubt that the protection of minors is a very serious issue to consider when one looks at FIFA’s legal framework, and safeguarding children is one of its main objectives.

But it is equally true that, since international transfers of minors were banned in 2001, football and society have changed a lot, and even though some amendments have been introduced throughout the years, the essence of Article 19 of the FIFA RSTP remains unchanged.

Many football law experts have questioned whether the current system is adequate in the current circumstances, whether it is still proportional to the legitimate goal it pursues, and above all, whether it has proven to be functional.

FIFA’s position on this matter has been consistent and straightforward, by taking a restrictive interpretation of the prohibition, with no room for exception other than in very specific cases (Art. 19.2 and 19.3 RSTP). However, this strict

application of the rule has led to many unfair decisions, especially in those cases where the transfer of the minor involved little or no risk at all.

The time has come for a thorough review of the current system, taking into account the concerns expressed by the main stakeholders of the industry, as well as the damage that this regulation is causing to many children and their families.

Two issues stand out from the rest: Brexit and extending the EU/EEA exception worldwide.

As readers would know, the Brexit implementation period ends on 31 December 2020. Until that date arrives, freedom of movement continues, and European Economic Area (EEA) nationals have the right to live and work in the United Kingdom (UK).

However, starting on 1 January 2021, UK clubs will no longer benefit from the exception of Article 19.2.b) RSTP that allows the international transfer of EU/EEA nationals aged between 16 and 18. This means that, from that moment on, the general prohibition of international transfers of under-18 players will apply to the four founders of the game: the National Associations of England, Wales, Scotland and Northern Ireland.

There are two main problems one can foresee: first, the evident loss of competitiveness of UK clubs in relation to other Leagues, as they will be prevented from signing talented young players at other EU clubs (or EU players at non-EU clubs). On the flipside, this may benefit home nations players, as they will have more opportunities and, in turn, British football will raise its level.

² www.fifa.com

³ Principles of these last two amendments can be found here: www.fifa.com

⁴ www.fifa.com

Second, FIFA's ban goes against the freedom of movement and work within the UK. We must stress that, due to historical reasons, the United Kingdom is one of the few countries in the world with more than one National Association under the same flag.

This means that the move of a player from Wales or Scotland to England, which is nothing more than a UK citizen moving freely inside his country, will be prohibited by FIFA, as it will be considered an international transfer. It is basically the same problem that forced FIFA to introduce the EU/EEA exception but will now be a problem for the UK from 1 January 2021.

This issue needs to be addressed urgently. A possible intermediate solution could consist of introducing a new specific exception "f)" to Article 19.2, which would allow transfers within the four UK National Associations, at least until the main topic below is addressed.

The second measure that FIFA is clearly considering is extending the EU/EEA exception worldwide, especially after CAS award 2016/A/4903 *Club Atlético Velez Sarsfield v. The FA, Manchester City FC & FIFA*.⁵

The facts of this case are as follows: *Benjamín GARRÉ*, a player of Argentinian nationality, was registered with *Velez Sarsfield* (Velez) when he was 11. Shortly before turning 16, the player obtained an Italian passport (in addition to his Argentinian one). On the very same day he turned 16, he entered into an employment contract with *Manchester City* for two years.

The case was brought by Velez to FIFA and then to the Court of

Arbitration for Sport (CAS) for allegedly having breached Article 19.2.b) RSTP. However, following the merits of the *Vada II* case (TAS 2012/A/2862)⁶, the Panel authorized the registration of the player with *Manchester City*, thus confirming that the nationality criterion prevails over territoriality when applying the EU/EEA exception.

“ We can expect a future harmonization of the Article 19.2.b) exception worldwide ”

More importantly, this award opened a Pandora's box for questioning the limitation of the exception only to EU/EEA citizens on the following grounds:

“(…) there is no apparent justification for FIFA to apply such dissimilar treatment between EU/EEA citizens and non-EU/EEA citizens (…) The Panel considers that this unequal treatment regarding EU/EEA and non-EU/EEA Players and Clubs should be avoided (…) The Panel is not concerned by the question of whether the appropriate age limit for transfers of minors should be 16 or 18, what concerns the Panel is that in certain situations an age limit of 16 applies, whereas in other situations an age limit of 18 applies, without there being any justification for such different treatment. (…)

This different treatment of minors and the different age limits also leads to a distortion of the transfer market, since clubs based in EU/EEA countries are able to attract minors between 16 and 18 years of age from all over the world as long as the

minor concerned has an EU/EEA passport, whereas clubs based in non-EU/EEA countries can never attract minors until they turn 18, regardless of their nationality, unless Article 19(2) (a) or (c) FIFA RSTP applies (…) *The Panel does not see any reason, nor has FIFA or any of the parties involved in the present arbitration given one, to justify why clubs based in EU/EEA countries deserve such preferential treatment over clubs based in other parts of the world. (…)*

In the opinion of the Panel, this finding suggests that the territorial scope of the provision should no longer be restricted to transfers “within the territory of the European Union (EU) or European Economic Area (EEA) (…) *this Panel considered lengthily whether to establish already in this case that Article 19(2)(b) FIFA RSTP should be applicable to all transfers worldwide, as long as the material requirements set out in Article 19(2)(b)(i)-(iv) FIFA RSTP are complied with. However, considering the implications of such decision, the Panel finds that the matter should be dealt with first by FIFA, which is expected to duly consider the findings of this award. FIFA will then be able to determine whether to amend the regulations, or to adopt a different interpretation of the rule through circular letters, or otherwise, which is of course, its prerogative.”*

Following this recommendation, the author is of the opinion that we can expect a future harmonization of the Article 19.2.b) exception worldwide. In other words, we can expect to see a lowering of the age of the general prohibition on international transfers from 18 to 16-year-old players.

⁵ Accessible at jurisprudence.tas-cas.org

⁶ Accessible at jurisprudence.tas-cas.org

Even though many will agree that this unequal treatment was not justified, the remedy proposed by CAS may be worse than the disease, and allowing worldwide transfers of players over 16 could lead again to an exodus of young South American and African players to Europe, thus not only increasing the risks that the current regulations try to prevent but also irremediably harming the competitiveness of the leagues of those continents.

Bearing in mind that the task is highly complicated due to the many and delicate interests at stake, what can be done to protect minors and clubs at the same time?

In the author's opinion, the basic principle that should guide the new regulation is to guarantee that clubs only sign minors they are really interested in, instead of hoarding them in lower categories with the hope they can someday turn their investment into a sport or financial profit.

In order to achieve this, some of the following recommendations could be applied:

- Update and significantly increase the value of training costs for UEFA clubs for training compensation purposes;
- Create a new Elite category of training costs for clubs of the Big 5 leagues (Spain, England, France, Germany and France), plus Portugal;
- Define more accurately the requirement "provide adequate football education and/or training in line with the highest national standards" (Art. 19.2.b.i). The limitation of this requirement only to category I and II clubs (as jurisprudence shows) is unfounded and does not reflect

reality, as there are more clubs outside than within those two categories that provide high standard football education;

- Oblige the destination club to register the minor with the first or second team and sign the player with a professional contract;
- Limit the number of foreign minors a club can sign every year, following the principles on international loans;
- Grant tax or financial fair play benefits to clubs with a certain number of home grown and/or national players in their first teams.

Transfer Windows

The second aspect that the Third Transfer Reform Package will address is Transfer Windows.

According to Article 6 RSTP, players may only be registered during one of the two annual registration periods fixed by the player's relevant association. The first transfer window, which may not exceed 12 weeks, shall begin after the completion of the season and normally end before the new season starts; and the second period usually occurs in the middle of the season and may not exceed four weeks.

Below are some examples of the registration periods of the last season 2019-2020:⁷

Confederation	Country	First Registration Window	Second Registration Window
UEFA	England	11/06/2019 - 02/09/2019	01/01/2020 - 31/01/2020
	France	11/06/2019 - 02/09/2019	01/01/2020 - 31/01/2020
	Netherlands	11/06/2019 - 02/09/2019	03/01/2020 - 31/01/2020
	Russia	11/06/2019 - 02/09/2019	22/01/2020 - 21/02/2020
	Germany	01/07/2019 - 02/09/2019	01/01/2020 - 31/01/2020
	Spain	01/07/2019 - 02/09/2019	01/01/2020 - 31/01/2020
	Italy	01/07/2019 - 02/09/2019	02/01/2020 - 31/01/2020
	Portugal	01/07/2019 - 02/09/2019	02/01/2020 - 31/01/2020
CON-MEBOL	Uruguay	07/01/2019 - 29/03/2019	24/06/2019 - 23/07/2019
	Brazil	10/01/2019 - 03/04/2019	01/07/2019 - 23/07/2019
	Chile	14/01/2019 - 05/04/2019	23/07/2019 - 22/08/2019
	Argentina	03/07/2019 - 24/09/2019	20/01/2020 - 19/02/2020
CON-CACAF	Mexico	14/06/2019 - 05/09/2019	01/01/2020 - 31/01/2020
	USA	13/02/2019 - 07/05/2019	09/07/2019 - 07/08/2019
AFC	Qatar	09/07/2019 - 30/09/2019	01/01/2020 - 31/01/2020
	China	01/01/2019 - 28/02/2019	01/07/2019 - 31/07/2019

As can be seen, registration periods in Europe are almost identical in all major leagues, with some minor differences (like Portugal and Russia).

However, if we look at other Confederations, transfer windows differ significantly not only with UEFA but also between countries belonging to the same Confederation (for example, Argentina, whose registration periods are more similar to European ones than to those of its neighbours).

Differences in the registration dates pose problems to the integrity of competitions and open the door for National Associations to gain a certain advantage in comparison to their rivals by being the last to close their registration period.

⁷ We are not considering the registration periods of the current season 2020-2021 as they are exceptional due to the COVID crisis.

This is so because the period to be considered when registering a player is always the one affecting the new club. This is exactly what has happened with England for the past two years, when the FA decided to shut the registration period *on the eve of the Premier League season*, while other leagues remained open.

The reason behind this decision was to avoid the move of players once a competition had started. However, this early closure of the window proved unsatisfactory, as it left English clubs at a clear disadvantage by exposing them to having players picked up by European rivals (particularly from the other Big 4 Leagues) without the opportunity to replace them. This decision was amended in February 2020, and now the *Premier League* closes on the same day as all other major European Leagues.

Ideally, the best solution to avoid integrity conflicts would be to agree that the two mandatory registration periods apply worldwide. However, this seems to be a difficult (if not impossible) task to achieve due to different circumstances, such as differing seasons (due to hemisphere) or different competition calendars.

Notwithstanding this, as a first step, the following measures should be adopted in the next Reform Package to protect the integrity of competitions:

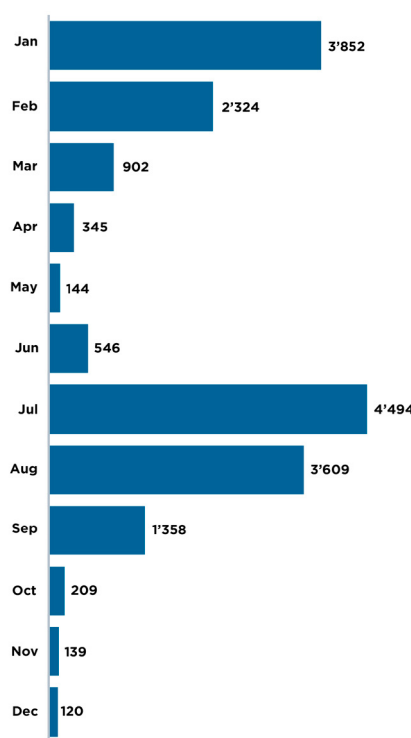
- ➡ Registration periods should be equal in all countries within the same Confederation. Situations like Argentina in CONMEBOL must be clearly avoided. Thus, FIFA should implement a maximum of twelve different registration periods (two per Confederation).
- ➡ All registration periods must close before the start of

domestic or international competitions so clubs are not allowed to change their squads thereafter.

- ➡ The summer transfer window should be reduced from the current 12 weeks to a maximum of eight weeks. For example, in Europe, it should run from 1 June to 31 July (max. 10 August) each season.

It's no secret that most deals are done in extremis, so what's the point of having a three-month market? Statistics support this view as well: as can be seen in the bar chart below (shared at the last FIFA Law Annual Review), a total of 8,649 international transfers took place in the 2019 summer transfer window.

Out of those, only 546 were agreed in June, representing a meager 6% of the total. It appears therefore that there is a month to spare.



- ➡ Finally, other authors suggest that the winter transfer window

should be abolished altogether. Amongst many reasons, one reason being because *“it impairs the development of a club’s youth, as short-term reinforcements constantly stand in the way of opportunity for the youngsters, hampering not only their development in the short term, but also their careers in the long term.”*⁸

Squad Size Limits

The second package of reforms had endorsed new regulations concerning loans *“to prevent player hoarding and ensure that loans have a valid sporting purpose for youth development as opposed to commercial purposes.”*

To that end, a progressive limitation on international loans was introduced, going from eight (in and out) to a maximum of six (in and out) during a transition period of three years⁹, with a maximum of three loans in and three loans out between the same clubs.

“Squads must not be increased, but instead need to be decreased”

At the domestic level, the new regulations also set a period of three years for Member Associations to implement domestic rules on a loan system in line with the principles established at the international level.

To counteract this limitation, especially if we consider the current industry’s scenario where calendar overload is a massive problem

⁸ See the interesting article wrote on this topic by Rustam Sethna at www.lawinsport.com

⁹ This limitation was due to enter into force the current season 2020-2021 but has been postponed indefinitely due to the current COVID-19 situation.

(that has worsened because of the COVID-19 pandemic, with more players suffering from injuries than ever before), it seems reasonable that the ECA could ask for squad sizes to be slightly increased, from the current 25 to, perhaps, 28-30 players per team.

However, if FIFA's goal to increase global competitiveness is to be genuinely achieved, the author is of the opinion that measures should be taken in exactly the opposite way: squads must not be increased, but instead need to be decreased.

The truth is that the problem does not lie in the size of the squad but with how coaches use it. It is not rare for clubs to always field the same starting eleven, and statistics show that coaches do not need squads of 25, as they only use a maximum of 18 players on a regular basis.

Let's see some random examples: during the 2019-2020 season, *Real Madrid* had eight players who played less than 10% of the total minutes of the season, and two of them did not even complete 90 minutes throughout the entire season. If we look at *FC Barcelona*, the number is even higher, with 10 out of 25 footballers being fielded less than 10% of the minutes.

Bayern Munich is probably the best example of a team where the coach only uses his starting eleven plus the same 3-4 substitutions every match: 11 players were fielded in less than 10% of the minutes, and out of these, an astonishing number of seven footballers (!!) did not reach 90 minutes throughout the season. That is *Hans-Dieter Flick* only needed 14 players to win all titles last season.

Lastly, *Liverpool FC* follows the same pattern: seven players were fielded in less than 10% of the games, and *Virgil VAN DIJK* alone

totalled more minutes than eight of his teammates together.

As can be seen, a decrease in squad sizes would have no practical impact on clubs. Instead, it would result in a better distribution of talent between clubs, which, in turn, would increase the competitiveness of all tournaments, both domestic and international. With this in mind, the following measures could be adopted:

- Limitation of squads to 22 players (2 complete line ups), to be implemented in a transitional period of three years;
- No limitation for clubs to line up players from their youth categories, which will foster the development of younger and home-grown talent;
- The five substitutions rule must remain. Although some argue that this rule benefits big clubs (which clearly goes against the competitive balance), it has clear side-benefits for the game.
- It allows players to rest more, it gives coaches more alternatives during matches, improving its quality (fresher players are more likely to produce better performances), regular "*bench players*" will be more involved if they know that five of them can play instead of only three, and it would increase the chances that all the squad is regularly fielded (16 out of 22 represents 72% of the squad, while current 14 out of 25, only 56%);
- Finally, the limitation on the number of players a coach can call for a game should be amended so that the full squad of 22 can attend every fixture. Again, this means more alternatives for coaches during games, and more chances to give their main roster a rest.

Furthermore, bench players would always be mentally fit to take the field while suppressing the "*punishment*" of watching the game from the stands.

Tax issues

On the occasion of the last FIFA Law Annual Review 2019¹⁰, *Ornella Desiree BELLIA*, FIFA Head of Professional Football, advanced some points concerning tax issues being discussed in the framework of the Third Reform Package.

The proposed measures will address the main financial flows in the employment and transfer markets, with the following general objectives: (i) to protect contractual stability and player welfare; (ii) to promote competitive balance at a global level, financial sustainability of football clubs and transparency in the market; (iii) to avoid speculation and dubious transactions and (iv) to tackle the concentration of talent.

Among the different solutions that could be implemented, Mrs *BELLIA* pointed out the following ones: salary caps (following the NFL-NBA model), luxury and competitive balance taxes, a levy on transfers, or the implementation of economic & financial control systems like UEFA's Financial Fair Play or *LaLiga*'s Economic control.

UEFA's FFP has proven to be an effective tool in the last years to control clubs' over-expenditure. However, it has also contributed to increasing the gap between rich and poor clubs, thus significantly affecting competitive balance at both domestic and international levels.

On the flipside, given the current COVID-crisis scenario, where clubs

¹⁰ Accessible here: www.fifa.com

are reporting hundreds of millions in losses that will take them years to recover from, the implementation of taxes or levies on transfers may not be a good idea, at least not in the short term.

Instead of introducing unproven and controversial formulas, another way of achieving a better distribution of wealth could be easier.

In this respect, the author suggests improving the mechanisms already in place by increasing the percentage to be distributed as a solidarity contribution (from the current 5% to 7-8%), and to include Article 21 and Annex 5 in Article 1.3.a) RSTP as one of the provisions to be incorporated without modification in the National Association's regulations, so that the solidarity contribution applies to ALL transfers worldwide, without exception.

Article 1.2 RSTP establishes that domestic transfers shall be governed by specific regulations issued by the Association concerned and that such regulations *"should provide for a system to reward clubs affiliated to the relevant association investing in the training and education of young players."* Despite FIFA's clear mandate, only very few National Associations have implemented domestic solidarity mechanisms, like Argentina or Portugal.

If FIFA really wants to reward training clubs, time has come to correct this system's failure. Maybe with these two changes, together with the increase in training compensation and a good functioning of the Clearing House, the goal can be achieved without the need to impose further financial obligations on clubs.

Conclusion

Football is constantly evolving, and FIFA has proven itself to have a tremendous capacity to adapt to current challenges. The task that is being accomplished by FIFA's Legal Department - brilliantly led by its Chief Legal Officer - has achieved unanimous industry recognition, and it is clearly on the right path to attain the goals set by FIFA for this four-year period.

However, as seen in the present article, there is always room for improvement, and the author hopes that some of the proposed ideas will contribute, even in a small way, to make football more balanced and better for all.

FIFA Amends the Rules on the Eligibility of Players for Representative Teams



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→ **Nationality - National team - Eligibility**
- FIFA Players' Status Committee (PSC)

Introduction

During the 70th meeting of the Congress of 18 September 2020, FIFA introduced relevant changes to the rules governing a player's eligibility to participate in the activity of representative teams of member associations.¹ These rules are contained in the Regulations governing the application of the [FIFA Statutes](#) (Regulations)².

Such changes were suggested by the Technical Working Group (TWG) established by the Football Stakeholders Committee of FIFA, pursuant to the requests of some member associations. Accordingly, the TWG identified some improvements to the rules on eligibility to make them more suited to the current cultural and social scenario that features significant migration flows and, consequently, an increasing number of individuals holding more than just one nationality.

The amendments suggested by the TWG and voted on by the 70th Congress have not altered the principles underpinning the FIFA rules on eligibility:

- no nationality, no eligibility;
 - no abusive “nationality shopping”;
 - protection of the integrity of competitions;
- and have been aimed at:
- clarifying some concepts and definitions;
 - introducing *ad hoc* provisions for stateless athletes;
 - giving more room to change of association whenever there are no nationality shopping risks associated thereto;
 - permitting the reversal of change of association in limited cases where the player has achieved no benefits from the change.

General principles

It has been stated in the introduction that the general principle of “no nationality, no eligibility” has remained unchanged: indeed, according to Article 5 of the Regulations, the first condition

for a player to be eligible for a representative team remains the holding of permanent nationality/citizenship of the country where the national association is based.

A new second paragraph, however, has been added to Article 5 to outline the difference between holding nationality and being entitled to apply for nationality and to clarify that nationality may be achieved:

- through the parents being national of a certain country (“*ius sanguinis*”) or following the birth in a specific territory (“*ius soli*”) or due to other automatic law provisions applicable to an individual;
- through a naturalization process that requires an application to the competent national authorities accompanied by evidence that specific conditions (e.g. having lived and worked for a certain number of years in the country concerned) are met.

The other pillar that has remained unchanged is that, regardless of any dual (or triple, quadruple, etc.) nationality that an individual may hold, once he has participated

¹ [FIFA Circular no. 1732, 23 September 2020](#)

² [FIFA Statutes - Ed September 2020](#)

in any official match for the representative team of one association, he cannot play for the teams of another association. The only exception to this rule is the “*change of association*” that will be examined below.

Nationality common to more than one Association

Minor changes have been introduced to the rules addressing the situation of more associations sharing the same national territory, just like the four independent football associations that govern each of the countries of the United Kingdom.

The minimum stay in the territory has been increased from 2 to 5 years and the “*living*” no longer needs to be continuous

The conditions to be eligible to play for the representative teams of one of the associations sharing the same national territory still are:

- being born (the player, his biological parents, or his biological grandparents) in the territory of the association concerned; or,
- having lived in the territory of the association for a certain number of years.

However, the latter prerequisite has been slightly amended by the 70th Congress: the minimum stay in the territory has been increased from 2 to 5 years and the “*living*” no longer needs to be continuous.

According to the new Article 5 par. 4 however:

- “*living*” means that, during the required five years, the player must be physically present in the specific territory;

- the stay is not interrupted by short absences due to personal reasons, holidays, medical treatments, or trips abroad for job-related reasons;

- unless exceptional circumstances exist, the physical presence of a player in the territory of the association concerned shall not be shorter than 183 days during a 12-month period of each year taken into account.

“ The minimum stay in the territory has been increased from 2 to 5 years and the “living” no longer needs to be continuous “

The same Article 5 par. 4, however, at letter b) states that the period of physical presence is interrupted (and the time requirement resets) if the player is transferred to a club affiliated to another association or leaves the territory of the association for any other reason than those indicated above.

The indication that the period resets where the player is absent from the territory can have both a narrow and a broad interpretation. In the former case, only the year running when the player leaves would be reset, leaving unaffected the years already completed, while, in the latter case, the whole period of 5 years would need to start all over again.

It can be expected that the commentary that will be published by FIFA at a later stage, will provide some guidance in this respect.

The last change to Article 6 is the addition of a new paragraph 3, providing for the publication, through a FIFA circular, of the list

of all the associations sharing a common national territory.

Acquisition of a new nationality

The general principles applicable to players who acquire a new nationality have remained unaffected by the amendments introduced by the 70th Congress. Therefore, according to Article 7 of the Regulations, a player is eligible to play with the representative teams of the association located in the country in which the player acquires nationality if:

- he has not played official matches with the teams of other associations; and,
- he, his biological parents, or his biological grandparents, were born in the territory of the new association, or the player has lived in the territory of the new association for a certain number of years.

The new Article 7 provides for a differentiation in the number of years the player must have lived in the territory concerned, depending on the age of the player when he moved to such territory.

In particular, for the purposes of avoiding any risk of “*nationality shopping*”, the number of years is:

- limited to three, when the player moved at a very young age (*i.e.* before turning ten, when he was too young to raise any interest in his football skills);
- still (as it was in the previous version of the Regulations) five years for players moving to the territory concerned when they were 18 or older.

For all players who moved to another country between the ages of ten and 18 (the time-frame is considered more at risk in terms of “*nationality shopping*”), in addition to the five years of physical presence, the player must demonstrate to the Players’ Status Committee (FIFA PSC) that his transfer to the territory of the new association is unrelated to the participation for the representative teams of that association.

In this case, in order to assess if the condition of living in the territory concerned for a certain number of years is met, the conditions of Article 5 par. 4 apply (see above).

Before the 70th Congress, the Regulations required the player’s continuous presence in the territory of the new association for at least five years after reaching the age of 18. In many cases, however, the FIFA PSC considered such rules excessively restrictive in light of the *rationale* behind Article 7, which is the prevention of abusive naturalizations. In particular, whenever they found that the move to another country of young people (either with their parents for working reasons or without, in case of orphans adopted internationally) had nothing to do with football-related reasons, the FIFA PSC declared the eligibility of players by way of derogation from the then Article 7.

Now, thanks to the new rules of Article 7, exceptions and derogations are no longer necessary. Now, a 16 year old player who had relocated to Italy with this family at the age of eight and has always lived in Italy and has obtained Italian citizenship according to the local laws, is immediately eligible to play with Italian national teams. On the contrary, when the old Regulations were in force, he was not eligible and needed to apply for a specific authorization from FIFA

that required time, the submission of paperwork, etc.

Still with the new Regulations in force, however, if the same player moved to Italy at the age of ten or eleven, even if he meets the 5-year physical presence criterion, he would need to file an application with the FIFA PSC and demonstrate that his family moved to Italy for reasons other than being declared eligible.

Stateless individuals

A new provision has been enacted to make stateless players eligible to play for representative teams even if the said stateless players would never have been granted the nationality of the country they live in.

According to Article 8 of the Regulations, the FIFA PSC can now grant their application and declare them eligible provided that:

- they have lived in the territory of the concerned association for at least five years;
- their movement to the territory occurred for reasons unrelated to his eligibility.

Change of association

The “*change of association*” (i.e. the authorization to play for the representative teams of a different association) is now regulated by Article 9 of the Regulations (previously Article 8).

The old regulation provided that switching from one association to another could only be granted if:

- a) the player had never participated in any official match at the “A” level; and,

- b) at the time when he played his first official match with the “*old*” representative, he already held the nationality of the “*new*” association.

Both pre-requisites a) and b) can now be derogated from if other conditions are met, given that now FIFA authorizes change of association under five scenarios described by the new Article 9.

The first case is the same as in the past, with both conditions under a) and b) needing to be met.

Whenever only the condition under letter a) is met (i.e. the player has never played official matches at the “A” level with the old association but did not have the citizenship of the new association when he played with the old association), FIFA will authorize the “*change of association*” if:

- the player was younger than 21 when he played his last official match with his “*old*” representative team; and,
- the conditions under Articles 6 or 7 (player, parents, or grandparents born in the territory of the new association or physical presence in its territory) are fulfilled.

If, on the contrary, the condition under letter b) is met, but not that under letter a) (i.e. the player has participated in official matches at the “A” level and, at the time of his first official appearance with the “*old*” representative team, he already held the nationality of the “*new*” representative), FIFA will only authorize the “*change of association*” if:

- the player was younger than 21 when he played his last official match with the “*old*” representative team;

- ➡ he participated in no more than three games (whether official or friendly) at the “A” level with the “old” representative team;
- ➡ his last appearance with the “A” team of the old association (in official or friendly matches) occurred more than three years prior to the application for change of association;
- ➡ he never participated with the “old” association in the final stage of the FIFA World Cup and/or the continental competitions organized by a confederation.

Finally, two cases of change of association were not regulated by the “old” regulations, being:

- ➡ the position of a player who wants to represent a newly affiliated association;
- ➡ the player who, against his will and following a competent government’s decision, loses the nationality of the country of his “old” association.

In the first case, the player is authorized to change allegiance if:

- ➡ he has never participated in any official match with the “old” association after the “new” association has been affiliated to FIFA; and,
- ➡ when he played his first match with the “old” association, the player already held the nationality of the “new” association, or he obtained it immediately after that the United Nations recognized the aforementioned country; and,
- ➡ the conditions under Articles 6 or 7 (player, parents, or grandparents born in the territory of the new association or physical presence in its territory) are met.

In the second case, in order to be granted the authorization to change association, the player only needs to hold the nationality of his “new” association.

As in the past, decisions regarding the change of allegiance are taken by the FIFA PSC (the applications, however, are now submitted directly to the FIFA PSC, rather than to the General Secretariat) and, once the application has been submitted and the decision is pending, the applicant cannot participate for any association.

A new provision addresses the case of players who have been granted authorization by FIFA to change association but are never fielded in any match (official or friendly) by the new association.

In such cases, provided that he still holds the nationality of the “old” association, the player can ask FIFA to annul the effects of the decision on “*change of association*” and declare him again eligible to play with the “old” association.

This serves the purpose of giving more chances to players who are seduced by the opportunity to play for another association considered of higher standing, however, ultimately find no space in the new team.

Final remarks

Even if there is still room for interpretation of some of the new provisions, it cannot be denied that the latest version of the eligibility rules is now closer to the current scenario of dynamic migration flows and melting pot of cultures and nationalities.

The broader room granted to the change of association rules seem to be perfectly in line with

the need to permit a player to represent a new association based on totally legitimate reasons, such as, for example, the personal and genuine ambition of players and their commitment towards another country with which they have sincere ties and at the same time preventing abusive naturalizations.

The New FIFA RSTP Rules regarding Bridge Transfers



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→ **Bridge transfer - Player transfer**
- FIFA RSTP - FIFA Regulations
- FIFA Disciplinary Committee
- FIFA Dispute Resolution
Chamber (FIFA DRC) - Court of
Arbitration for Sport (CAS)

As of 1 March 2020, the Regulations on the Status and Transfer of Players (RSTP) include the definition of “bridge transfer” as well as the prohibition on clubs and players looking to be involved in them.

History

Before 1 March 2020, FIFA did not expressly regulate in its Regulations on the Status and Transfer of Players (RSTP) the so-called “bridge transfers”. However, certain cases dealt with these types of transfers, both at the level of the Dispute Resolution Chamber (DRC) and the FIFA Disciplinary Committee (DC).

At the DRC level, the validity and effectiveness of bridge transfers aimed at avoiding or evading the payment of Training Compensation has been discussed. For example, a Category 4 club (which is not required to pay Training Compensation under the RSTP), that hires a player and immediately transfers him to a Category 1 or

Category 2 club, defrauds the training clubs. There are many decisions of the DRC and the Court of Arbitration for Sport (CAS) which are based on these facts that is, where a player who has not competed for the first club (bridge club), is transferred to a second club and was not recognized, such that the second club was ordered to pay the training compensation.

In the FIFA DC context, the most well-known cases took place in Argentina and Uruguay, where FIFA attempted to discipline clubs for their use of bridge transfers. These cases involved free-agent players who were signed by Uruguayan club *Institución Atlético Sud América* and then immediately transferred, without a fee, to Argentinean clubs *Racing Club*, *Club Atlético Independiente*, *Club Atlético Rosario Central* and *Instituto Atlético Central Córdoba*.

Once the complaint was filed with FIFA by the Argentinean Treasury, corresponding disciplinary

procedures were initiated, and in the end, FIFA imposed economic fines on the Argentinean clubs and an economic fine and a prohibition on the registration of new players for two transfer periods on the Uruguayan club.

At the time, and through its press releases, FIFA defined bridge transfers as “a collaboration of several clubs to transfer a player to a destination club through a bridge club in whose line-up he never appears”. In addition, FIFA based the sanctions, which it had imposed, on the fact that all these clubs had used TMS to make transfers without any sporting interest which, according to FIFA, “constituted a deliberate use of TMS for illegitimate purposes, with the sole effect of justifying a commercial operation.”²

Racing Club and *Institución Atlético Sud América* appealed their sanctions before the CAS. In the first case, the CAS decided to revoke the sanction because it understood - among other arguments - that according to the principle of legality, there was no clear rule which prohibited this type of transfer and enabled the imposition of a sanction.³ In the case of *Sud América*, the CAS also revoked both the economic sanction and prohibition since it understood that it was neither correct nor legal to apply a sanction that was solely based on general principles contained in the Statutes and not on any specific disciplinary regulations.⁴

Thus, in the two cases that reached the CAS, in which FIFA imposed disciplinary sanctions on clubs as a consequence of them having

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² Ariel RECK in *Estudios Jurídicos* no. 14 - ‘Homenaje al Profesor Fernando Nin Rial - Derecho Deportivo’, Universidad Católica del Uruguay, pp. 235 et seq..

³ CAS 2014/A/3536 *Racing Club Asociación Civil c. FIFA*.

⁴ TAS 2018/A/5637 *Institución Atlético Sud América c. FIFA*.

participated in a bridge transfer, the CAS revoked the sanctions, as it understood that there was no rule that expressly prohibited bridge transfers. Therefore, on 1 March 2020, a new edition of the RSTP (March 2020 Edition) came into force, including a definition of bridge transfer and prohibition on clubs and players from participating or getting involved in them.

Defining Bridge Transfers in the New FIFA RSTP

By Circular no. 1709 of 13 February 2020, FIFA informed all Member Associations of the amendments that were due to be made to the RSTP, which would come into effect on 1 March 2020 and 1 July 2020, respectively.

Among them, as of 1 March, 2020, the RSTP included the definition of “*bridge transfer*” as well as the prohibition on clubs and players looking to be involved in them.

In terms of a definition, number 24 of the RSTP Definitions establishes that a “*bridge transfer*” is:

“any two consecutive transfers, national or international, of the same player connected to each other and comprising a registration of that player with the middle club to circumvent the application of the relevant regulations or laws and/or defraud another person or entity.”

In other words, according to number 24 of the RSTP Definitions, bridge transfers are those which satisfy the following requirements:

- ➡ two consecutive national or international transfers of the same player;
- ➡ linked to each other and with an intermediate club registration;

➡ to avoid the application of the relevant regulations or legislation; and/or,

➡ to defraud other persons or entities.

In our opinion, the essential element for two transfers to be considered “*bridges*” is intention; that is to say that such consecutive transfers of the same player, with the registration in an intermediate club, are made with the purpose and intention of avoiding the application of rules and regulations or with the purpose of defrauding other persons or entities. Accordingly, where such purpose is fulfilled, then the two consecutive transfers of the player will be considered as a bridge transfer.

We must also point out that, in our opinion, where the RSTP refers to “*to circumvent the application of the relevant regulations or laws*”, it is referring to the carrying out of a manoeuvre (either a transfer or registration) aimed at avoiding the application of the regulations or laws in order to obtain a benefit, which would not have been obtained if such manoeuvre had not been carried out and, therefore, if the regulations or laws had been applied. In this sense, and as a clarification, FIFA has treated and sanctioned as bridge transfers, among others, transfers that tried to avoid the payment of the training compensation, as well as transfers that seek to defraud the tax authorities. In addition, there can also be bridge transfers intended to avoid the application of UEFA Financial Fair Play Regulations and the limitations on the number of foreign players that can be included in a team's playing squad, etc.

Another important element when establishing whether a transfer is a bridge or not is to define what is actually meant by “*transfer*”.

Historically, a transfer was considered to be the situation where two clubs have agreed to transfer or assign a player's rights from one to another. On the contrary, and with the exception of certain articles of the RSTP,⁵ the registration of a free-agent player with a club was not considered a transfer.

However, by [FIFA Circular no. 1679 of 1 July 2019](#), the definitions of “*international transfer*” (Definition no. 21) and “*national transfer*” (Definition no. 22) were included in the RSTP, defining the former as “*the transfer of the registration of a player from one association to another*” and the latter as “*the change of a player from one club in an association to play for a new and different club in the same association.*”

It is thus clear that FIFA defines transfers in an administrative sense, including for the cases where free-agent players are signed or registered in a club, without a transfer agreement between the engaging and releasing clubs. Even though we are dealing with an administrative concept of transfer, this is the definition that FIFA will take into account when analyzing whether or not a bridge transfer has occurred.

Finally, it is also important to determine what is considered to be two consecutive transfers. According to the Cambridge Dictionary, the word “*consecutive*” refers to “*events, numbers, or periods of time which come one after the other*”. According to the Collins Dictionary, it is “*periods of time or events happening one after the other without interruption*”. Thus, according to the definitions, it would seem that two transfers, which are carried out immediately,

⁵ Article 20 of the RSTP regarding Training Compensation refers to “*transfer*” and is interpreted in the sense of administrative transfer.

and without interruption, are considered bridge transfers, which further implies that the player was never involved in, nor competed for, the club that receives the player (bridge club) and subsequently transfers him to another club.

Article 5bis of the FIFA RSTP - Prohibition of Bridge Transfers

Under the previous heading, we analyzed the definition that FIFA has given to bridge transfers. Below we examine the regulation itself.

Article 5bis of the RSTP, in force as of 1 March 2020, reads as follows:

"1. No club or player shall be involved in a bridge transfer.

2. It shall be presumed, unless established to the contrary, that if two consecutive transfers, national or international, of the same player occur within a period of 16 weeks, the parties (clubs and players) involved in those two transfers have participated in a bridge transfer.

3. The FIFA Disciplinary Committee, in accordance with the FIFA Disciplinary Code, will impose sanctions on any party subject to the FIFA Statutes and regulations involved in a bridge transfer."

Subsection 1 clearly prohibits clubs and players from engaging in bridge transfers, while subsection 3 expressly provides for the imposition of sanctions on parties who engage in this type of transfer, in accordance with the FIFA Disciplinary Code. The sanctions provided for by the Disciplinary Code are already known to us; they can range from warnings, fines, prohibitions on transfers, removal of points, demotion and even disaffiliation.

Subsection 2 of said article is, however, the most important provision, as it establishes a simple presumption against the parties; which, in effect, provides that if consecutive transfers are carried out within a period of sixteen weeks, the parties involved in the said transfer shall be deemed to have participated in a bridge transfer. That is, they have participated in a transfer with the intention of *"avoiding the application of the relevant regulation or legislation and/or with the purpose of defrauding other persons or entities."*

Thus, according to Article 5bis of the RSTP:

- ➡ two transfers of the same player must be carried out;
- ➡ these transfers must be consecutive;
- ➡ the transfers must also be carried out within 16 weeks;
- ➡ a bridging transfer is presumed, i.e. with the intention of avoiding the application of rules and regulations and/or defrauding third parties.

It is, however, important to note that such a presumption is a simple one, which can easily be rebutted by submitting proof to the contrary (*"unless otherwise established"*), i.e. by proving that it was not the parties' intention to avoid the applicable rules and regulations, and/or to defraud third parties. Based on the aforementioned proof, the simple presumption to the contrary will be rebutted.

Finally, we understand that there is a contradiction in the rule, as it requires two consecutive transfers carried out within 16 weeks in order to create the presumption that there has been a bridging transfer. As we said before, *"consecutive"* implies

that something happens without interruption or immediately, which does not fit the idea of 16 weeks passing between transfers. Perhaps, when Article 5bis of the RSTP refers to two consecutive transfers, it refers to the fact that there is no intermediate transfer between the two consecutive transfers, or as we said, that between one and the other transfer, where the player has not participated or competed in the first club, to give the idea of immediacy or lack of interruption between the two transfers. The truth is that, up until now, there has been no case-law on this matter, nor have any new Comments to the RSTP been published, which would explain such possible contradiction.

Article 5.2 of the FIFA RSTP: Sporting Interest

Simultaneously with the definition and prohibition of bridge transfers, Circular no. 1709 also modified Article 5 of the RSTP, by adding to subsection 2 that:

"A player may only be registered with a club for the purpose of playing organized football. As an exception to this rule, a player may have to be registered with a club for mere technical reasons to secure transparency in consecutive individual transactions (cf. Annexe 3)."

Subsection 2 of Article 5 does nothing but reflect in the RSTP, FIFA's position that the registration of players with a club (administrative transfers according to the new definition) must be for a sporting interest: *"for the purpose of playing organized football"*. On the other hand, players cannot be registered for a single commercial or economic purpose; if this were the case, it would be a violation of the rules, and, consequently,

the club could be sanctioned according to Article 9 of Annex 3.

There are suggestions that Article 5.2. of the RSTP is one of the ways to evade the application of laws and regulations provided for in Article 5bis. However, in our opinion, Article 5.2. is independent of Article 5bis because, in the former, a breach of the Regulations is directly sanctioned (registering the player without sporting interest) while in the latter, a manoeuvre is sanctioned that is seemingly legal but in reality is not true and is only carried out to evade the application of the RSTP (being involved in a bridge transfer).

Let's turn to an example. A "A" club registers a player with the sole economic purpose of transferring the player to another club for a higher price, without the player having represented the team, and before the 16 weeks have passed, the club transfers the player to club "B".

Although in this case there is a presumption of a bridge transfer against "A" and "B" (because the second transfer has been made within 16 weeks), they should not be sanctioned for engaging in a bridging transfer, in terms of Article 5bis of the RSTP, provided that both clubs are able to prove that the registration of the player was not intended to avoid compliance with laws and regulations or to defraud third parties.

However, beyond the fact that such registration was not made with the purpose of avoiding the applicable laws and regulations, it would be in violation of Article 5.2 of the RSTP, insofar as "A" would have registered a player for a purely economic purpose with no sporting interest, in order to transfer the player to "B". Consequently, the "A" club could be sanctioned for violation of Article 5.2 of the RSTP even if it was not sanctioned under Article 5bis. In

this case, only the "A" club could be sanctioned since the registration made by the "B" club has a sporting interest and, therefore, does not violate Article 5.2. of the RSTP.

Practical Examples

Let's now examine some case studies that could arise in the future in order to see what possible solutions might be.

Hypothetical A

The first hypothetical scenario is where a player is transferred - contractually or administratively - from "A" club to "B" club; the player stays more than 16 weeks registered at "B" and then is transferred (permanently or on loan) to "C" club.

In our opinion, the fact that the player is transferred within or outside of the 16 weeks following the first transfer (from "B" to "C") does not make or convert such transfer into a bridge transfer. Just as it can be proven that no bridge transfers took place even though the second transfer was made within 16 weeks, it can also be proven that bridge transfers took place even though the second transfer was made after 16 weeks.

In this case, there will be no simple presumption against the clubs, but this does not imply that there is no such thing as a bridge transfer; as the burden of proof will shift to the other party (the DC or the complainant, as the case may be) to prove that there was a bridge transfer, even though the second transfer was made after the 16-week period had elapsed.

In conclusion, even if the second transfer had been made outside the 16 weeks, it could still be considered a bridge transfer if the FIFA DC or

the defrauded party can prove that the two consecutive transfers of the same player were made with the intention of avoiding the applicable laws or regulations or with the aim of defrauding third parties.

Concerning the application of Article 5.2. of the RSTP, it is of primary importance to determine whether or not the player competed for "B" during the 16 weeks that he was registered with the club. If the player had, then Article 5.2. would not apply. However, supposing the player had not competed for "B" during those 16 weeks, then it becomes necessary to determine the reason why the player did not, in order to know whether "B" registered the player with a sporting interest (*i.e.* for the purpose of playing organized football) or not.

Hypothetical B

The second hypothetical scenario is where a player is transferred - contractually or administratively - from "A" club to "B" club and plays for "B" but is finally transferred to "C" club, temporarily or definitively, before the 16 weeks have passed.

We are then faced with a scenario in which:

- there are two transfers of the same player ("A" to "B" and from "B" to "C");
- between the two transfers, the player participated in official matches with "B";
- the second transfer (from "B" to "C") took place within 16 weeks of the first one ("A" to "B").

As you can see, we have not said in the first point that we were facing two consecutive transfers because such immediate or consecutive character could have been interrupted by the player's

participation with “B”. If so, it could not be considered a bridge transfer due to the absence of one of the requirements demanded by the RSTP: “*two consecutive transfers*”. This interpretation could be in line with FIFA’s position that bridge transfers were set up where there is no sporting interest in the player’s transfer.

Notwithstanding this, and as stated in the previous paragraph, the fact that the transfer from “B” to “C” has been made within 16 weeks does not mean that it is indeed a bridge transfer. Accordingly, we are only facing a simple presumption that can be easily rebutted by the three clubs involved by proving that there was no objective to avoid compliance with laws and regulations or defraud third parties.

In conclusion, the fact that the player had participated in “B” before being transferred to “C” could imply that the character of both transfers is interrupted and, therefore, it could not be considered a bridge transfer because it lacks one of the requirements demanded by the RSTP.

In addition, the fact of having been transferred from “B” to “C” before the 16 weeks from the elapse of the first transfer does not necessarily imply the existence of a bridging transfer, but a simple presumption of its existence, which obviously can admit evidence to the contrary.

As for the application of Article 5.2. of the RSTP, given that the player participated for “B”, in principle, the rule would not have been violated due to the sporting interest in the registration of the player with “B”. However, this will have to be analyzed on a case-by-case basis, since in our opinion, the inclusion of the player for a few minutes of a match would not be sufficient to sustain an argument that there was

a sporting interest; on the contrary, the inclusion for a few minutes could be demonstration that there was no sporting interest and that, if this was done, it was only for the purpose of avoiding the application of Article 5.2. of the RSTP.

Hypothetical C

The last hypothetical scenario is where a player is transferred (contractually or administratively) from “A” to “B” and immediately, at the same time, “B” loans the player to “C” (or even back to “A” itself).

We are facing the following scenario:

- there is a transfer (contractually or administratively) from “A” to “B”;
- immediately, and at the same time, a second contractual transfer is made from “B” to “C” (or back to “A”);
- the player does not participate with “B” before being transferred to “C” (or “A”) for a loan;
- in the case of an immediate loan, no more than 16 weeks has elapsed.

This case can be considered a clear case of a bridging transfer, according to the definition of the RSTP. However, we must refer to what has been said in the previous paragraphs. Although according to Article 5bis of the RSTP, there would be a simple presumption of bridging transfers between the three clubs, this would not definitively be the case, as this presumption could be rebutted if it were proven that there was no objective of evading compliance with laws and regulations or defrauding third parties. Naturally, such proof would be difficult if the second transfer (“B” to “C”) had

been final; however, immediate loans are common and have, as their explanation, to validate the interest in acquiring the player’s rights, but that they continue to be trained in teams where they will have more opportunities to compete.

In conclusion, in the above hypothetical scenario, there would be a simple presumption of the existence of a bridge transfer, but this presumption could be rebutted if the clubs are able to prove that there was no objective of circumventing the laws and regulations or defrauding third parties.

As for the application of Article 5.2. of the RSTP, it will be necessary to analyze it once again on a case-by-case basis. Suppose the immediate transfer to a loan from “B” to “C” (or to “A”) was intended for the player to continue training in teams where he would have more opportunities to compete, etc., but after the loan is completed, the player returns to “B” to play. In that case, “B” club should not be sanctioned by Article 5.2. of the RSTP since there is a sporting interest. However, if “B” registers a player and contracts him for one year and immediately transfers him to “C” for a loan of one year, then “B” could be sanctioned because there is no sporting interest in the player; since at the same time that the loan from “B” to “C” expires, the contract between “B” and the player also expires.

In conclusion, we will have to wait for decisions from the FIFA DC and eventually from the DRC (in case of economic claims based on bridge transfers) to know how jurisprudence will interpret the articles of the Definition of Bridge Transfers and Articles 5bis and 5.2 of the RSTP. We will also be attentive to the new RSTP Comments already announced by the FIFA Legal Department, led by *Emilio GARCÍA SILVERO*.

Regulatory Actions Implemented by FIFA in 2020



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→ **FIFA - FIFA Regulations - FIFA RSTP - COVID-19**

This article outlines the regulatory actions carried out by FIFA in 2020, including the different measures and adjustments instituted to confront the COVID-19 pandemic, as well as those new regulations and initiatives which are aimed at renewing the legal framework.

Unsurprisingly, in the coming decades, 2020 will be remembered as the year of the COVID-19 pandemic. The unceasing spread of the virus across the globe led to the implementation by government authorities of significant measures, mostly aimed at the preservation of public health.

As could be expected, the football industry has also been affected by the critical measures for COVID-19 prevention and control.

Indeed, it is a well-known fact that the temporary cessation and postponement of competitions provoked a dramatic reduction of revenues, which resulted in drastic and immediate losses and, at the same time, profoundly disrupted the football transfer market.

Against this background, the Fédération Internationale de Football Association (FIFA) - which has been in the process of regulatory reform for some years - reacted promptly by establishing provisional measures with the aim of providing, on the one hand, a response to the loopholes caused

by this anomaly; and, on the other, financial relief and economic support to those who have been most affected.

Measures and adjustments instituted to confront the COVID-19 pandemic

Worldwide registration periods calendar

As included in Article 6 of *Regulations on the Status and Transfer of Players* (RSTP), players may only be registered during one the two annual registration periods fixed in the relevant association, with the exception that a professional, whose contract has expired prior to the end of a registration period, may be registered outside that registration period. During the “COVID-19 time”, there was a temporary exemption to this rule, where a professional footballer, whose contract has expired or been terminated as a result of the pandemic, had

the right to be registered by an association outside a registration period, regardless of the date of expiry or termination.

With this scenario, and the uncertainty about what could happen with professional football during the pandemic, FIFA was constantly updating the different transfer window periods of the different associations. Normally, the first transfer window begins after the completion of the season and ends before the new season starts. The second transfer period normally occurs in the middle of the season and may not exceed four weeks. However, due to the pandemic, the worldwide registration periods calendar has been constantly changing in accordance with the developments of the health crisis in each country. For this reason, FIFA has also been constantly modifying the information about the transfer windows.²

The first period may not exceed 12 weeks, and the second one, may not exceed four weeks, whether for male or female competitions.

¹ From 1 January 2020 until 10 December 2020.

² resources.fifa.com

The two registration periods for the season shall be entered into the FIFA Transfer Matching System (TMS) at least 12 months before they come into force, and FIFA shall determine the dates for any association that fails to communicate them on time. Due to the pandemic situation, for associations following a dual-year calendar, the first registration period for the 2020-2021 season may overlap with the completion of the 2019-2020 season for a maximum of four weeks. On other side, during the first registration period for the 2020-2021 season which overlaps with the termination of the 2019-2020 season: (i) the transfer between clubs was permitted; and (ii) the engagement of an out-of-contract player was permitted. In both cases, the player shall only be eligible to participate in domestic competitions for their new club in the 2020-2021 season.

Finally, the provisions concerning registration periods do not apply to competitions in which only amateurs participate.

International Match Protocol (“Return to Football”)

On 1 October 2020, FIFA published Circular no. 1735 together with FIFA’s Return to Football – International Match Protocol (Protocol). During the pandemic, the national associations, together with the football leagues, began to implement different protocols regarding the return to football, which allowed the successful resumption of domestic, continental and international football.

The Protocol set an example and offered a glimmer of hope to people and demonstrated that some aspects of our daily lives can return to a “*new normal*”. In accordance with this, the

FIFA Council has implemented important measures, and one such decision was the Protocol. The Protocol defined preventative measures to be embedded into the footprint of matches and at official sites. It also incorporated the latest recommendations issued by the World Health Organization. It further provided important safeguards for the health of the players and the rest of the coaching staff, as well as simultaneously facilitating a return to play.

The Protocol (or an equivalent protocol of the relevant confederation), is mandatory for all international matches within a window of the International Match Calendar. The relevant confederation shall submit its protocol to the FIFA general secretariat for review and approval prior to it being implemented. For all other matches not covered by this scope, the Protocol serves as a recommended guideline. Any violations of the Protocol may be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code. The Protocol applies to both matches behind closed doors, as well as matches played in the presence of ticketed spectators, with little difference.

Release of players to association teams

There are two FIFA Circulars concerning this issue (no. 1712 of 13 March 2020 and no. 1729 of 24 August 2020).

The first was published at the beginning of the pandemic, in the context of Annexe 1 of the RSTP. The Bureau of the Council decided on the following course of action in accordance with Article 27 of the RSTP:

- ➡ Clubs were not obliged to release their player to national teams,

- ➡ If a club agreed to release a player to a national team, the player could decline the call-up,
- ➡ Any such decision shall not be subject to disciplinary measures,
- ➡ If a player was unable to resume duty with their club, by the relevant deadline due to COVID-19, the association and/or the player shall not be subject to any future restrictions or disciplinary measures,
- ➡ The international windows subject to this decision were: (i) 23-31 March 2020 (for men); and (ii) 6-15 April 2020 (for women and futsal).

FIFA recommended the deferment of the matches during such windows, but the final decision was to be taken by the relevant competition organisers or member associations (MAs) in case of friendly matches.

Circular no. 1729 concerned the release of players to national teams in the international window for men (31 August to 8 September 2020) and women (14-22 September 2020), but was only applicable for UEFA MAs. The rules relating to the release of players to their association teams in Annexe 1 of the RSTP shall apply as normal, except where:

- ➡ There was a mandatory period of quarantine or self-isolation of at least 5 days upon arrival in: (i) the location of the club which has an obligation to release the player to an association team; or (ii) the location where a representative team match was scheduled to take place;
- ➡ There was a travel restriction to or from either location; or,
- ➡ A specific exemption from the relevant authorities relating to

the above decisions had not been granted to players.

Impact of COVID-19 on FIFA MAs (immediate financial relief) and FIFA COVID-19 Relief Plan

On 15 April 2020, the FIFA Development Committee and the FIFA Finance Committee (on 16 April 2020), committed to the establishment of a unique and far-reaching financial relief programme, which is reflective of this exceptional emergency. These measures have been proposed to provide some immediate financial support to FIFA members, as explained below:

- Operational cost entitlement for 2019 and 2020. The release of the second instalment of operational costs for 2020 will be moved forward from the July payment date, as specified in the *Forward 2.0* Regulations. This funding should be used to mitigate the financial impact of COVID-19 on football in MAs.
- Extension of deadlines. Any relevant deadlines stipulated in the *Forward* Programme were to be extended, concerning statutory audit reporting as outlined in Article 14, as well as treatment of unused *Forward 1.0* funds as per Article 22 paragraph 2 of the *Forward 2.0* Regulations.

On 29 July 2020, FIFA shared information about FIFA COVID-19 Relief Plan, approved by the FIFA Council on 25 June 2020. The following three-stage approach has been adopted:

- Stage 1. Provision of immediate liquidity relief to MAs. FIFA waived all conditions associated with remaining operational-cost entitlements

under the *Forward* Programme up to and including 2020.

- Stage 2. Provision of additional support to MAs. The Members had the opportunity to transform remaining *Forward* specific project allocations into temporary COVID-19 relief funds. To make use of this option, MAs shall be required to complete the relevant reporting forms detailing how the funds were used, including to the budget.
- Stage 3. Support for MAs and the wider football community.

Member Associations

- Solidarity Grant of USD 1 million (approx. EUR 825,000) per MA, in two installments (50% following the FIFA general secretariat's approval and 50% in January 2021);
- Women's football Grant of USD 500,000 (approx. EUR 413,000) per MA, will be payable as a single payment following the FIFA general secretariat's approval;
- Loan facility. Each MA was entitled to apply for interest-free loans amounting to up to 35% of its audited annual revenues. In the interest of solidarity, all MAs may request a loan of USD 500,000, while the maximum aggregate amount available to any MA will be USD 5 million (approx. EUR 4.1 million).

The disbursement of funds to the wider football community must be carried out in accordance with the relevant provisions of the Stage 3. The permissible uses of the funds, among others are the

resumption of competition across all categories, implementation of return-to-play protocols, including testing, and the maintenance of footballing infrastructure.

Confederations

Each confederation was also entitled to support, *via* a grant of USD 2 million (approx. EUR 1.7 million) and the opportunity to apply for a loan of up to USD 4 million (approx. EUR 3.3 million).

Amendment Code of Ethics FIFA

The new Article 75.5 of the Code of Ethics allows the holding of public hearings by way of videoconference on an exceptional basis, and only during the COVID-19 period.

Football Regulatory Issues (COVID-19) - Transition measures and others

On 11 June 2020, the Bureau of the FIFA Council endorsed temporary amendments to RSTP and the Rules Governing the Procedure of the Player's Status Committee and Dispute Resolution Chamber (Procedure Rules), as follows:

- Article 5.4 of the RSTP: unemployed players are permitted to be registered with a maximum of three clubs and are eligible to play in official matches for three clubs during same season, limited to: (i) for MAs following a dual-year calendar: the 2019-2020 and 2020-2021 seasons; and (ii) for MAs following a single-year calendar, the season 2020.
- Article 6.2. of the RSTP: dual-year calendars are permitted

to commence on the “*first registration period*” for the 2020-2021 season prior to the completion of the 2019-2020 season, subject to the limitation that: (i) the first registration period for the 2020-2021 season may overlap with the final rounds of the 2019-2020 season for a maximum of four weeks; and (ii) during the portion of the first registration period for the 2020-2021 season which overlaps with the final rounds of the 2019-2020 season, the transfer of a player between clubs was permitted and the engagement of an out-of-contract player was permitted. In both cases, the player shall only be eligible to participate in domestic competitions in the 2020-2021 season.

- Articles 17 and 18 of the Procedural Rules: for any claim lodged between 10 June and 31 December 2020, no requirement to pay an advance of costs and no procedural costs shall be ordered; and for any claim lodged prior to 10 June 2020, which had yet to be decided, the maximum amount of the procedural costs shall be equivalent to any advance of costs paid.

COVID-19: Medical Considerations for a Return to Footballing Activity

In May 2020, FIFA established a working group with support and representation from each of the six confederations and the World Health Organization to examine the medical considerations for a return to football competitions. With input from this group, this tool has been developed to practically support football teams, national associations, confederations and event organisers in assessing the specific additional risks.

New regulations and initiatives aimed at renewing the FIFA legal framework

New regulations

On 18 September 2020 the FIFA Congress³ adopted the “*September 2020 edition*” of the **FIFA Statutes**⁴, which came into force immediately.

The main amendments to the FIFA Statutes have been undertaken with regard to the *Regulations Governing the Application of the Statutes*.⁵

On 13 February 2020, FIFA revealed⁶ relevant amendments to the **RSTP**, which came into force from 1 March 2020.

The main modifications refer primarily to the following topics:

- Application of the solidarity mechanism to national transfers with an international dimension;
- Clarifications concerning training compensation;
- International transfer of minors;
- Provisional registration of players;
- Validation exceptions through TMS;
- Bridge transfers.

³ The FIFA Congress is the only body capable of modifying the FIFA Statutes. Any change requires a three-quarters majority of the associations present and eligible to vote.

⁴ Available at img.fifa.com

⁵ For more information, see the FIFA Circular no. 1732 dated 23 September 2020 which summarizes the changes (available at resources.fifa.com)

⁶ Circular no. 1709 (available in resources.fifa.com).

On 25 June 2020, the FIFA Council approved the new version of the **Anti-Doping Regulations**⁷, which are due to come into effect from 1 January 2021.⁸

It is noteworthy that all FIFA MAS have the obligation to adopt and comply with the *Anti-Doping Regulations*.

Initiatives

On 23 September 2020, FIFA released Circular no. 1732 which included the publication of the **FIFA Legal Handbook**⁹ that constitutes an electronic resource containing all the relevant regulatory framework of FIFA (up until the September 2020 updates). The *FIFA Legal Handbook* comprises: (i) FIFA regulations; (ii) key FIFA circular letters; and (iii) standard documents.

Recently, FIFA has held several summits and workshops of a compliance nature. Further, on 20 October 2020, FIFA announced¹⁰ the publication of the *FIFA Compliance Handbook*.¹¹

The **FIFA Compliance Handbook** has been defined by FIFA as “*a practical, interactive and easy-to-use PDF document for member associations and other sports stakeholders that outlines the basic principles and benefits of implementing compliance guidelines.*”

Third-party influence on clubs (also known as TPI) and third-party ownership of players economic rights (TPO) are two of the most complex and controversial issues that FIFA has faced in recent years.

⁷ Available at resources.fifa.com

⁸ In this sense, on 7 November 2019 the World Anti-Doping Agency adopted the new World Anti-Doping Code, in force from 1 January 2021.

⁹ Available at: resources.fifa.com

¹⁰ Through Circular no. 1737 (available at resources.fifa.com).

¹¹ Available at resources.fifa.com

Articles 18bis and 18ter of the RSTP have been adopted by FIFA to protect the integrity of football, by means of safeguarding the transfer system and promoting the contractual stability between players and clubs.

On 9 September 2020, FIFA published the Manual on “TPI” and “TPO” in football agreements¹² (Manual) with the main purpose of providing guidance on how FIFA interprets and applies Articles 18bis and 18ter of the RSTP.

Accordingly, this document has a strong practical component and includes different recommendations on how to avoid possible infringements of the RSTP. Undoubtedly, the Manual is a must-read document.

Following the programme launched by FIFA in July 2019, known as FIFA Guardians¹³, at the beginning of 2020, FIFA issued the Circular Letter no. 1706¹⁴ dated 21 January 2020 whereby FIFA reported on the development and subsequent steps of FIFA Guardians.

As is generally known, the **protection of minors** constitutes one of the fundamental pillars of FIFA. Article 19 of the RSTP¹⁵ lays down an explicit prohibition on the international transfer of minors, with the purpose of protecting the most vulnerable stakeholders in football, *i.e.* young players.

Nonetheless, the international transfer of minors is allowed in exceptional circumstances. In this sense, Annexe 2 of the RSTP regulates the procedure governing

applications for first registration and international transfer of minors.

In that context, on 30 September 2020, FIFA published¹⁶ the “*Guide to Submitting a Minor Application*”¹⁷, by virtue of which FIFA “*provides an overview and outlines the relevant documents to be included in the application depending on the various individual circumstances surrounding the international move of a minor player.*”

FIFA’s commitment to the development of **women’s football** is reflected in the Circular no. 1730¹⁸ dated 7 September 2020. FIFA asserts that “*opportunities in football exist for women and girls everywhere both on and off the pitch.*”

For these purposes, FIFA has created diverse programmes to support its MAs with the development of the women’s football.

Throughout the last quarter, FIFA has issued **several reports** :

- *Players’ Status Department Report 2019-2020: The FIFA Players’ Status Department Report 2019-2020*¹⁹ - published for the first time - gives an overview of the department’s activities during the period 1 July 2019 to 30 June 2020;
- *Intermediaries in International Transfers 2020 Report*: This report²⁰ details the involvement of intermediaries during 2020 in international transfers completed in FIFA’s International TMS;
- *Disciplinary & Ethics Report 2019/2020*: The Disciplinary

and Ethics Report²¹ - published for the first time - contains an analysis of the work carried out by the Disciplinary Committee, Appeal Committee and Ethics Committee;

- *Anti-Doping Report 2019/2020*: Also published for the first time, the *Anti-Doping Report*²² reflects the anti-doping measures adopted during the 2019-2020 season, including the statistics of the doping tests undertaken at FIFA competitions and their results;
- *International Transfer Market Snapshot June-October 2020*²³: For the first time, FIFA provides an analysis of players transfer activity of global transfers (involving both male and female players) immediately after the conclusion of the international transfer window.
- *FIFA Vision for the period 2020-2023*: On 26 February 2020, FIFA released Circular no. 1710²⁴ whereby FIFA made public its goals “*to pursue the objective of making football truly global*”. Similarly, FIFA intends to modernise the football world and make it increasingly inclusive.
- *Integrity*: One of FIFA’s statutory objectives is to promote integrity. In this regard, on 16 January 2020, FIFA announced²⁵ the development of an “*Integrity Officer Kit*” to support the implementation of preventive measures and initiatives at both the regional and national levels.

¹² Available at resources.fifa.com

¹³ Child safeguarding programme and toolkit for MAs to prevent any risk of harm to children in football.

¹⁴ Available at resources.fifa.com

¹⁵ The modern RSTP arises from the agreement reached in 2001 by FIFA, together with UEFA, with the European Commission.

¹⁶ By means of the Circular no. 1734 (available at resources.fifa.com).

¹⁷ The Guide is available in the FIFA website at img.fifa.com

¹⁸ Available at resources.fifa.com

¹⁹ Available at img.fifa.com

²⁰ Available at resources.fifa.com

²¹ Available at resources.fifa.com

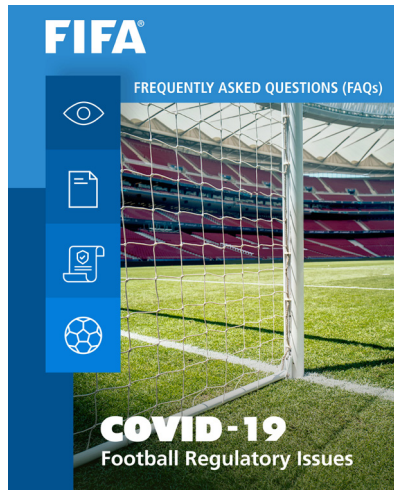
²² Available at img.fifa.com

²³ Available at resources.fifa.com

²⁴ Available at resources.fifa.com

²⁵ By the Circular no. 1703 (available at resources.fifa.com).

FIFA clarified the limited scope of the FIFA COVID-19 Guidelines and FIFA COVID-19 FAQ



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→ **COVID-19 - Force majeure - FIFA - FIFA Regulations - FIFA RSTP - FIFA Dispute Resolution Chamber (FIFA DRC) - Overdue payables - Salaries - Breach of contract**

FIFA DRC, 20 July 2020, no. 20-00758, Player Nikolay Bodurov, Bulgaria / Club Esteghlal, IR Iran¹

In one of the first, if not the first, motivated FIFA Dispute Resolution Chamber (DRC) decisions in the COVID-19 era, the DRC clarified that the FIFA COVID-19 Guidelines (ed. April 2020) and the FIFA COVID-19 FAQ (ed. June 2020) (i) did not declare that the COVID-19 outbreak was a force majeure situation in any specific country or territory per se or that the concept of force majeure impacted any specific employment or transfer agreement and (ii) are only applicable to "unilateral variations to existing employment agreements." Therefore, except where a contract's termination occurred following a unilateral variation made due to COVID-19, the FIFA COVID-19 documents do not apply to assess unilateral terminations of existing employment agreements.

Brief facts

The Club and the Player signed a contract, valid from 30 January to 31 May 2020, whereby the Player was entitled to an advance payment of a month's salary due by 10 February 2020 and four monthly salaries, starting from 5 March 2020. In addition, the Club committed to pay a fee to the Player's agent. The Club never paid any money to the Player.

On 14 March 2020, the Club announced that "training will be closed until further notice."

On the same day, the Player put the Club in default in respect of the advance payment and one salary (i.e. the *pro-rata* value of two salaries) and set a 15-day deadline

for payment under Article 14bis of the FIFA Regulations on the Status and Transfer of Players (RSTP). Besides, the Player referred to the COVID-19 outbreak and the Club's announcement to justify that he could not return to the Islamic Republic of Iran for the time being.

In its reply, the Club requested an unspecified extension to pay the outstanding amounts, which the Player rejected forthwith.

On 30 March 2020, having received no payment or further communication from the Club, the Player terminated the contract unilaterally based on Article 14bis RSTP.

Later that day, the Player was "officially invited to attend in Disciplinary Meeting with the Club

Officials on Saturday 11 April via Skype to explain about leaving the country without the Club permission after technical staff asked for compulsory Quarantine and forced the players to stay home for avoiding the Corona Virus."

On the same day, the Player responded to the Club, *inter alia*, that "it is a general principle of labor law that an employer is not empowered to exercise any disciplinary control, let alone impose monetary sanctions, on a person that is no longer employed by it (cf. [CAS 2009/A/1974](#) at para. 42; DRC No. 05170372 at para. II.25; DRC No. 04142953 at para. II.28)" and that the Club's grievance was inadmissible for being raised retroactively and contrary to good faith.

The FIFA Decision

The essential findings from the FIFA decision are:

- In light of the worldwide COVID-19 pandemic, FIFA issued a set of guidelines, the COVID-19 Guidelines, which were aimed at providing appropriate guidance and recommendations to member associations and their stakeholders, to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonized in the common interest and the FIFA COVID-19 FAQ, which provide clarification about the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters;²

² Cf. FIFA DRC, 20 July 2020, no. 20-00758, Player Nikolay Bodurov, Bulgaria / Club Esteghlal, IR Iran, par. II.14.

¹ resources.fifa.com

- ➡ FIFA did not declare in these documents that the COVID-19 outbreak was a *force majeure* situation in any specific country or territory *per se* or that the concept of *force majeure* impacted any specific employment or transfer agreement. A party invoking *force majeure* must establish it under the applicable law/rules and the resulting consequences. The assessment shall be made on a case-by-case basis, taking into account all the relevant circumstances;³
- ➡ The FIFA COVID-19 documents are only applicable to “*unilateral variations to existing employment agreements.*” Therefore, except where a contract’s termination occurred following a unilateral variation made due to COVID-19, the FIFA COVID-19 documents do not apply to assess unilateral terminations of existing employment agreements;⁴
- ➡ Specifically, the DRC stated that the COVID-19 outbreak should not be used as an opportunity to escape from debts that had arisen from contractually agreed payments that had already fallen due at an earlier stage;⁵
- ➡ The Club tried to rebut the existence of a just cause for the Player to terminate the contract invoking two reasons: (i) the player had been absent without authorization since 6 March 2020, and (ii) there was a *force majeure* situation;
- ➡ The DRC quickly moved to reject the Club’s objections by stating: (i) the first time the Club raised the issue of the Player’s absence was in reaction to the

termination notice. Hence, the Club’s argument could not be sustained since it appears to be a mere attempt to retroactively (*ex post facto*) save the situation. Moreover, “on 6 March 2020, the day on which the player allegedly left Iran, the club was already in breach of its financial obligations and could therefore not expect for the player to continue executing the contract” (*exceptio non adimpleti contractus*);⁶ and (ii) the Club did not submit any documentary evidence or allegations that the situation it faced was to be considered *force majeure*. As a result, no situation of *force majeure* could be established;⁷

- ➡ Finally, “As regards the part of the claim related to the agent fees submitted by the Claimant, the DRC pointed out that it does not qualify as an employment-related dispute. Indeed, it appears clear that the respective amount was to be paid by the Respondent to the agent for services provided by the latter in relation to the signing of the respective employment contract. As a result, the Chamber concluded that this part of the claim is to be considered inadmissible.”⁸

This matter is now pending before the Court of Arbitration for Sport.⁹

⁶ *Ibid.* par. II.24-25.

⁷ *Ibid.* par. II.26.

⁸ *Ibid.* par. II.32.

⁹ CAS 2020/A/7500 Esteghlal FC v. Nikolay Bodurov.

³ *Ibid.* par. II.15-16.

⁴ *Ibid.* par. II.17.

⁵ *Ibid.* par. II.20.

Sporting succession of Football clubs in Ukraine: the FC Arsenal-Kyiv case



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→ **FIFA – Bankruptcy – FIFA Regulations – FIFA Disciplinary Committee – Court of Arbitration for Sport (CAS) – FIFA Dispute Resolution Chamber (FIFA DRC) – Insolvency – Overdue payables – Sport entities**

FIFA Disciplinary Committee, decision no. 140063 PST, 25 September 2019

The history of an original debtor is a part of its identity. Hence, even if Article 15 par. 4 of the FIFA FDC does not explicitly mentioned it as a criterion for assessing whether an entity is to be considered as the sporting successor of another entity, by assuming the history of the Original Debtor, a new club should be considered as a sporting successor if it assumes the history of the previous club as its own

In May 2013, the FIFA Dispute Resolution Chamber decided that the club *FC Arsenal Kyiv* (Original Debtor) had to pay an amount of money to *Dominion Hotspur FC* (Creditor).

Since the Original Debtor did not comply with the FIFA DRC's requirements, the FIFA Disciplinary Committee (FIFA DC) started proceedings against the Original Debtor for failing to comply with Article 64 of the FIFA Disciplinary Code, 2017 edition (FDC).

The Football Federation of Ukraine (FFU) informed the FIFA DC that the Original Debtor was no longer affiliated with the federation (since early 2014). The Creditor informed FIFA that the Original Debtor was still operational and participating in the 'Kyiv District' regional league under the name of *Arsenal-Kyiv*. Following this information, the FFU was requested to clarify the situation and any possible connection between the Original Debtor and *Arsenal-Kyiv* (New Club), to which the Creditor had referred to.

The FFU responded that the New Club was registered on 28 February 2014 and it did not have anything in common with the Original Debtor. It further added that the New Club is neither the legal nor the sporting successor of the Original Debtor due to several reasons, which are summarised below:

- The New Club began its activity in the lowest division of Ukrainian football in 2014-2015. Afterwards, it obtained the FFU certification and became a professional club;
- As a result, it took part in Ukraine's second football league during the 2015-2016 season and was immediately promoted on sporting merits to the first football league for the season 2016-2017. Subsequently, it gained the right to participate in the Ukrainian Premier League in the 2018-2019 season;
- The New Club's shield is different from the one the Original Debtor had, and none

of the players registered with the Original Debtor are playing with the New Club;

- The New Club went through all the necessary competitions until it reached the Ukrainian Premier League;
- No succession agreement was signed between the New Club and the Original Debtor.

Following the FFU's response, on 5 September 2019, the FIFA DC initiated new proceedings against the New Club for potential non-compliance with the FIFA DRC's decision and requested the position of the New Club regarding the allegations made by the Creditor.

The New Club objected to a link to the Original Creditor and denied any potential sporting succession. The new Club's arguments were as follows:

- The New Club was registered with the old popular name on

28 February 2014. In the same year, it became a collective member of the FFU;

- ➡ The New Club is not the sporting successor of the Original Debtor since the New Club did not replace the Original Debtor's final standings and did not use the Original Debtor's football achievements. Furthermore, while the Original Debtor had been competing in the top football division between 2007 and 2013, the New Club only received a professional club status in 2015 and participated, based on sporting merits, in the Ukrainian Premier League for the first time in the season 2018-2019;
- ➡ The New Club does not own a stadium that meets the requirements of the relevant regulations to host Ukrainian Premier League matches. Thus, during the 2018-2019 season, it had borrowed the Original Debtor's stadium;
- ➡ The New Club has different owners, players, and logo from the ones of the Original Debtor.

While deducing the case, the FIFA DC referred to Articles 15 par. 4 of the FDC (2019 ed.) and also to CAS jurisprudence¹ on the matters of sporting succession and legal interpretation of the aforementioned Article 15 par. 4, which states that:

"The sporting successor of a non-compliant party shall also be considered a non-compliant party and thus subject to the obligations under this provision. Criteria to assess whether an entity

is to be considered as the sporting successor of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned."

Finally, the Deputy Chairman of the FIFA DC observed² that:

"[...] the name used by the New Club as well as the colours and the stadium are identical to those of the Original Debtor. Moreover, the Deputy Chairman stresses that the New Club's shield shows the number "1925", which corresponds to the year of foundation of the Original Debtor. In the opinion of the Deputy Chairman, and as it has been confirmed by the FFU, this implies that the New Club has assumed the Original Debtor's history as its own. Furthermore, the Deputy Chairman notes that the New Club chose an identical name as that from the Original Debtor to attract fans, meaning, therefore, that the New Club's fans are the same fans that the Original Debtor had.

In light of all the above, the Deputy Chairman recalls that in line with the jurisprudence of CAS and art. 15 par. 4 of the 2019 FDC, the identity of a club is constituted by elements such as its name, colours, logo, fans, history, players, stadium, etc., regardless of the legal entity operating it. As a result, the Deputy Chairman deems that, on the basis of the information and documentation at hand, there is no other alternative but to conclude that the New Club, FC Arsenal-Kyiv, appears to be the sporting successor of the Original Debtor, FC Arsenal Kyiv."

Findings

1. The list of criteria mentioned in Article 15 par. 4 of the FDC is not exhaustive (it says "among others").
2. The history of an original debtor is a part of its identity. Hence, even if Article 15 par. 4 of the FIFA FDC does not explicitly mention it as a criterion for assessing whether an entity is to be considered as the sporting successor of another entity, by assuming the history of the original debtor, a new club should be considered as a sporting successor if it assumes the history of the previous club as its own. Vice versa, a new club would not assume the name and the history of a defunct club, if it has not first assumed the debts of the previous entity.

¹ Cf. [CAS 2007/A/1355 FC Politehnica Timisoara SA v. FIFA & Romanian Football Federation \(RFF\) & Politehnica Stintia 1921 Timisoara Invest SA](#); TAS 2011/A/2614 and [CAS 2011/A/2646 Club Rangers de Talca v. FIFA](#); TAS 2012/A/2778; CAS 2013/A/3425.

² Cf. par. 22-23 of the Decision.

The Curious Cases of Chennai City FC



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→ COVID- 19 - Force majeure - Player contract - Breach of contract - Just cause - Salaries - Overdue payables - Compensation - Mitigation - FIFA Dispute Resolution Chamber (DRC) - FIFA Regulations - Swiss Law

FIFA DRC, 20 July 2020, nos 20-00728, 20-00729 & 20-00730

On 20 July 2020, the FIFA Dispute Resolution Chamber (DRC) rendered three inter-connected decisions against the Indian club Chennai City FC (Club) in favor of several Spanish footballers - Sandro RODRÍGUEZ FELIPE, Adolfo Miranda ARAUJO and Roberto ESLAVA SUÁREZ (Players) - whereby it ordered the Club to pay the Players' outstanding salaries and compensation for unilaterally terminating their employment contracts without just cause.

Introduction

What makes these cases so interesting is that each of the Players' employment contracts contained a very detailed *force majeure* clause, providing that:

"17. Subject to the other provisions of this Agreement, the failure by a party to fulfil any of its obligations under this Agreement shall not be considered to be a breach of or a default under this Agreement in so far as the inability arises from an event of Force majeure, provided that the party affected by that event has taken reasonable precautions, has duly communicated the occurrence of the event to the other party, and has taken due care and attempted to mitigate the consequences of such event, all with the objective of carrying out the terms of this Agreement without delay. For the purpose of this Agreement, "FORCE MAJEURE" means an event or circumstance which is beyond the reasonable control of a party and which makes a party's

performance of its obligations impossible and includes but is not limited to wars, acts of terrorism, civil unrest, hostilities, public disorder, epidemics, fires, Acts of God, Court Orders or Governmental restrictions and actions and decisions of regulatory and sports authorities."

Unlike a lot of other *force majeure* clauses included in international sporting contracts, these clauses actually foresaw both "*epidemics*" and "*government restrictions*" as specified events beyond the reasonable control of a party, thus justifying their avoidance of liability in the circumstances.

At this point, it may be surprising that the FIFA DRC found against the Club, despite the presence of such detailed clauses in the Players' employment contracts, but, as will be demonstrated below, the FIFA DRC was correct in reaching its conclusion due to the conduct of the Club in light of the *force majeure* clauses, as well as the COVID-19 Football Regulatory

Issues¹ and FAQs² published by FIFA in April and June 2020.

In their respective claims lodged before the FIFA DRC, the Players sought to recover their outstanding salaries, as well as compensation for the premature termination of their employment contracts without just cause. The Players alleged that, on 29 March 2020, the Club, without prior notice, decided to unilaterally terminate their contracts, pursuant to the *force majeure* clause, in view of the COVID-19 global pandemic. All three Players responded to the Club on 31 March 2020, thereby rejecting the *force majeure* that it had invoked and offered a 10-day deadline to "*find an amicable solution*" regarding the issue of termination as well as their outstanding salaries.

The Club, in its reply to the Players, rejected their offer to find an amicable solution, as it simply confirmed their termination and advised the Players that their outstanding salaries would

¹ [FIFA, COVID-19 Football Regulatory Issues, 7 April 2020.](#)

² [FIFA, COVID-19 Football Regulatory Issues FAQs, 11 June 2020.](#)

be paid by no later than the end of April 2020.

The Players further alleged that the Club invoked the *force majeure* clause in order to terminate the contracts of all its foreign players, against the principle of equal treatment, in order to take advantage of the situation by restructuring its squad. Ultimately, the Players held that actions of the Club were contrary to the FIFA COVID-19 Regulatory Issues and FAQs.

In its reply to the claim, the Club denied that FIFA was competent to deal with the matter, alleging that the contract between itself and the Players conferred jurisdiction on the Players Status Committee of the All Indian Football Federation (AIFF). Regarding the merits of the dispute, the Club acknowledged that it was indebted to the Players for their outstanding salaries but rejected the claims regarding the unilateral termination of their employment contracts, on the basis that the Indian League was suspended on 15 March 2020, and that it was experiencing financial difficulties due to service problems with local banks, leaving it with no other option but to terminate the contracts based on the *force majeure* clauses contained therein.

Considerations of the DRC

The DRC judged itself competent to deal with the matter by virtue of Article 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players (RSTP), due to the Club's failure to provide any evidence proving that the Players Status Committee of the AIFF was compliant with the criteria established in FIFA Circular no. 1010 of 20 December 2005.³

³ FIFA Circular no. 1010, 20 December 2005

The main issue which needed to be resolved by the DRC, in this case, was whether or not the Players' employment contracts had been terminated with or without just cause, as well as the resulting consequences of the same. In consideration thereof, the DRC proceeded to highlight that, following the outbreak of the pandemic, FIFA had issued a set of guidelines (COVID-19 Football Regulatory Issues) which aimed to provide advice and recommendations for the purpose of helping member associations and stakeholders mitigate the negative consequences of the pandemic, as well as ensure that any response was harmonized in the common interest. This was subsequently followed by the COVID-19 FAQs, which provided further clarification on relevant questions in connection with the regulatory consequences of the virus.

Thereafter, the DRC noted that the unilateral termination of the Players' contracts was based on the Club's assumption that the outbreak of the COVID-19 pandemic was to be considered a situation of *force majeure*, thereby leaving it with no other option but to terminate the contracts. However, in analyzing the concept of a *force majeure* situation, the DRC noted, based on the documents issued by FIFA, that "*it is for a party invoking force majeure to establish the existence of said event under the applicable law/rules as well as the consequences that derive in connection thereto.*" Applying this reasoning to the case at hand, the DRC noted that the Club had failed to submit any form of documentary evidence which supported the existence of a *force majeure* situation.

This was even more relevant in light of the wording of the *force majeure* clause relied upon by the Club, as it stipulated that the party

in default must take *reasonable precautions* and *duly communicate the occurrence of the event*, as well as attempt to mitigate the consequences thereof. Again, the DRC acknowledged that no evidence had been presented, which proved that the Club had taken such precautions or attempted to mitigate the damages for the Players. In this context, the conduct of the Club was highly relevant, as it had unilaterally decided to terminate the Players' contracts immediately, without exploring less drastic measures and without any prior notice having been given to the Players. In this regard, the Chamber highlighted that (i) the AIFF season was only suspended and not canceled and (ii) that, in any event, the Players' contracts were due to run for an additional season before the fixed term was due to expire, and thus there was nothing to suggest that the Players' contracts had become permanently impossible to perform.

“ Only a breach or misconduct of a certain severity justifies the termination of a contract, which can only ever be the ultima ratio ”

Returning to the COVID-19 documents issued by FIFA, the DRC wished to emphasize, as per the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Football Regulatory Issues, that "*except where a termination of a contract occurred following a unilateral variation made as a result of COVID-19, said guidelines do not apply to assess unilateral terminations of existing employment agreements.*"⁴ Therefore, these documents were held not to be applicable in the

⁴ FIFA DRC, 20 July 2020, nos 20-00728, 20-00729 & 20-00730

present case, as none of the Players agreed to a variation before the termination was affected. Accordingly, this dispute had to be settled in line with the FIFA Regulations and jurisprudence.

In this respect, it was recalled that only a breach or misconduct of a certain severity justifies the termination of a contract, which can only ever be the *ultima ratio*. Thus, if more lenient measures can be taken in order to ensure the fulfillment of the parties' contractual obligations, then such measures must be taken. With regard to the facts of this case, it was accepted that the Club unilaterally terminated the Players' contracts on 29 March 2020 without any prior notice or attempt to find an amicable solution, as per the offer made by the Players on 31 March 2020. In light of the above, the DRC concluded that the Club had no right to unilaterally terminate its employment relationship with the Players, and thus the termination effected by it on 29 March 2020 was without just cause.

Regarding the Players' outstanding salaries from December 2019 until March 2020, the DRC was unanimous in its opinion that the submissions offered by the Club, *i.e.* service restrictions at the local banks, could not justify the non-fulfillment of its obligations, especially considering that a number of installments were due before the pandemic broke out. Accordingly, it was concluded that the Club was not entitled to use the COVID-19 outbreak as an opportunity/excuse to escape from its debts, which had validly fallen due before the outbreak.

Regarding compensation, the DRC ordered the Club to pay the Players their outstanding salaries, which were due at the time of termination, together with the

residual value of their employment contract as damages in terms of Article 17(1) of the FIFA RSTP and interest at the rate of 5% *per annum*. All further requests for compensation were rejected.

Analysis

Firstly, it is necessary to note that the COVID-19 Football Regulatory Issues published by FIFA was only intended to provide general (non-binding) interpretative guidelines to the RSTP. FIFA is thus encouraging clubs and their players/coaches to work together to find appropriate collective agreements on a club or league basis [...] for any period where the competition is suspended due to the COVID-19 outbreak. Accordingly, unilateral decisions to vary terms and conditions of contracts will only be recognized by the DRC or Players' Status Committee (PSC), where they are made in good faith, are reasonable⁵ and proportionate.

Furthermore, unilateral decisions, consistent with national laws or accepted by collective bargaining structures, will only be recognized where: (i) clubs and employees cannot reach an agreement, and (ii) national law does not address the situation or collective agreements with a players' union are not an option or not applicable. Thus, it is not impossible for FIFA to recognize the validity of unilateral terminations based on *force majeure*, however, there is only a very narrow corridor which

parties must pass through for the same to be permissible.

The above paragraphs serve to highlight that FIFA has made the express decision not to dictate how parties should proceed to arrange their employment affairs in view of the COVID-19 pandemic. Rather, FIFA can be seen as encouraging parties to try and find some common ground regarding suitable employment conditions while their relevant league competition is suspended and, only thereafter, will FIFA recognize unilateral decisions.

” Clubs must ensure that they do not owe players any overdue payables when seeking to invoke a unilateral termination based on force majeure “

It should thus be unsurprising that the DRC refused to recognize a unilateral termination invoked by the Club, despite the presence of detailed *force majeure* clauses, as the players' offer to enter good negotiations in order to find a solution was refused. It would have been contradictory for FIFA, on the one hand, to encourage parties' cooperation in finding mutually agreeable solutions and, on the other, confirm a termination that has been imposed by one party without attempting to negotiate a solution with the other party.

It is therefore suggested that, even if clubs have included *force majeure* clauses in their employment contracts with their coaches and players, it does not automatically entitle them to terminate these agreements unilaterally on the basis of the same. On the contrary, clubs seeking to rely on *force majeure* clauses referring to COVID-19 must: (i) specifically

⁵ When assessing whether a decision is reasonable, the DRC or the PSC may consider, without limitation:

- (i) Whether the club had attempted to reach a mutual agreement with its employee(s);
- (ii) The economic situation of the club;
- (iii) The proportionality of any contract amendment;
- (iv) The net income of the employee after contract amendment;
- (v) Whether the decision is applied to the entire squad or only specific employee(s).

define the types of events which, in their opinion, would lead to a situation of *force majeure* and (ii) be able to prove, before FIFA, the existence of the said events which have created the *force majeure*, as well as the consequences deriving therefrom.

Furthermore, clubs must ensure that they do not owe players any overdue payables when seeking to invoke a unilateral termination based on *force majeure*, as they risk giving the impression that they have not attempted to negotiate a solution and are simply trying to abuse the power that they have. As mentioned above, the situation surrounding the COVID pandemic does not relieve a club from its contractual obligations, especially where those obligations have validly fallen due prior to the outbreak of the virus. Hypothetically, if FIFA were to accept the “*financial difficulty due to COVID-19*” argument, it would inevitably open the door to clubs seeking an excuse not to pay their players or forcing the players to terminate their contracts.

However, even where the presence of a *force majeure* clause has been established, and the existence of a situation of *force majeure* can be proved before FIFA, a club must nonetheless conduct itself in a manner which is consistent with its agreements. For example, if a contract specifies a notice period, then that notice period must adhered to. Similarly, with regard to clauses which place an obligation on the parties to negotiate an agreeable solution, any failure to do so will likely preclude a club from relying upon such clause when seeking just cause to terminate.

One final note regarding *force majeure* under Swiss Law: if there is no *force majeure* clause provided for in an employment contract,

the legal consequences - in terms of Swiss Law - will be dependent on whether the impossibility of performance exists only for a limited period of time. In this scenario, the default provisions of Articles 107 to 109 of the Swiss Code of Obligations become applicable. These provisions accordingly provide that, where a party is in default, the other party may set an appropriate time limit for the performance to take place. Failing which, the other party may withdraw from the contract. Where a party withdraws, any payment or other performance already made must be returned; however, no compensation is required where a party is not at fault. This will usually be the case where a party was unable to fulfill the contract due to COVID-19.

However, if performance of the terms of the contract become permanently impossible, Article 119 of the Swiss Code of Obligations provides that the parties will be released from their respective obligations, which have not yet been fulfilled, and they must accordingly return what they have already received from the other. These are, however, not mandatory rules, as parties are free to negotiate and provide their own rules, which will accordingly prevail over the legal provisions of the Swiss Code of Obligations.

FIFA DRC decision to compensate *Zamalek* for *KAHRABA*'s termination of the contract without just cause



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→ **Player contract - Breach of contract - Just cause - Contractual stability - FIFA Dispute Resolution Chamber (FIFA DRC) - FIFA Regulations - Egyptian Football Association (EFA)**

FIFA DRC, 13 August 2020, no. 20-00051, Kahraba

Brief facts

The Player known as *KAHRABA* (picture) concluded a contract with *Zamalek* for a period of four seasons, ending at the end of the 2018-2019 season. The Player was paid under his original contract EGP 3 million (approx. EUR 160,000) per season. Before being loaned to *Al-Ittihad Jeddah*, Saudi Arabia in season 2017-2018 in exchange of USD 1.5 million (approx. EUR 1,24 million), the Player signed a new contract with *Zamalek* to extend his contract until the end of 2021-2022 season for EGP 8 million (approx. 415,000) per season.

After his loan came to an end, the Player returned to *Zamalek*. However, at the end of 2018-2019 season, the Player did not play the remaining three matches with *Zamalek* in the league championship after resumption of the competition.

Afterwards, the Player unilaterally terminated his employment contract with *Zamalek*, claiming that the contract had not been registered. Thereafter, the Player traveled to Portugal and signed a two-season contract with Portuguese club *CD Aves* in July 2019, until June 2021.

The Portuguese club asked FIFA to issue a temporary International Transfer Certificate (ITC) to the Player, after *Zamalek* refused to send the Player's ITC from the Egyptian Football Federation (EFA), based on the Player's contract extension with the club until 2022.

Later, the Player terminated his contract with the Portuguese club by mutual consent, after he paid the value of the penalty clause in his contract, amounting to USD 450,000 (approx. EUR 372,000), which is equivalent to the amount that he was due to receive from *Al-Ahly SC*, by signing with it in January 2020, with a four and a half-season contract.

Zamalek decided to file a claim against the Player, CD Aves and Al-Ahly before FIFA Dispute Resolution Chamber (FIFA DRC)

Zamalek claimed that the Player terminated the second contract (extended contract) unilaterally without just cause. Moreover, it claimed that the second contract was registered by EFA.

Additionally, by way of evidence, *Zamalek* filed an interview conducted with the Player and broadcasted *via* the media in Egypt. The claimant argued that, in such interview, the Player admitted he had "extended" his contract with *Zamalek* "for an additional four years".

In continuation, the claimant held that *CD Aves* and *Al Ahly* should be considered jointly liable for the payment of compensation for breach of contract. In particular, the claimant was of the opinion that a bridge transfer took place. In support of these allegations, the claimant filed two interviews given by the Player to media outlets in 2018 and 2019. The claimant maintained that, in such interviews, the Player admitted to having been involved with *Al Ahly*.

Player's response

The Player, for his part, deemed that the second contract was in fact executed on 14 July 2016, and not on 28 August 2017. While admitting he had signed a blank document, allegedly due to the pressure exercised on him by claimant in

the context of his loan to *Al-Ittihad*, the Player argued that the claimant later filled out the second contract with stipulations different from those he had primarily agreed to, namely: a one-year contractual extension and a salary raise, instead of an extension until 2022 and the same remuneration.

The Player further deemed that the second contract was not properly registered with the EFA, and thus requested that *Zamalek's* claim be dismissed.

CD Aves response

The Portuguese club alleged that, due to the act of misrepresentation which took place in the execution and registration of the second contract, both contracts should be considered null and void. It further submitted it should not be held jointly liable, as it did not induce the Player to breach the contract. It finally requested the claim be rejected or, in the alternative, that the amount of compensation be substantially reduced.

Al-Ahly SC response

The Egyptian club submitted that it has no standing to be sued. In this sense, it argued that the claimant did not make any specific requests for relief against it, therefore violating the requirement of certainty and the principle of "*non ultra petita*", as well as its right to be heard.

Furthermore, it held that it had no previous contact with the Player, as allegedly demonstrated by an interview given by *Al Ahly's* Marketing and Football Contracts Director. Accordingly, it requested the FIFA DRC to dismiss the claimant's claim.

FIFA DRC considerations

1. The FIFA DRC considered - first and foremost - that *Al-Ahly* had standing to be sued, since the claimant deemed *Al-Ahly* to have participated in the alleged breach of contract by way of a bridge transfer, and because the issue of whether or not the claim can be upheld pertains to the facts and substance of the case. However, the FIFA DRC dismissed *Zamalek's* claim with regards to the existence of a bridge transfer between *Al-Ahly*, *Zamalek* and the Player, as it held that the claimant had failed to discharge both the burden and standard of proof.

2. With regards to the validity of the second contract (extended contract), the FIFA DRC examined the evidence, including all copies of the second contract - filed by the EFA, the claimant and the respondents. The FIFA DRC observed that the contract had the same content, with stamps and signatures with different placements. This, in the FIFA DRC's view, demonstrated that at least three copies of the same document were made, as it is customary in football, *i.e.* one copy for each party, and one copy for the association concerned. On the other side, the Player failed to provide enough evidence to support the allegation that he signed a blank document, and thus failed to sufficiently prove that the second contract had not been executed. Therefore, the FIFA DRC had no option but to agree with *Zamalek*.

3. Moreover, the FIFA DRC reminded the parties of its well-established jurisprudence according to which, the validity of a contract is not subject to the fulfillment of administrative

conditions.¹ It further confirmed that the parties' dispute, regarding the registration of the second contract, does not have an impact with regard to the legal consequences resulting from the execution and termination, of such agreement.

4. Therefore, the claimant and the Player were held to be bound by a valid employment contract, binding the parties thereto for five seasons, *i.e.* as from the season 2017-2018 until the end of the season 2021-2022. The FIFA DRC, thus, found that the Player had acted in breach of the second contract with the claimant without just cause.

5. Having established the above, the FIFA DRC also concluded that the Player had violated Article 18 par. 5 of FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), as he had contracted with different clubs for the same period, thus breaching contractual stability. This was furthermore held to have occurred during the protected period.

6. After finding that the Player had breached his contract without just cause, the FIFA DRC applied Article 17 par. 1 and 2 of FIFA RSTP, according to which the Player and

¹ "A legal distinction should be drawn between the "registration" and "economic rights" related to a player: the registration of a professional player with a club and the pertinent national federation serves the administrative purpose of licensing that player and certifying that solely a given club is entitled to field him during a given period; obviously, such registration is possible only if there is an employment contract between the club and the player. Then, a club holding an employment contract with a player may assign, with the indispensable player's consent, the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights may be defined as the "economic rights to the performance of the player" ("economic rights"); this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagement - the so-called "free agents" - may be hired by any club freely, with no economic rights involved." (CAS 2012/A/2902 *Cerro Porteño FC v. Locarno FC*, award of 16 July 2013)

his new club (*CD Aves*) are jointly and severally liable to compensate *Zamalek*.

7. The calculation of compensation took into account the remuneration under the old contract, as well as the new contract concluded with *CD Aves*. The FIFA DRC mitigated the amount that should be received by *Zamalek*. Moreover, the FIFA DRC took into consideration some other objective criteria, such as specificity of sport, the replacement value and loss of transfer fee.

Decision of the FIFA DRC

1. The claim of the claimant, *Zamalek*, is admissible;
2. The claim of the claimant is partially accepted;
3. The Player has to pay to the claimant the following amount: EGP 32,837,175 (approx. EUR 1.7 million) as compensation for breach of contract without just cause plus 5% interest *p.a.* on said amount as from 6 January 2020 until the date of effective payment;
4. *CD Aves* is jointly and severally liable for the payment of the aforementioned compensation;
5. Any further claims of the claimant are rejected.

Conclusion

The Player failed to bring sufficient evidence to support his position, and thus his defense was accordingly disregarded by the FIFA DRC. Having not been able to prove that the second contract was not registered, the FIFA DRC found that the termination committed by him was without

just cause. Subsequently, the club *CD Aves* and the Player found themselves in breach of the RSTP, as their conduct was held to be contrary to the provisions of Chapter IV, which provides for the maintenance of contractual stability between professionals and clubs. Therefore, the FIFA DRC decided to compensate *Zamalek* for the loss that the club suffered due to the breach of contract, but without imposing any sporting sanctions on *CD Aves* or the Player. The FIFA DRC further dismissed the claim brought against *Al-Ahly* for lack of evidence.

Evaluation

In our opinion, the amount of compensation awarded by the FIFA DRC was not proportionate to the severity of the breach committed by the Player and *CD Aves*. The actions of the Player and *CD Aves* were clearly contrary to the fundamental principles of the contractual stability principle and may also affect the integrity of competition.

As per the DRC practice, as well as established jurisprudence regarding this matter², the FIFA DRC should have imposed a minimum period of suspension in addition to the compensation, in order to create a deterrent penalty for any clubs wishing to signing an employment contract with any player that is still under a valid contract for more than six months, without acquiring the approval of his current club first in accordance with Article 18.3 of FIFA RSTP.

² FIFA DRC Decision dated 14 June 2019 (imposing sanction on both the player and the club) resources.fifa.com

On the Road to Compliance



By Achta Mahamat SALEH
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→ Court of Arbitration for Sport (CAS)
- COVID-19 - Argentine Football
Association (AFA) - Relegation -
National Regulations - FIFA Regulations

On 15 October 2020, the 3rd FIFA Compliance Summit was held by videoconference. On this occasion, the Confédération Africaine de Football (CAF) presented its latest compliance developments. The author wishes to use this article to better explain the issues and difficulties encountered by CAF, by sharing with all football stakeholders the genesis and path taken by CAF to take compliance to the next level.

CAF and Compliance: An Origin Story

CAF was founded on 8 February 1957 by its first four members, Egypt, Ethiopia, South Africa, and Sudan.

In 2018, the CAF Legal Affairs Division was established.

Indeed, it became more necessary than ever for CAF to equip itself with appropriate institutional tools given the challenges it was facing, not only in terms of governance but also in protecting its interests *vis-à-vis* third parties.

The primary mission of the new team set up and led by CAF's Legal Director, Ms Achta Mahamat SALEH, was to build the department from scratch and improve the legal tools that CAF had at its disposal. These improvements included all corresponding legal processes needed to defend CAF's interests.

Simultaneously, a new independent Compliance Division was also set up in March 2018. Its role was to provide advice and support on compliance-related affairs, in the first instance, to CAF team members and its various stakeholders (member associations, clubs, or football officials).

Subsequently, in November 2019, the Legal Affairs Division merged with the Compliance Division, creating a single Legal & Compliance, in line with the organization set up at FIFA.

Compliance Challenges within CAF - A Retrospective of the Actions Carried Out

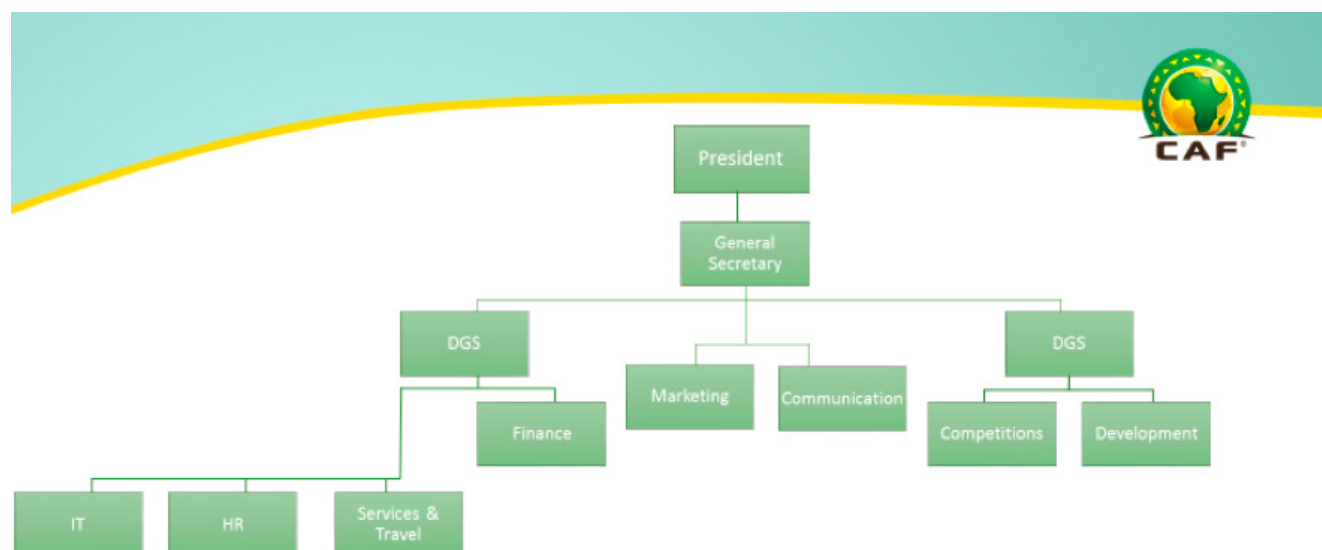
CAF's main goals are oriented around three pillars:

- To be the African sports institution of reference in matters of governance;
- To be recognized as the African sports institution most strongly committed to the fight against corruption and bad governance; and,
- To protect the integrity of football and its values.

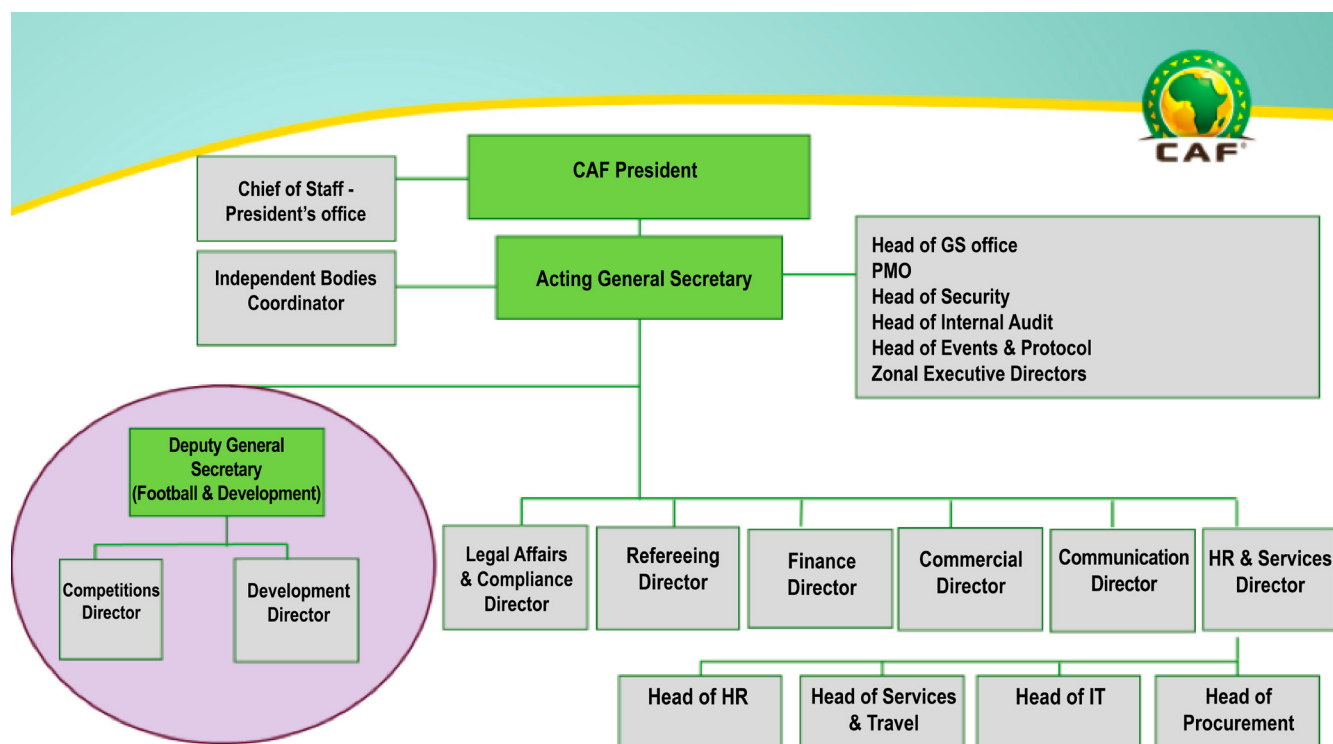
In this respect, CAF has had to focus on the following:

- To clarify the role of the CAF Compliance Division;

CAF 2017 Organizational Chart



CAF 2020 Organizational Chart



- ➡ To define and unify its field of action; and,
- ➡ To develop and codify a set of common standards.

In pursuit of these goals, the Legal & Compliance Division has undertaken the following actions.

1. A Charter was put in place defining the duties of CAF staff and the required compliance actions attaching to each role. The compliance actions are set out as follows:

- ➡ preventative actions that are to be undertaken:
 - when purchasing/providing goods or services or when signing a new commercial partnership; and,
 - so as to be aware of the influence of potential peddling and manipulation of matches/competitions (such as match-fixing).
- ➡ implementation of procedures such as:
 - KYC - know your customer;
 - risk assessment procedures (control of money transfers/ verification of relevant bank details and eventual international sanctions); and,
- ➡ continuous monitoring of financial transactions.
- ➡ investigative and warning actions with respect to the:
 - influence of peddling;
 - facilitation payments; and,
 - match/competition manipulation.

2. The Legal & Compliance Division

has also done significant work on the creation of a Compliance Handbook. To do so, FIFA supported the relevant CAF officials with its own resources and assistance. Accordingly, the following policies and measures were included in the aforementioned CAF Compliance Handbook:

- ➡ a CAF policy on gifts and hospitality;
- ➡ an anti-corruption policy;
- ➡ a conflict of interest disclosure policy;
- ➡ an enhanced data confidentiality policy;
- ➡ a whistle-blowing policy;
- ➡ a handling of complaints and investigations policy;
- ➡ a third-party policy: including contracts and due diligence investigations;
- ➡ measures for the mandatory compliance training of all CAF officials. These training workshops are to be attended by both CAF employees and the staff of its member associations; and,
- ➡ measures to manage integrity and compliance breaches.

It goes without saying that the road to implement these actions and changes has been arduous.

Furthermore, the Legal & Compliance Division has faced the following difficulties:

- ➡ inadequacy of resources/ workload: at the beginning, the Legal Division was composed of three people and a Legal Director, two of whom were assigned exclusively to disciplinary matters and one

to contractual issues. With the merger of the Compliance and Legal Divisions, the Legal Division found itself with a much broader field of action but without a change in staff numbers.

- ➡ legal compliance from scratch: in its first months, the Compliance Division prioritized financial compliance policies. Significant work has been done in this area, even leading to the creation of a dedicated Commercial and Legal Department within CAF. When the Legal Affairs Division merged with the Compliance Division, it had to start from scratch in order to develop a compliance program specific to CAF and to deploy and implement legal compliance policies.
- ➡ CAF bodies had to adapt to its new compliance policies: The Legal Division had to put in place a whole process to change CAF's mentality on compliance issues. An effort was made to familiarize CAF staff with compliance policies to improve their implementation and to ensure correct functioning.

FIFA Compliance Summit & Challenges for the Future

With everything that has already been put into place and being aware of the importance of the need for constant improvement of the compliance environment, CAF started working on a legal *corpus*.

During the October 2020 FIFA Compliance Summit, CAF undertook a compliance stocktake and also announced the upcoming release of the following regulations:

- The CAF Code of Conduct, which has been finalized and is in the process of ratification; and,
- The CAF Code of Ethics, which includes relevant amendments in other regulations, so as to standardize CAF codes and regulations.

Furthermore, with this new Code of Ethics, CAF will be equipped with a tool that will enable it to face the various challenges confronting African football and protect its integrity. Indeed, CAF will be able to punish offenses relating to personal rights such as discrimination or defamation, as well as the following offenses:

- abuse of position;
- misappropriation of funds;
- undue payments;
- match-fixing; and,
- falsification of relevant documents.

It is hoped that the Code of Conduct and the Code of Ethics will be operational sometime in 2021.

In conclusion, for the future, CAF is aiming:

- to intensify the sanctioning of pernicious behaviors while continuing to practice a policy of “*zero tolerance*” for any behavior that jeopardizes the integrity of the organization; and,
- to maintain its lead and remain at the forefront of Compliance and Governance issues on the African continent.

Beyond the African continent however, CAF wishes to be a force

for the proposal of best practices. CAF is aiming to show football stakeholders that there are other ways to manage these issues and hence inspire best practices amongst all.

— World in Review —
National News



Expiration of the Agency Agreement right before the Signature of a New Employment Contract



By Ariel RECK
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→ **Intermediaries - Agents - Intermediary fees - Time-limit - Player transfer - National courts**

City of Buenos Aires Commercial Court of Appeal, 16 October 2019, Chamber B Simonian, Alberto M / Yacob, Claudio A.

In a decision dated 16 October 2019, the Appeal Chamber of the City of Buenos Aires confirmed a first instance decision accepting a monetary claim filed by an agent against a player. Notwithstanding this, the amount requested by the agent was reduced.

Mr *SIMONIAN* sued Mr *YACOB* for outstanding commission related to his contract with Argentinean side *Racing Club de Avellaneda* (Racing) and his contract with English club *West Bromwich Albion FC* (WBA). The player argued that the commission in the *Racing* agreement was time-barred, and the *WBA* contract was signed after the expiration of the representation agreement.

The appeal chamber's decision rejected the argument brought by the defendant that the commission for the *Racing* contract was time-barred, on the basis that the applicable statute of limitation was a general one of 10 years (now it is five years).

It was also admitted that the agreement with *WBA* had been

signed five days after the expiration of the agency agreement between Mr *SIMONIAN* and Mr *YACOB*. However, the agent proved his involvement and the previous negotiations he had conducted with the club.

Nevertheless, the second instance decision reduced the compensation granted to the agent by the first instance decision by 50% because another agent concluded the final agreement and that final contract was better than the one negotiated by the claimant.



Football Federation Australia and the Australian Professional Football Clubs Association agree to the legal separation and independence of the A-League



By Peter PALEOLOGOS
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→ **Football Federation Australia FFA - Australian A-League - Clubs' Union - Professional Footballers Australia - Governance - Salary cap - COVID-19 - Multi-Club Ownership - Financial control**

The Australian Professional Football Clubs Association (APFCA) - set up to represent the A-League club owners - has finally received legal control of the management and operation of the A-League¹ from the Football Federation Australia (FFA). FFA Chief Executive James JOHNSON (picture) said "discussions over several months have now produced a resolution. The clubs will become the league's owner and operator, and the FFA will become the regulator of the Australian professional game."

Introduction

The legal separation was based on an FFA New Leagues Working Group (NLWG) report which was finalised in April 2019 and recommended an alternative model for how the professional football leagues in Australia should operate. It should be noted that the NLWG is comprised of representatives from each Member State Federation, the A-League clubs, Professional Footballers Australia (PFA), the Women's Football Council and the FFA Board.

The key-principles related to the legal separation of the A-League in the NLWG report included:

- ➔ The new entity will be responsible for the professional football leagues, including the A-League;
- ➔ The new entity will be autonomous and separate from the FFA; and,

- ➔ The new entity will offer the clubs greater responsibility and encouragement to invest in order to commercialise and grow the professional game as a part of and for the benefit of Australian football.²

The implementation of these key-principles through the transitioning of the operation of the A-League from the FFA to the APFCA, are aimed at making Australia consistent with most other worldwide football frameworks where the professional leagues (English Premier League, La Liga, Bundesliga, etc) operate as separate entities under the umbrella of their National Federation.

The A-League clubs will now take full control of the A-League

In early November 2020, the FFA and the A-League clubs had come

to an agreement over the future direction and operation of the A-League.

As several media outlets have pointed out "the APFCA will take control of the marketing and commercialisation of the A-League and will be able to lead the drive for outside investors and sponsors. They will also be responsible for drawing up the fixture and player contracting rules in conjunction with FFA."³

The unbundling of the A-League from the FFA's control will become operational at the start of the upcoming A-League season beginning in late December 2020.

FFA Chief Executive James JOHNSON said "discussions over several months have now produced a resolution. The clubs will become the league's owner and operator, and the FFA will become the regulator of the Australian professional game."⁴

The APFCA will most likely be set up as an independent company to run the A-League. Like major leagues in Europe, the APFCA will be responsible for negotiating future television broadcasting rights and sponsorship rights for the A-League competition.

Challenges of an Independent A-League

Although the APFCA has now obtained control of the A-League, there are two significant issues that must be addressed for the A-League to prosper. Firstly, clubs are facing massive financial pressure as a result of the coronavirus pandemic; therefore, the APFCA had to deal with the PFA (Australian player's union) in relation to the

¹ Australia's professional men's league.

² Football Federation Australia, 2 April 2019, 'New Leagues Working Group Report and Recommendations' www.a-league.com.au

³ Michael LYNCH, Sydney Morning Herald, 'FFA, A-League clubs reach agreement on separation' www.smh.com

⁴ Ibid.



player contracts framework as the *A-League* Collective Bargaining Agreement (CBA) has already expired. Secondly, a fresh capital injection into the *A-League* and its clubs is crucial in the short term. Several clubs are under severe financial pressure due to the coronavirus pandemic.

The CBA and *A-League* salary cap negotiations between the independent *A-League* and the PFA provided the first real test of the APFCA operated *A-League*.

Consequently, as the APFCA takes more formal control over the *A-League's* future, *"this has included assuming control over the negotiation with PFA of the CBA for the professional leagues. This change has seen the APFCA assume the role of 'employer representative' and negotiator on behalf of the clubs directly with PFA, who represent the player group on CBA matters. FFA has taken a more traditional 'regulator' role in the negotiations."*⁵ In essence, the APFCA is made up of an employer *A-League* clubs membership, which will give it the decision making power and influence that the clubs never had before, when the FFA was the operator of the *A-League*. This power has already been exercised by the reduction of the *A-League* salary cap amounts.

As in the recent CBA negotiations between the APFCA and the PFA, which have also been affected by funding downturns and the process towards an independent *A-League* which gives the APFCA proper bargaining and negotiation power, it was decided that *A-League* players face cuts of up to 30% on their salaries and the *A-League* salary cap has been reduced from AUD 3.2 million (approx. EUR 2

million) per club to AUD 2.1 million (approx. EUR 1,3) per club for the 2020-2021 *A-League* season.

The APFCA also has to deal with the financial plight of two *A-League* clubs, namely the *Central Coast Mariners* and the *Newcastle Jets*, as both are up for sale by their overseas-based owners (*Martin LEE* of Hong Kong and *Mike CHARLESWORTH* of England, respectively).

Several owners of the richer *A-League* clubs have been in preliminary discussions over the establishment of a central *A-League* club owners' hardship fund. This could be used as a safety net to rescue clubs like the *Newcastle Jets*, who may be in danger of financial collapse.

If no suitable new owners are found for both the *Central Coast Mariners* and the *Newcastle Jets*, then those club licences could end up being bought by the proposed trust funded by the richer club members of the APFCA. Prior to the *A-League's* independence vote, licences would traditionally revert to FFA's control when an owner was no longer able to fund the operations of a club or when FFA moved to strip an owner of their licence for legal, regulatory, participation or funding breaches. The APFCA fund *"would potentially serve that same purpose as a licence holder of last resort - or, as sources say has also been mooted, it could purchase licences from underperforming owners, nurse those clubs back to full health, and then on-sell the licence at a profit to a new owner."*⁶

The biggest risk of setting up a central fund is that FIFA, Asian Football Confederation (AFC) and FFA rules prohibit any person from controlling or influencing

more than one club in a league or competition for integrity reasons. The establishment of an arms-length fund or trust could provide a workaround, while the FFA constitution states that the FFA itself can purchase clubs as it has done in the past with *Newcastle Jets* and then sell the club to a new owner. However, as the APFCA is essentially a club owned entity, their central fund of holding an *A-League* club licence poses federative regulatory issues. Further, the *A-League* clubs are essentially franchises, and the *A-League* has no relegation or promotion, thus the APFCA will aim to protect the club owners' investments as the collapse of clubs hurt the value proposition and model. Only if the APFCA sets up a separate independent company/entity (with independent directors) that is not directly owned by the *A-League* clubs, would it be able to avoid regulatory multi-ownership and integrity hurdles.

Finally, by the APFCA taking on a greater financial burden if required to support the struggling *A-League* clubs, this may conflict in the future with how the *A-League* will be managed independently. Therefore, the participatory role of the FFA as a regulator may be a suitable protective mechanism to ensure the *A-League* remains truly independent from any one entity's overwhelming sphere of influence.

⁵ Lucas RADBOURNE, 11 September 2020, FTBL, 'FFA keeping distance from independent *A-League*, PFA negotiations', Retrieved from www.ftbl.com.au

⁶ Vince RUGARI, 9 August 9, 2020, Sydney Morning Herald, 'Takeover target: *A-League* owners fund could buy out battling clubs' www.smh.com.au



The URBSFA's decision not to grant *Excelsior Virton* a professional licence appears *prima facie* to be incompatible with Belgian competition law



By Grégory ERNES
Partner Altius - Co-founder Atfield

and Willem-Alexander DEVLIES
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→ Club Licencing - Financial control - Competition law - Royal Belgian Football Association (URBSFA) - Belgian Court of Arbitration for Sport (CBAS) - Provisional measures - Proportionality

On 20 November 2020, the Belgian Competition Authority (Authority) decided, in a dispute between the Royal Belgian Football Association (URBSFA) and the professional football club Excelsior Virton (Virton), that the URBSFA's decision not to grant Virton the necessary licence to compete in professional football appeared *prima facie* to be incompatible with competition law. As a result, the Authority imposed interim measures against the URBSFA.

The litigation began on 8 April 2020 when the URBSFA's Licensing Committee refused to grant a professional licence to *Virton*, which prevented the club from competing in the Belgian first and second divisions during the 2020-2021 football season. On 10 May 2020, this decision was upheld by the Belgian Court of Arbitration for Sport (BAS).

In short, both the URBSFA and the BAS considered that *Virton's* economic continuity ("*continuité*") could not be guaranteed for the 2020-2021 football season, in particular given that the club's bank accounts showed negative net working capital - not covered according to both the RBFA and the BAS - of more than EUR 3 million.

Virton, on the other hand, argued that the club's economic continuity was not endangered

and that negative net working capital was covered both by the issue of a comfort letter and by a commitment made by one of its sponsors. Fundamentally, the conditions that the URBSFA imposed for allowing the said guarantee and sponsorship deal were at the heart of the dispute, with the Authority ultimately considering it disproportionate.

According to the URBSFA's regulations, comfort letters can only be issued by a legal entity that demonstrates not only its solvency but also necessary liquidity. The same regulations do not consider future sponsorship payments if the particular sponsor is a "*related legal entity*" to the club. In the case at hand, the letter of comfort came from the President - a natural person of the club - whereas the concerned sponsor was a company belonging to the same group as the club owner.

A complaint on the merits and an application for interim measures were filed with the Authority. On 29 June 2020, the Authority considered *Virton's* application for interim measures as unfounded. The reasons for this decision were relatively contradictory. The Authority, whilst considering that "*it is not prima facie excluded that certain criteria set out in the Publication or their application may be disproportionate to the objectives that the URBSFA can legitimately pursue*", decided, without further analysis, that *Virton* had not *prima facie* demonstrated that the club would have satisfied the licensing conditions in the absence of these criteria.

On 23 September 2020, the Brussels Court of Appeal (Commercial Section) overturned the Authority's decision and ordered the latter to retry the case.

The Brussels Court of Appeal, after stressing that the Authority had found the general conditions for granting a licence to be - *prima facie* - disproportionate, decided - specifically regarding the sponsorship requirement - that other more flexible and proportionate solutions were available to the URBSFA to meet its legitimate objective of ensuring the proper functioning of the sport competition. In the Court of Appeal's view, to the extent that the rule was contrary to competition law and that, regarding this sponsorship, *Virton's* negative net working capital was well-covered and its economic continuity ensured, the Authority failed to draw the appropriate consequences.

On 20 November 2020, the Authority had no choice but to apply the legal principles contained in the Court of Appeal's decision and decided that the URBSFA had wrongfully withheld *Virton's* licence. In addition to the lack of consideration of sponsorship commitments by an entity related to the club, the Authority had also ruled out the prohibition on a natural person effectively guaranteeing the licence applicant's economic continuity.

The Authority subsequently ordered the URBSFA to offer *Virton* the option of re-entering Division 1B - the second division of Belgian professional football - in the 2021-2022 season. It is worth noting that, so far, *Virton* has forfeited all matches it would have normally played if it had stayed at a lower and non-professional football division.

This dispute is far from being settled, with *Virton* currently claiming substantial damages from the URBSFA (estimating its loss at EUR 15 million). Also, *Virton's* reinstatement in professional

football could lead to many other disputes between the URBSFA and other clubs. Finally, the Authority's decision is a massive blow to the URBSFA's licensing requirements, which are considered by many to be disproportionate. Without an overhaul of these licensing requirements, many other clubs may be tempted to follow *Virton's* example and seek relief before the Authority in the event that their licence is refused.



Building an Institution within Sports Arbitration: the first four years of the Brazilian National Dispute Resolution Chamber



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→ **Brazilian Football Confederation (CBF) – Arbitration – Arbitration clause – Football dispute – Domestic dispute – Sporting sanctions – Jurisdictional competence – National courts**

This paper outlines the first four years of activity of the Câmara Nacional de Resolução de Disputas (CNRD) – the national dispute resolution chamber of the Brazilian Football Confederation (CBF).

During this period, the CNRD has managed to achieve significant institutional maturity. It received more than 680 disputes between clubs, players, coaches or intermediaries within Brazilian football (almost 65% of which were derived from arbitration clauses), and its work has been constantly praised by several decisions of Brazil's ordinary courts. This article explores the path the CNRD has traced over the years, the main challenges it has faced, the choices it has made and the results it has obtained.

The CNRD's position in the structure of Brazilian organized football

In light of the CBF Statutes, the CNRD can be described as a judicial body independent of the CBF's administrative structure (Art. 111), with decision-making powers to resolve disputes between certain participants of the Brazilian organized football (Art. 119). These participants must comply with the CNRD's decision (Art. 23) and are subject to sporting sanctions if they fail to do so. The CBF regulates persons subject to the CNRD's jurisdiction, the types of

disputes that can be drawn to its attention, how its procedures must take place and what sanctions it can impose (Art. 120). These issues are defined in the CNRD Rules (Rules).

Article 2 of the Rules lists persons subject to the CNRD's jurisdiction: players, clubs, intermediaries, federations and coaches. These five categories are entitled to appoint members to the body.

In the CNRD's current format, each category appoints two members, and the ten members are distributed among four different divisions according to their expertise: one division dedicated to disputes involving intermediaries (the *Division on Working with Intermediaries*), one dedicated to disputes between clubs (the *Commercial Division*), one dedicated to employment-related

disputes (the *Labor Division*) and one dedicated to disputes related to non-compliance with the CBF's regulations or with the CNRD's decisions (the *Regulatory Division*). The meeting of these members has administrative attributions only, without any decision-making or revisional powers.²

The most attractive aspect of the CNRD is that non-compliance with its decisions can result in the CBF imposing sporting sanctions. This feature is inspired by FIFA's judicial bodies, such as the Dispute Resolution Chamber and the Players' Status Committee, whose decisions may give rise to sporting sanctions imposed by FIFA. Subjecting clubs, intermediaries

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² In the original format of the CNRD, which was in force from October 2016 to July 2020, each category indicated a member and a deputy member. The five members then formed the CNRD's Full Panel – its only body, which had both administrative attributions and decision-making powers.



or players to sporting sanctions (such as a registration ban or match suspension) makes dispute resolution by private associative bodies especially attractive to creditors of financial obligations since it tends to be a less time-consuming and more cost-effective alternative compared to legal disputes taken to judicial courts.

It is important to note that the CNRD succeeded a previous body, which intended to resolve disputes involving Brazilian football stakeholders, the now-defunct Litigation Resolution Committee (LRC). The LRC was created in 2002, in the wake of the regularization of football agents, with limited jurisdiction to hear disputes involving agents. Its jurisdiction was expanded in 2012 when the CBF admitted solidarity mechanism or training compensation claims at the national level to be ruled by the LRC.³

In addition to disputes involving intermediaries, solidarity mechanism and training compensation, the CNRD judges several other types of disputes, with emphasis on: (a) disputes between clubs for non-compliance with their financial obligations (in similar ways to Article 12bis of the FIFA Regulations on the Status and Transfer of Players (RSTP); (b) imposition of sanctions for non-compliance with the CBF's regulations on registration, transfer of players or working with intermediaries; (c) disputes relating to contractual stability; (d) employment-related disputes, provided that the parties agree to submit them to the CNRD;

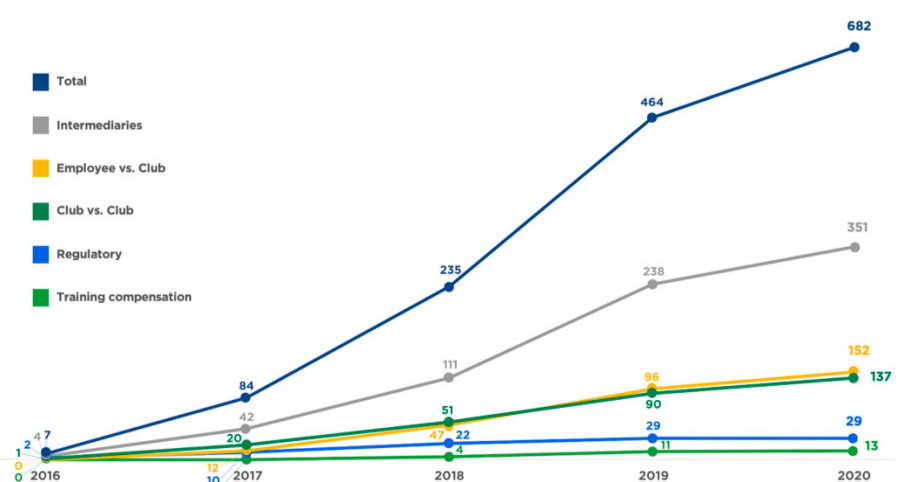
(e) imposition of sanctions for non-compliance with CAS decisions or decisions of international associations' judicial bodies; (f) disputes between clubs and local federations; and (g) disputes relating to registration acts performed by the CBF's Registration and Club Licensing Department.

The analysis of the main CNRD figures shows that most of its disputes are commercial in nature - particularly disputes involving intermediaries, which represent more than 50% of its cases. Disputes between clubs on overdue payables are also significant, as well as employment-related disputes:

Graph 1 - Evolution of the CNRD's cases by semester (until July 2020)



Graph 2 - Evolution of the CNRD's cases per year (until October 2020)



³ In its 14 years of existence, the LRC received approximately 80 cases, of which at least five were appealed to CAS. This number was quickly surpassed by the CNRD, which reached its 80th case in less than 14 months, totaling 682 cases in four years.



The growing acceptance of the CNRD by Brazilian football stakeholders, along with the task of promoting compliance with modern and constantly developing CBF's regulations, has prepared the CNRD for its main challenge: becoming a perennial institution, capable of fulfilling its mission and showing that the confidence placed in it by Brazilian football stakeholders is justified.

The first challenge: identifying obstacles and possibilities of the CNRD

Succeeding the LRC was not a simple task - after all, the LRC did not become a popular alternative for football bodies. Thus, it was necessary to identify the types of disputes submitted to it for analysis and understand which obstacles prevented the LRC from reaching greater potential.

The first step adopted was to digitize all procedures in the LRC's files (which were processed by physical means). After that, the CNRD studied all cases in detail, identifying the different types of disputes it handled, how many were appealed to CAS, and who were the primary stakeholders familiar to the LRC. Above all, the CNRD identified which procedures were closed and which ones were still pending - the latter would represent the CNRD's first opportunity to demonstrate its worth.⁴

However, moving ahead with the LRC's repertoire would not be enough. First, the CNRD received jurisdiction *ratione materiae* that had not been tested by the LRC. Second, the dispute resolution model for sports in Brazil is somewhat peculiar.

It was next essential to delimit the boundaries of the CNRD's activities, identifying its potential for decision-making without bumping into specific jurisdictions reserved to federal laws or even the Constitution. Three issues were especially important: (a) the specific jurisdiction reserved to the phenomenon known as "*sports justice*"; (b) the jurisdiction of ordinary courts, in particular labor courts; and (c) the legal framework of arbitration under Brazilian Law.

The specific jurisdiction of the "sports justice" system

"*Sports justice*" is a peculiar phenomenon in the Brazilian litigation framework. It is a jurisdictional function that the Constitution reserves to a system regulated by federal law and structured in parallel with entities that govern each sports modality. This system has priority to analyze disputes related to *sports competitions* and *sports discipline* (i.e. disciplinary offences).⁵ It means that, as a constitutional rule, matters of this nature cannot be referred to ordinary courts without being first assessed by the sports justice system, which has 60 days to issue a decision.

In concrete terms, each sports governing entity must take steps to establish and finance "*sports courts*" under its auspices. In the case of football, parallel to the CBF, the *Superior Tribunal de Justiça Desportiva* (Sports Justice Superior Court - STJD) is divided into two sections: a first formed by different committees of five members each, and a second formed by a group of nine members - appointed by entities

representing clubs, players, federations, referees and the national bar association. The STJD is responsible for competition-related matters and disciplinary offences committed at the national level.⁶

“ The main possibility for CNRD's scope of action are the commercial aspects of the football industry ”

This results in a first limitation to the CNRD's scope of action: the CNRD cannot analyze matters that deal with *competition* or *disciplinary offenses*, which must be handled by the sports justice system. This includes disputes over the interpretation of competitions' regulations, doping cases, fielding of ineligible players, inappropriate behavior on the part of supporters (such as object throwing, pitch invasion, etc.), match manipulation or corruption, among others.

However, there is a broader spectrum of disputes in the football environment besides competition and disciplinary offenses. Clubs, players or members of the coaching staff share legal relationships that go beyond the playing field: clubs may transfer players on a definitive or loan basis; players and coaches enter into employment contracts with clubs; clubs may be entitled to receive training compensation or solidarity mechanism; and all of them can rely on intermediaries in their operations (who, by the way, are completely oblivious to competition or disciplinary offences).

Therefore, the main *possibility* for CNRD's scope of action are the commercial aspects of the football industry.

⁴ The CNRD received 12 pending cases from the LRC, eight of which were closed within less than ten months.

⁵ In an exercise to facilitate the understanding of the reader not used to the Brazilian model, the jurisdiction reserved for the sports justice system is to some extent similar to that attributed by FIFA Statutes to the Disciplinary Committee.

⁶ There are also State Sports Courts responsible for similar matters occurring at a local level (whose decisions may be subject to appeal to the STJD).



Anticipating the main concerns of Brazil's ordinary courts: the issue of "full access to courts"

A second point of attention imposed on the CNRD involves the jurisdiction of ordinary Brazilian courts.

Article 5, XXXV, of the Brazilian Constitution sets out that *"the law will not exclude appreciation by the courts of any injury or threat to rights"*. This rule is commonly read within Brazilian legal culture as a basis for a sort of principle of full access to courts - that is, a principle under which the jurisdiction of ordinary courts cannot be set aside. This protective approach, which already gives state and federal courts considerable room to decide disputes between individuals, is further accentuated when one refers to the jurisdiction of labor courts (a portion of federal jurisdiction that the Constitution and federal laws organize to resolve individual or collective disputes arising from labor relations).

In addition to rules that set out to guarantee access to the courts, Brazilian judicial culture tends to be very zealous about its jurisdiction and powers. It may also be somewhat skeptical about the ability of alternative methods of dispute resolution to dispense justice. Former initiatives such as *mandatory conciliation* before the filing of labor lawsuits were unsuccessful, under the idea that it would represent an undue obstacle to the aforementioned principle of access to courts. Furthermore, decisions passed by internal bodies of private entities or even by bodies of the Executive Branch of the Brazilian Government may be dismissed by judicial courts, assuming that they are purely *"administrative decisions"* (and therefore subject to judicial review).

This concern with ordinary courts being able to review the merits of decisions issued by the CNRD is something to keep in mind since the creation of a sporting body whose decisions are appealed before a regular court may be considered as superfluous.

This was a lesson learned from observing how commercial arbitration evolved in Brazil: it only became a reality in the local business environment after the Supreme Court recognized that removal of regular courts' jurisdiction by means of an arbitration clause did not jeopardize the full access to justice principle, since the jurisdiction of arbitrators derives from agreements, and occasionally, awards may be set aside by regular courts. Companies were afraid to spend significant amounts of money on arbitration proceedings whose resulting award could be, in turn, set aside by regular courts. Therefore, Brazilian litigation culture remained skeptical about the potential of arbitration between the adoption of the Brazilian Arbitration Act of 1996 and the said Supreme Court decision of 2001. Since the decision, arbitration has flourished.

The finding of the Supreme Court served as a second beacon for the CNRD: it should be aware *that Brazilian practitioners would be skeptical about the potential of a private body to decide disputes that would formerly be subject to the jurisdiction of the courts*, such as the collection of financial obligations due by clubs to other clubs, and disputes involving players or coaches. In employment matters, in particular, the CNRD was aware that labor courts would be resistant to the idea that an arbitration clause could compel employees to file their claims before the CNRD or prevent them from seeking redress before

labor courts. This is known as the *negative effect* of arbitration clauses, incorporated by Article 41 of the Brazilian Arbitration Act.

Once again, the Brazilian legal system imposed some limitations, but those limitations still enabled the CNRD to focus on those areas where it could act. If the main obstacles to defining the CNRD's scope of activity arose from rules under the Constitution and federal laws, the CNRD legitimated its jurisdiction in those same sources of law.

This was achieved thanks to Article 217, I, of the Constitution, according to which it is *"a duty of the State"* to observe *"the autonomy of the sports governing entities and associations as to their organization and functioning."* Thus, the Constitution grants special protection to the autonomy of sports governing entities, and this protection is reinforced by Article 2, II, of Law no. 9,615/1998, according to which development of sport in Brazil is based on the principle of autonomy, *"defined by the liberty and freedom of individuals and legal entities to organize themselves for sports practice."*

As such, both the Constitution and Brazilian federal legislation guarantee the CBF's autonomy to create a body designated to promote and enforce regulation concerning the commercial aspects of organized football, provided that: (a) it respects the priority of the sports justice system to decide matters related to disciplinary offenses and competitions, and (b) it does not force individuals to submit their claims exclusively to the CNRD.



Limits and possibilities of arbitration as a tool for CNRD's procedures

Considering the cultural context of sports disputes, whose main stakeholders were already used to CAS arbitration, the CNRD naturally resorted to arbitration as a tool to structure its procedures. But arbitration proceedings also have their own limitations.

The main limitation has to do with the quality of the consent to arbitration granted by the CBF's Statutes and its regulations. First, the Arbitration Act requires specific formalities to validate arbitration clauses inserted in adhesion contracts. Article 4, § 2 states that "[in] adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause." The Superior Court of Justice (Brazil's highest court for non-constitutional matters) has repeatedly invalidated arbitration clauses inserted in franchise contracts that did not meet those requirements. Therefore, it would be expected that invoking rules inserted in the CBF Statutes or regulations issued by the CBF would face strong criticism - especially since several disputes that would be taken to the CNRD involve people who have not signed those documents (namely players and coaches).

Furthermore, two other issues should be kept in mind, and both of them have to do with Article 90-C of Law no. 9,615. This article reinforces the priority of the sports justice system's jurisdiction and, as such, forbids that competition and disciplinary offence-related matters be taken to arbitration. Moreover, the rule only permits

arbitration of employment-related disputes in sports matters if the arbitration clause was provided for in a collective bargaining agreement. This limitation was overcome by the addition of Article 507-A to the Consolidation of Labor Laws, which permits arbitration in employment-related matters as a general rule, provided that the employee receives remuneration exceeding approximately BRL 12,000 (approx. EUR 2,000).⁷

Despite these observations, arbitration has been a very useful tool to structure the activities of the CNRD in Brazil.

The legal framework of arbitration in Brazil addresses some of the main concerns stated in the previous sections. Two aspects stand out. The *kompetenz-kompetenz* principle, accepted by the Arbitration Act, by which arbitrators are given the ability to assess their own jurisdiction, assigns to the CNRD the potential to decide which cases should be subject to its jurisdiction before intervention by ordinary courts. In addition, Article 32 of the Arbitration Act establishes very few cases in which an ordinary court may review an arbitral award, limited to pathological situations, such as: (a) in case of invalid arbitration agreements, (b) if the award is rendered by someone who could not act as arbitrator, (c) if the award does not comply with all formal legal requirements, (d) if the award is rendered outside the scope of an arbitration clause, (e) if the award is tainted by corruption, (f) if the award is given outside the set time limit; or (g) if it does not respect the principles of due process, equal treatment of the

parties, impartiality of the arbitrator and freedom of decision. Thus, structuring the CNRD's proceedings as arbitration proceedings may strengthen not only its jurisdiction but its decisions as well.

A third aspect also reinforces connections between the CNRD model and arbitration as a tool: the provision of an independent arbitration institution to hear appeals of the CNRD's decisions. Although the Arbitration Act does not provide for the right to appeal in arbitration, nothing prevents someone from agreeing to an appeal. Also, according to Article 58 of the FIFA Statutes, decisions passed by bodies linked to national associations (such as the CBF) are subject to appeal to CAS, but CAS jurisdiction is set aside if an appeal may be made "to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation."

This was achieved through the election of the *Centro Brasileiro de Mediação e Arbitragem* (CBMA - Brazilian Arbitration and Mediation Center) as the institution responsible for administering appeals of the CNRD's decisions. Its first Sports Arbitration Procedural Rules were edited in 2016, taking clear inspiration from the CAS Code of Sports-related Arbitration, and in light of the then-current debates held due to the repercussions of the *Pechstein* case - which justified, for example, the provision of an open-list of arbitrators, instead of a closed-list appointment system.⁸

At the cultural level, observing how commercial arbitration developed in Brazil also served as an important inspiration to

⁷ We note, however, that some scholars argue that Article 90-C's of Law no. 9,615 was not revoked by Article 507-C of the Consolidation of Labor Laws. In this case arbitration clauses in employment-related football contracts would only be valid if incorporated in collective bargaining agreements.

⁸ It is known within Brazilian sports law circles that different CBMA arbitral tribunals have had arbitrators who were not part of the open-list, such as active attorneys with strong litigation practice in the sector or respected commercial law scholars.



mold the CNRD's first years. It is widely known that commercial arbitration was built (in Brazil and internationally) through a set of relationships that have not only arbitrators as protagonists but also law firms and legal departments of major stakeholders, who are the effective clients of arbitration. It is also known that one of the main advantages that arbitration offers is the expected procedural flexibility, which allows arbitrators and the parties to shape each dispute in accordance with its needs. These factors decisively influenced the CNRD.

The second challenge: creating a new institution in the environment of organized Brazilian football

The limitations and possibilities mentioned above served as a relevant guide for the CNRD to understand which paths to take to achieve its goals: becoming a perennial institution and playing a pivotal role in regulating organized football in Brazil. Some steps were particularly effective in this journey.⁹

Constant dialogue with stakeholders

Observing the cultural context surrounding commercial arbitration inspired the CNRD to maintain a direct and open dialogue with the football industry's main stakeholders: federations, clubs,

players, intermediaries, coaches, law firms and academia.

The paramount importance given to this dialogue was present since the beginning of the CNRD's work. Once the CNRD was installed, its first measure was hiring a secretary general. *Rafael TERREIRO FACHADA* was recruited for the mission - a young lawyer already active in the sports justice system and a member of the first Brazilian sports law LL.M. class. Mr. *FACHADA* was someone who was already known to the community that would naturally be consumers of the CNRD's services.

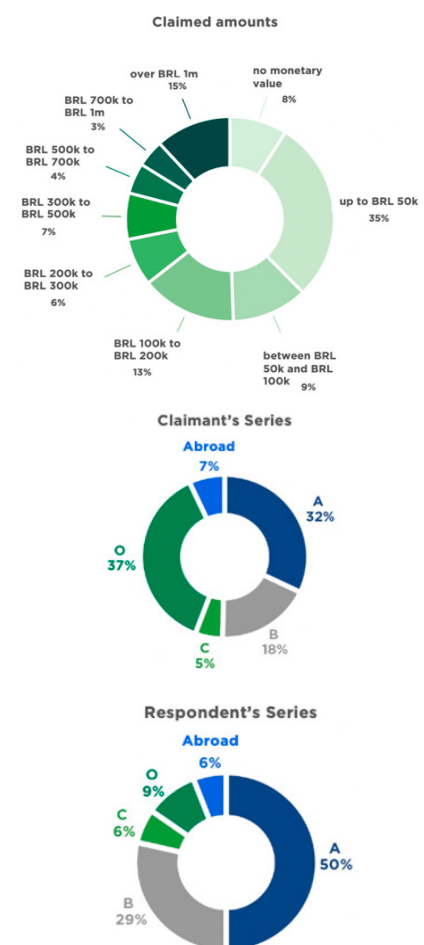
Access to the CNRD was also facilitated. As Brazil is a country of continental dimensions, the CNRD started using electronic means since the inception of its activities: electronic filings *via* e-mail allowed lawyers from different regions of Brazil to have equal opportunities to submit their claims; meetings to discuss terms of reference have been held by videoconference since late 2016; all procedures are available to attorneys through an easy-to-handle electronic platform, protected by personal passwords and managed by CBF's IT Department. Hearings have also been taking place for the majority of cases through videoconferencing since 2017.

In addition, the CNRD organized a symposium in July 2017 to receive feedback from football clubs and law firms involved in its cases and publicized its activities to those who had not yet had the opportunity to work in a CNRD case.¹⁰

This set of measures brought significant results, as the services of the CNRD became widespread in the Brazilian football industry: as

the graphics below demonstrate, clubs with different investment potential are submitting claims to the CNRD, as well as players, coaches and intermediaries from different backgrounds;¹¹ the CNRD has been the choice for disputes of all sizes, ranging from small disputes to disputes involving millions of Brazilian Reais:

Graph 3 - Profile of the CNRD's cases



⁹ Several institutional choices made by the CNRD were inspired by the seminal work of *Frank Sander* in its classic paper *Varieties of dispute processing*, presented at the Pound Conference in 1976 in Minneapolis, Minnesota. To sum up: "I would suggest the following criteria for determining the effectiveness of a dispute resolution mechanism: cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not all, predictability may also be important" (p. 67).

¹⁰ Graph 1 shows how the evolution of the CNRD figures was impacted by the said symposium, as can be seen by an uninterrupted ascending trajectory that began in mid-2017.

¹¹ In the graphs above, clubs and players were classified as claimants or respondents according to the type of competition they were playing when their cases were submitted to the CNRD. Thus, "A" means they were playing the top-tier level of the Brazilian Championship (*Série A*), "B" means they were playing the second-tier national competition (*Série B*), "C" means they were playing the third-tier competition (*Série C*), "O" means they were playing other competitions, but not within the top three tiers; and "Abroad" means that the relevant party (a player or coach) was playing outside Brazil when the case was filed. Intermediaries are not considered in these figures.



And the dialogue remains. Legal departments and attorneys have direct and constant access to the CNRD's Secretary - formed by young lawyers and legal interns specializing in sports law and with a robust client service approach. The CNRD members frequently participate in public debates in the academic environment of sports law in Brazil and abroad. Its repertoire of case law has been progressively disseminated to the market through the CBF's Governance "*hotsite*", a project developed jointly with research groups from São Paulo University and Rio de Janeiro Federal University. Several meetings have been held with representatives of the five categories subject to the CNRD's jurisdiction. Their feedback has been decisive for the most recent reform of the CNRD Rules. Finally, the first edition of the *CNRD Bulletin* was published in July 2020, giving substantial information to the sector on the first four years of its existence and sharing its challenges and targets for the coming years.

The use of arbitration as a procedural tool

Perceiving how zealous judicial authorities could be in relation to an unknown private judicial body, the CNRD sought ways in the legislation to be in permanent compliance with the regular legal practice of Brazilian ordinary courts.

Given the range of options provided by the Brazilian legal system, arbitration appears to be the one with the most appropriate tools to achieve what football stakeholders expected from the CNRD: (a) preventing ordinary courts from hearing cases that the parties had chosen to submit to the CNRD, and (b) preventing ordinary courts from reviewing the merits of the CNRD's decisions.

To this end, the well-known *arbitration clause by reference argument*, usually invoked to validate the jurisdiction of sports judicial bodies, would not be readily accepted within the Brazilian legal community, since ordinary courts tend to set high standards for the consent required to validate arbitration clauses. Still, arbitration serves as a tool in two different situations.

The first (and most important) is the recognition that clauses contained in sports contracts signed among clubs, players, coaches or intermediaries appointing the CNRD to resolve their disputes are authentic arbitration clauses, since they fulfill all requirements of the Arbitration Act for doing so: the consent to submit disputes on freely transferable property rights (Art. 1) to be decided by a group of individuals appointed in accordance with the rules of a specialized institution (Art. 13, § 3).

Thus, when the CNRD identifies that a particular dispute is submitted (based on a contract that contains an arbitration clause) choosing the CNRD as the institution responsible for handling it, the case is conducted as a commercial arbitration - after all, the jurisdiction of the CNRD in these cases comes from consent. The CNRD then follows all rules and standards of the Arbitration Act, inviting the parties to sign terms of reference in order to supplement gaps in the arbitration clause and detail the following stages of the proceedings. Also, the CNRD renders awards that meet all requirements of the Arbitration Act.

In the absence of an arbitration clause, however, the CNRD is of the opinion that its jurisdiction is not arbitral in nature since it does not derive from the clear and undisputed consent of the

parties, but from rules of the CBF - in particular, the CBF Statutes and the CNRD Rules. Nevertheless, the CNRD also invites the parties to sign terms of reference in these cases, in the form of a submission agreement, so that the award is also under the protection of Article 18 of the Arbitration Act (*i.e.* not being subject to judicial review).

The effects of CNRD's awards in these two situations are not the same.

“ The CNRD has powers to impose sporting sanctions (such as registration bans) on clubs that do not perform financial obligations, regardless of the presence of an arbitration clause in the relevant contracts ”

In case of a proceeding initiated under a contract that contains an arbitration clause electing the CNRD, the proceeding is arbitral in nature, and the commencement of an arbitral proceeding tolls the statute of limitations and gives rise to *lis pendens*. The CNRD's award also has the same effect as an arbitral award: the final decision has *res judicata* effect and may be enforced in court through an expedited proceeding that gives creditors access to attachments and other types of freezing orders.

In turn, where there is no arbitration clause in the contract, or without both parties' consent in a submission agreement on the jurisdiction of the CNRD to rule on the merits of the contract, the CNRD has a limited role, and its decision has limited effect. Its role is basically to check if financial obligations were performed or not, in light of Article 64 of CBF's Regulations on Registration and Transfer of Players



and impose sporting sanctions in case of default.

According to this rule (inspired by FIFA RSTP's Article 12bis on overdue payables), clubs *"must timely pay their financial obligations towards professional players, coaches and other members of the coach staff, or other clubs, as per the terms stipulated in the instruments entered into and formalized between them."* Thus, since all clubs must comply with financial obligations under contracts signed with other clubs, players or coaches, non-performance of the said obligations are a violation of CBF's regulations, and sporting sanctions could be expected. However, in the absence of an arbitration clause, the CNRD's decision would only produce effects at the CBF level and would not produce effects beyond the scope of football. In other words, respondents may be sanctioned, but the decision will not have all the effects of an arbitral award: the proceedings would not toll the statute of limitations, the CNRD's decision would have no *res judicata* effect and it would not support expedited proceedings in court.

As one can see, in light of the autonomy granted to sports governing entities, and considering the CBF Statutes and the applicable regulations issued by the CBF, the CNRD has powers to impose sporting sanctions (such as registration bans) on clubs that do not perform financial obligations, *regardless of the presence of an arbitration clause in the relevant contracts*. This line of action, which has been supported by case-law, allowed the CNRD to grow in the Brazilian football market.

The effectiveness of sporting sanctions

Faced with skepticism by practitioners on the effectiveness

of the CNRD's decisions, combined with the prudence to find support on clear and undisputed consent of the parties, the CNRD sought ways to be attractive enough to serve as a *deliberate choice* by Brazilian football stakeholders, instead of a top-down imposition by the CBF. The application of sporting sanctions is likely the greatest attractive factor for that, but not the only one.

One of the strategies was creating a simple and predictable cost structure: the CNRD charges claimants a fixed filing fee of 2% of the claimed amount, with a minimum of BRL 1,000 (approx. EUR 160) and a maximum of BRL 20,000.00 (approx. EUR 3,250). The prevailing party's attorney is also entitled to attorney's fees, usually set around 5% of the economic benefit granted to its client. Thus, the claimant and the respondent know from the outset the financial burden of a dispute before the CNRD.

Another strategy was the combination of a simple procedure, less time-consuming than a court case, whose decision entitles the creditor to request the imposition of sporting sanctions on the debtor - which in most cases tend to create incentives for settlement agreements between the parties or forces clubs to pay the amounts awarded in less time (and with less effort) than before an ordinary court.

The list of sporting sanctions is provided for in Article 40 of the CNRD: (a) warnings; (b) written reprimands; (c) fines (including for procedural misconduct); (d) withholding of amounts that clubs may receive from the CBF (or from local federations); (e) return of prize money paid by the CBF; (f) ordering employers (clubs) to withhold up to 10% of monthly remuneration of employees and

to transfer the withheld amount to creditors; (g) suspension of the certificate that entitles clubs to claim training compensation at the national level; (h) domestic and international registration bans; (i) exclusion from competitions; (j) suspension from football-related activities; (k) ineligibility or ban from football-related activities.

The CNRD applied its first sanction in December 2016, being a warning imposed on a club that failed to comply with a CAS award that granted the creditor payment of solidarity mechanism of approximately USD 50,000 (approx. EUR 41,000). The payment was made soon after and the case was closed in February 2017. Since then, the CNRD has imposed more than 60 sanctions.

As a rule, two reasons may lead the CNRD to impose sporting sanctions: (a) if the CNRD finds that the defendant has violated the CBF's regulations on registration, transfer of players or working with intermediaries, at the end of a *regulatory procedure*; or (b) in case of *non-compliance with a CNRD decision*.

In 29 regulatory procedures submitted to the CNRD thus far, 13 warnings have been imposed on clubs or players, in addition to nine fines. Considering financial claims, the CNRD has imposed 28 warnings on clubs and one on a player. The CNRD has also withheld a total of BRL 61,277.60 (approx. EUR 10,000) from two clubs with revenues to receive from the CBF, which were redirected to their creditors.

The sporting sanction that produces the greatest impact on clubs is the registration ban, which prevents clubs from transferring players during domestic or international transfer windows. Up until October 2020, the CNRD



has imposed this sanction on three different clubs for debts relating to eight different cases. In addition, the CNRD has imposed only one-match suspension on a player, in December 2019, for a 60-day period. The player paid the debt to his creditor a few weeks thereafter.

“ The experience of these first years shows that withholding revenues or registration bans tend to be the most effective way to lead to the payment of financial obligations ”

Over these four years, the CNRD was particularly cautious when imposing sporting sanctions, adopting reasonableness standards, and guaranteeing debtors all possibilities to present their cases. The CNRD takes the following steps to impose sporting sanctions for non-compliance with financial obligations: (a) first, creditors must report non-compliance with a decision, and the CNRD then grants the debtor ten days to prove that it has paid the amounts due, or to justify the default; (b) after this period has elapsed without proof of payment, the CNRD then imposes on the debtor at least one of the penalties provided in Article 40, § 1, of the CNRD Rules (usually fines or warnings), and grants the debtor a new ten-day deadline to comply with the obligation; (c) if the debtor still does not prove payment, the CNRD may apply any of the sporting sanctions provided in Article 42, § 1, of its Rules. The experience of these first years shows that withholding revenues or registration bans tend to be the most effective way to lead to the payment of financial obligations at such a stage.

In any of these stages, the CNRD may defer upon request a debt payment program to avoid or suspend imposition of more severe sanctions, considering the debtor's economic situation. The CNRD can also suspend sanctions already imposed under certain conditions if there are reasonable grounds to do so, provided those conditions can balance the debtor's financial situation with the legitimate interests of creditors.

Two clubs have already benefited from this measure, either due to settlement agreements with their creditors (which authorizes the conditional suspension of sanctions) or by the CNRD's approval of a new payment plan with reasonable installments. Up until October 2020, the CNRD has not had to impose more severe sanctions than the ones we have already mentioned.

The CNRD as a deliberate choice by relevant stakeholders: the recognition of its activities by Brazilian ordinary courts

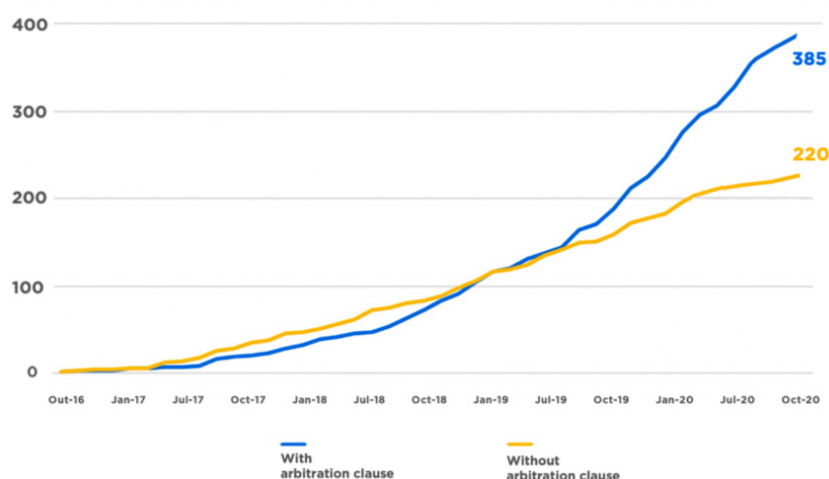
The strategy described above produced significant results: the combination of open dialogue, focus on client service, low

and predictable costs, less time-consuming procedures and the effectiveness of sporting sanctions made the CNRD a deliberate choice for football stakeholders over ordinary courts. In other words, instead of *imposing* its jurisdiction by testing the limits of the legal framework, the CNRD opted to invest in becoming an alternative *based on consensus*.

Instead of imposing its jurisdiction by testing the limits of the legal framework, the CNRD opted to invest in becoming an alternative based on consensus

From this perspective, clubs that were initially concerned about the CNRD's jurisdiction started to realize that it could also be an option for collecting debts from other clubs; employees' attorneys that feared a sort of pro-club bias realized that the CNRD applied laws and regulations as it should, and that their clients would be able to collect debts in a considerably shorter timeframe than compared to collection lawsuits in the ordinary courts. As a result, there have been progressively more claims based on contracts containing arbitration clauses electing the CNRD than claims based solely on its jurisdiction under the CBF's regulations:

Graph 4 - Evolution of contractual disputes submitted to the CNRD





This considerable adhesion by football stakeholders to the possibilities opened up by the CNRD was also followed by relevant support of its work through different judicial precedents. The most significant ones are highlighted below.

The nature of the CNRD's jurisdiction before an arbitration clause

It can be said that, in general, Brazilian courts are supporting the work of the CNRD and that the CNRD's views on the nature of its jurisdiction are aligned with judicial findings on the matter: (a) in the presence of an arbitration clause choosing the CNRD to resolve a specific dispute, courts are of the opinion that CNRD acts as an arbitral tribunal and that its decision equates to an arbitral award; (b) in the case where there is no arbitration clause, the CNRD acts within the limits of CBF's regulatory framework, so that its decision may result in sporting sanctions, but it does not have the same effects as an arbitral award.

In early 2018, an interim decision issued by the Minas Gerais Court of Appeal in a confidential case considered that the CNRD was the "*competent arbitral tribunal*" to hear a dispute derived from a contract that contained a CNRD arbitration clause. This same view was adopted by the 17th Civil Chamber of the Rio de Janeiro Court of Appeal in May 2018, thus dismissing a claim in a decision regarding a contract with an arbitration clause electing the now defunct LRC, which was succeeded by the CNRD.¹²

Following this trend, and in line with the *kompetenz-kompetenz* principle, a decision issued by

the 4th Civil Court of São Paulo State in June 2019 held that, in light of an arbitration clause electing the CNRD, the CNRD itself had jurisdiction to assess its jurisdiction to hear a dispute over the contract.¹³ In April 2020, the 7th Special Civil Court of Brasília did the same, dismissing a proceeding without ruling on the merits due to the presence of an arbitration clause electing the CNRD.¹⁴

As the presence of an arbitration clause defines the limits of the CNRD's jurisdiction, the effects of its decisions are also distinguished from this same criterion. Thus, in November 2016, the 6th Civil Chamber of the Paraná Court of Appeal considered that absent a valid arbitration clause indicating the superseded LRC to assess a specific dispute, its decision on a particular case was limited to having effects within CBF's regulatory framework, being thus unable to produce *res judicata* effect.¹⁵

In turn, the 36th Private Law Chamber of the São Paulo Court of Appeal recognized in July 2017 the arbitral nature of the jurisdiction and the *res judicata* effects of a decision issued by the superseded LRC based on a contract that contained an arbitration clause electing it.¹⁶

The jurisdiction of the CNRD to hear employment-related disputes

Labor courts have also begun to speak in favor of the CNRD's jurisdiction - despite an initial skepticism from a considerable portion of football specialized attorneys.

In October 2019, the 2nd Labor Court of Campinas recognized the CNRD as the competent body to hear an employment-related conflict between a player and a club, in the face of a settlement agreement that contained an arbitration clause choosing the CNRD.¹⁷ The 9th Labor Court of Campinas also adopted the same reasoning in May 2020, recognizing the validity of an arbitration clause signed between a club and a player electing the CNRD.¹⁸ This line of thought was reinforced by the Campinas Labor Court of Appeal when its 8th Chamber dismissed an employment-related claim due to the presence of an arbitration clause electing the CNRD.¹⁹

In August 2020, the 5th Santos Labor Court issued a significant decision dismissing a USD 1.5 million (approx. EUR 1.2 million) employment-related claim filed by a player against his club, seeking to terminate his contract with just cause for outstanding salaries, due to the presence of an arbitration clause electing the CNRD.²⁰ The decision added that Article 507-A of the Consolidated Labor Laws prevailed over the former requirement made by Article 90-C of Law no. 9,615 (*i.e.* that an arbitration clause could only be valid if inserted in a collective bargaining agreement), confirming that individual contracts signed between clubs and employees can also be submitted to the CNRD.

The validity of sporting sanctions imposed by the CNRD

Finally, two paramount decisions issued in a specific case brought before the Rio de Janeiro Court of

12 TJRJ, 17th Civil Appeal Chamber, Case no. 0280532-13.2016.8.19.0001, May 2018.

13 TJSP, 4th Civil Court of São Paulo, Case no. 1015827-64.2019.8.26.0100, June 2019.

14 TJDF, 7th Special Civil Court of Brasília, Case no. 0732961-69.2019.8.07.0016, April 2020.

15 TJPR, 6th Civil Appeal Chamber, Case no. 0015217-11.2013.8.16.0001, November 2016.

16 TJSP, 36th Private Law Appeal Chamber, Case no. 1005880-85.2015.8.26.0565, July 2017.

17 TRT-15, 2nd Campinas Labor Court, Case no. 0011418-64.2018.5.15.0032, October 2019.

18 TRT-15, 9th Campinas Labor Court, Case no. 0011456-24.2018.5.15.0114, May 2020.

19 TRT-15, 8th Appeal Chamber, Case no. 0010520-13.2019.5.15.0001, October 2020.

20 TRT-2, 5th Santos Labor Court, Case no. 1000585-81.2020.5.02.0445, August 2020.



Appeal consolidated the CNRD's institutional position within the Brazilian football market.

Due to a claim for non-payment of financial obligations submitted by a player, the CNRD issued two awards against the claimant's former club in January 2019, totaling BRL 230,000 (approximately EUR 37,000). The club did not comply with the decisions and the player required the imposition of sporting sanctions. Following the procedures set in the CNRD Rules, a deadline was imposed on the club to demonstrate proof of payment, without which the CNRD would first impose a warning for non-compliance. Then, upon request of the club, the CNRD granted a debt payment plan consisting of 30% of the total amount to be paid within 15 days and the balance to be paid in six installments. The club did not make a single payment. The CNRD took a slow pace with the proceedings, aimed at allowing the club to obtain sufficient funds to settle with the player or start paying the installments plan, but no payment was made. Finally, the CNRD decided to impose a registration ban of six months in December 2019 on the club.

Dissatisfied with the sanction, the club challenged the validity of the CNRD's decision before the Rio de Janeiro State Court - despite several rules stating that any appeal against a CNRD decision must be lodged with the CBMA. The club's request for an interim measure was rejected by the 2nd Barra da Tijuca Civil Court, in an eloquent decision with several considerations about the course of the proceedings before the CNRD, emphasizing the legality of the registration ban imposed by the CNRD. The decision also recognizes that the merits of a CNRD decision are not subject to judicial review, particularly if all formal procedures necessary to do

so are observed.²¹ When assessing the club's appeal, the 10th Civil Chamber of the Rio de Janeiro Court of Appeal upheld both CNRD decisions, reinforcing the validity of the imposed registration ban.²²

Conclusions: meeting stakeholders' expectations as the new challenge

The main challenge faced by the CNRD in its first four years was to establish itself as a perennial institution, capable of fulfilling its mission and showing that the confidence placed in it by Brazilian football stakeholders was justified.

This objective was achieved, as can be seen from the conclusions drawn in the previous sections: (a) stakeholders trust the way the CNRD handles cases, which can be seen in the growing number of cases and contracts that are drawn up with arbitration clauses electing the CNRD to resolve disputes; (b) the CNRD receives cases involving both large and small amounts of money, and from clubs and players from all levels of Brazilian football; (c) most sanctions that the CNRD has imposed have been warnings, which shows that a mere warning has generally been sufficient to encourage debtors to comply with their obligations; (d) the most serious sanctions, such as registration ban, although used at times, are restricted to a

small group of debtors for whom warnings or debt payment plans took no effect; and (f) the CNRD has built a model of administration and appreciation of cases that is receiving consistent recognition from Brazil's ordinary courts.

The CNRD has new challenges ahead, which will bring further growing pains. Stakeholders have additional expectations to be met, and the CNRD will need to rise to the occasion. But it is fair to say that the first task has been completed: the CNRD's first four years have put it on the path to success.

²¹ TJRJ, 2nd Barra da Tijuca Civil Court, Case no. 0000158-10.2020.8.19.0209, January 2020. Some words of the decision deserve to be reproduced: *"the Judiciary Branch does not control the administrative merits of the decision, but only the legality. And what is intended here ... is to debate only the merits of the decision that imposed the sanction: it is a discretionary administrative act (the CNRD Rules allows the imposition of this sanction, among others, and it was the one that seemed to the CNRD the most appropriate, in light of its reasoning). ... As already said, the registration ban is one of the sanctions provided for in the CNRD Rules. Nothing illegal here."*

²² TJRJ, 10th Civil Appeal Chamber, Case no. 0000449-55.2020.8.19.0000, January 2020.



Salary Cap in Chinese Professional Leagues for Seasons 2021-2023



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→ **Chinese Football Association (CFA) – Chinese Super League (CSL) – Salary cap – National Regulations – Player transfer – Foreign players – National team**

The Chinese Football Association (CFA) recently issued further measures for

the sustainability of the Chinese football industry, tightening salary caps adopted for the 2020 season, with several innovations concerning also the application of different caps for each professional league. For the sake of completeness in this article, after describing the salary cap for the 2021-2023 seasons, we will provide a comparative table with the salary cap in the CSL for the 2020 and 2021 seasons.

Introduction

In previous articles, we have analyzed the CFA's policies over the last few years, describing the attempts of the Chinese football governing body to correct various dysfunctions of the football industry in China.

We should consider as a premise that the football industry in China is far from being financially healthy and self-sustaining, meaning that the system is not yet capable of generating enough revenues while, on the contrary, football clubs rely heavily on investments from their parent companies. It is a fact that, during the past few years, several professional clubs, especially in lower divisions, have faced financial difficulties and disappeared after bankruptcy proceedings or because of overdue payables.

For this reason, the CFA has issued several policies to curb excessive

expenses for the transfer and employment of football players, such as the investment cap¹, the so-called "luxury tax"², as well as the salary cap, which was introduced by the CFA for the first time in 2019 - exclusively for domestic players, then amended in 2020 to include foreign players and now updated again with tighter and more detailed measures for the upcoming 2021 season.

In particular, the salary cap for foreign players was introduced for the first time in a package of measures issued by the CFA at the end of the 2019 season, under the so-called "Notice of the Chinese Football Association on the adjustment of the 2020

professional league policy" dated 31 December 2019. Then, different caps have been set for domestic and foreign players.

As general features to be mentioned, salary caps under the CFA policies:

- Differ substantially between Chinese (so-called domestic) and foreign players;
- On the one hand, they include other remuneration such as image right fees, sign-on fees, housing allowance, transportation, remuneration in kind and other benefits. On the other hand, they specifically do not include collective bonuses, which have also been regulated by the CFA to avoid any potential circumvention of the policy;
- Sanctions may be imposed for different violations of the

¹ For more information, see [Alessio SANTOSUOSSO and Yi Lu, 'An Overview of the China Football Association Policies - The Past, Present and Future', Football Legal # 11 \(June 2019\).](#)

² For more information, see [Giandomato MARINO and Roy CHU, 'One year of transfer adjustment fee \(a.k.a. "luxury tax"\): recent changes and effects on the Chinese transfer market', Football Legal # 9 \(June 2018\).](#)



CFA's policies. Clubs can be sanctioned with fines, registrations bans, point deductions and relegation to a lower division. Players may be sanctioned with fines or suspension from official competitions.

The 2020 season was characterized by the COVID-19 pandemic and resulted in a further financial struggle for football clubs, which could not count on the ticketing and commercial revenues. As a result of the provisional suspensions imposed by the Government on all sports-related events, the kick-off of the season was delayed until August 2020, and professional competitions were scheduled under a "bubble" system, with the 16 teams of the *Chinese Super League* (CSL) playing in two groups in Dalian (Liaoning Province) and Suzhou (Jiangsu Province), and a final play-off and play-out competition based on the ranking of the two groups.

The salary cap in 2021

As mentioned above, at the end of the 2020 season, the CFA considered that further restrictions to the expenditure of Chinese clubs were necessary. Therefore, it implemented tighter salary cap amendments in contrast with the 2020 season. On 25 November 2020, the said amendments were announced by the CFA for the 2021 to 2023 seasons. The policy was officially published on the CFA website on 14 December 2020 and applies to all the contracts entered into after 1 January 2021.³

According to the new policy for CSL clubs, the maximum salary for foreign players is set at EUR 3 million gross per year,

which means a reduction of approximately 50% compared to the 2020 salary cap (see the table below). With regards to the global cap on foreign players, it is stated that the total amount of salaries that each CSL club can pay to foreign players cannot exceed EUR 10 million gross per year. Considering, therefore, that CSL clubs can have a maximum of six foreign players in their rosters, the average salary that could be granted to each foreign player (in the case of six foreign players registered) would be equal to EUR 1,666,666 gross per year.

The cap for domestic players is set at RMB 5 million gross per year (approx. EUR 630,000), which means a reduction of 40-50% of the amount provided as the cap for the 2020 season, and further limitation of the average salary of domestic players in the club roster set at RMB 3 million gross per year (approx. EUR 380,000). The same amounts of RMB 300,000 gross per year (approx. EUR 38,000) were confirmed for domestic U-21 players.⁴

It should be noted as well that, in an attempt by the CFA to protect clubs relegated from higher to lower divisions, both domestic and foreign players' salary caps will not apply for the season following the relegation.

For Chinese League One (CL1), the maximum salary for foreign players is now set at EUR 1.5 million gross per year. With regards to the global cap on foreign players, it is stated that the total amount of salaries that each CL1 club can pay to foreign players shall not exceed EUR 4 million gross per year.

⁴ Unless they participate in official matches for more than 900 minutes during the relevant season. In such case, the salary cap for those players becomes 5,000,000 RMB gross as per other Chinese players.

The cap for domestic players is, in turn, set at RMB 3 million gross per year (approx. EUR 400,000), with a further limitation of the average salary of domestic players in the club roster set at RMB 1.5 million gross per year (approx. EUR 190,000). The amounts for domestic U-21 players are equal to those of CSL.⁵

For Chinese League Two (CL2),⁶ the cap for domestic players is set at RMB 1.2 million gross per year (approximately EUR 150,000), with a further limitation of the average salary of domestic players in the club roster set at RMB 500,000 gross per year (approximately EUR 62,000). The amounts for domestic U-21 players are equal to those of CSL.⁷

Considering that specific salary caps for CL1 and CL2 were provided for the first time for the 2021 season⁸, the comparative table below will only take into account the caps for the CSL in 2020 and 2021.

Comments and conclusion

Besides the evident reduction on the maximum remuneration payable to each player, it shall be noted that, in the policy for the 2021-2023 football seasons, specific caps have been set for each professional league, including CL1 and CL2.

A further innovation is the introduction of a global cap for

⁵ With same exception as footnote 4 above, apart from the minutes of appearance in official competitions which amount to 1,800.

⁶ Clubs participating in CL 2 cannot register foreign players.

⁷ With the same exception for CL1 as per footnote 5 above.

⁸ Only caps for the total amount of salaries were set for the CL1 and CL2 during the 2020 season, in the limit of a percentage of the total expenditure of the club during the season.

⁹ Assuming as a reference only the highest IIT rate in China at 45%

¹⁰ There is no public information on the amounts these players receive from the CFA.

³ www.thecfa.cn



SALARY CAPS FOR THE CSL DURING THE SEASONS 2020-2021

SEASON	FOREIGN PLAYERS	CHINESE PLAYERS	CHINESE NATIONAL TEAM PLAYERS	CHINESE U-21 PLAYERS	TOT. SALARY FOREIGN PLAYERS	AVG. SALARY CHINESE PLAYERS
2020	EUR 3,000,000 net (EUR 5,700,000 gross) ⁹	EUR 1,300,000 gross	Clubs can increase salary up to 20% more	EUR 40,000 gross	X	X
2021	EUR 3,000,000 gross	EUR 650,000 gross	Extra salary directly paid by the CFA ¹⁰	EUR 40,000 gross	EUR 10,000,000 gross	EUR 400,000 gross

foreign players for each team, resulting in an additional restriction for clubs, which may only remunerate some players (whether Chinese or foreign) of their roster with the maximum amount possible.

Under the new policy, CSL clubs will not be able to increase the remuneration of Chinese players selected for the national team, as provided in the 2020 policies, whereas CSL clubs could choose whether to increase the salary of those players up to 20% more per year. Considering that this policy raised doubts regarding its practical implementation, from the 2021 season onwards, the CFA will be directly responsible for the payment of additional remuneration to national team players.

The amendment of the policies for the 2020 season clearly shows the intention of the CFA to give a rapid signal to its members and reverse the negative financial trend of the Chinese football industry. However, as frequently happens with the lawmaking in this particular industry in China, there could be issues when it comes to the practical application of the new rules.

We believe that this new policy will definitely slow down the expenditure trend of Chinese clubs and such trend can also be noticed when looking at the new foreign players and coaches in the CSL during the last 2-3 years. However, whether the aforementioned policies represent a real restriction or rather a strong recommendation/guidance for Chinese clubs will depend on the CFA's approach, considering the vast disciplinary power it has in this respect.



Removal of Commercial Partners from the Professional Club's Name



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→ Chinese Football Association (CFA)
- Chinese Super League (CSL) -
National Regulations - Sport entities -
Sponsorship - Governance

Background

In China, football professionalism started at a much later stage compared to other countries, with the first professional league in China established in 1994 and the current *Chinese Super League* (CSL) in 2004. Then, further factors such as the immaturity of the domestic football system, corruption scandals and the poor performance of Chinese national teams in international competitions resulted in the slow development of football in the country, which is even more evident when compared to the growth speed of the country's economy.

However, after 2009, the Government together with the Chinese Football Association (CFA) were determined to change this situation. After undertaking some targeted reform, football started to progressively meet higher standards of professionalism and rebuild a positive image. This attracted powerful Chinese investors, who started to inject liquidity in the industry, hoping to foster the growth of the sport in

the country and gain a return from their investment.

From a commercial point of view, those investors intended to use clubs as a marketing vehicle in order to promote their businesses through the association with a football brand. The best example was *Evergrande Real Estate Group*, one of the biggest real estate companies in China. This group acquired a second division club from the city of Guangzhou in 2010 and, after renaming it as *Guangzhou Evergrande FC* (GE - see picture) and taking it to the first division,¹ they managed to build the most successful Chinese football club ever, which has won 8 CSL league titles, two national cups and two AFC Champions Leagues in the past ten years.

Such achievements brought great popularity to GE and its shareholders, leading other companies to follow a similar

path of acquiring football clubs. Consequently, clubs started signing famous international players and coaches, as well as investing large sums in grassroots and facilities, with the purpose of building strong and competitive squads that could become an important showcase for the club's investors. As a result, football increased its popularity considerably in the country, also attracting the interest of sponsors and broadcasters, which have become important stakeholders in the domestic market.

However, in 2018, the CFA issued a policy setting out criteria that clubs must fulfill by summer 2021 in respect of the registration of their official names. In essence, clubs will need to, *inter alia*, remove the name of any sponsor or commercial partner from the club's names. The present article will address these rules, as well as the main reasons that triggered its enactment by the football federation in China.

¹ In 2014, the largest e-commerce company in China *Alibaba* acquired 40% of the club's stake. As a result, the club was renamed as *Guangzhou Evergrande Taobao FC* (i.e. *Taobao* is the e-commerce platform of *Alibaba* in China).



The policy

The first time this rule was formally proposed was in the comprehensive football reform plan issued by the Chinese Government in 2015, whereby a number of significant measures were set with the aim of reforming the structure of football in China (Plan).² In essence, the Plan mainly focused on increasing the participation of the population in football, improving the development of grassroots and football facilities and enhancing the financial stability of professional clubs.

Among other regulatory measures, the Plan introduced the rules we explain in this article, forcing football clubs to “clean” their names by removing any reference to their commercial partners.

As a result of that, the CFA issued in 2018 a set of rules in this respect, which professional football clubs shall comply with within the following three years.³

In essence, the full name of professional clubs shall comply with the following composition:

“Name of the Location” + “Name of the Club” + “Football Club” + “Co., Ltd.”

Regarding the *“Name of the Location”*, the CFA requires clubs to include the name of the city or province where the club is located. Then, in relation to the *“Name of the Club”*, even though it grants some flexibility, clubs shall comply with the minimum criteria listed below:

- ➡ The name shall be formed by a maximum of four Chinese characters, which shall not include or suggest any link to the name of the shareholders, actual controllers and/or any affiliated third parties to the latter. Moreover, the name shall not include the name or any reference to any brand, product and/or service category of the aforementioned parties; and,
- ➡ The name shall have some cultural and/or historical link to the region where the club is seated, without making reference to any term that may imply violence, pornography or any sort of discrimination *vis-à-vis* race, culture, religion, gender, politics, etc. The purpose of this requirement is to create a link with the local community.

All professional clubs must submit the applications with the proposals for their new names to the CFA by 30 June 2021 and then, upon final approval by the federation, they shall register the new names at the relevant bureau by 31 December 2021.

On the other hand, some exceptions may be granted to those clubs having a name *“continuously used for a long period of time and have acquired high reputation and recognition within the domestic football industry”*. In this regard, the CFA further specifies that only clubs that have continuously: (i) participated in the CSL; and (ii) have remained in the same location since at least 2004 could fall within such exception. However, it is up to the CFA’s discretion to approve the application for those exceptions, the result of which can only be speculated upon and is therefore unforeseeable at this stage.

Finally, the regulation determines that those clubs that do not have their applications approved within the set deadline above will not be allowed to participate in official competitions. In the same vein, different disciplinary sanctions would be imposed on those clubs that, after having approved their new names, continue using their previous names for different purposes (e.g. in advertisements, on the club’s website, in its merchandising, etc.).

Conclusions

There is no doubt that the investments made by shareholders of clubs in Chinese football during the last decade have enormously contributed not only to the development of football in the country, but has also attracted the interest of the population to this sport and given the leagues much higher exposure at national and international levels. This is evident, for instance, when scrolling the list of top foreign players and coaches who have recently played for Chinese clubs.⁴

However, on the other hand, the constant change of ownership in some clubs, with the subsequent change of name (and sometimes even location) after each acquisition, has negatively affected clubs, which were not able to establish a strong connection with local fans. This has resulted in several clubs lacking a proper fan base, with stadia practically empty

² The Plan consisted of improving the ranking of the national team by means of massive grassroots youth development policies, with the eventual goal of hosting and winning the FIFA World Cup in 2050. Full English translation of the Plan: wildeastfootball.net. The Plan was further developed in 2016 in more detail with ‘The Medium and Long Term Development Plan of Chinese Football’. Details of the Plan are available at: china-football-8.com.

³ This regulation is called *“Naming Regulations for the CFA Professional Clubs”*.

⁴ Since 2009, we could mention players as Didier DROGBA, Carlos TEVEZ, Alexandre PATO, PAULINHO, OSCAR OF HULK, or coaches as Marcello LIPPI, Mauricio PELLEGRINI, Luis Felipe SCOLARI or André VILLAS-BOAS.



or with quite low attendances,⁵ and becoming almost entirely dependent on the financial injections of their shareholders.

For that reason, the Government and the CFA issued these measures with a view to the long term, with the aim to create long-lasting names (and brands) for their professional clubs and strengthen the connection with the local community. The final aim of this measure is to stimulate clubs to be more financially independent from their shareholders.

Despite the fact that these measures will enter into force during the 2022 season, this topic gained relevance recently, on 25 November 2020, when the CFA held a conference in Suzhou (Jiangsu Province), whereby it announced that it would follow a strict approach in order to apply the said regulations concerning the approval of new names. So far, in the entire CSL, only *Dalian Pro FC* (Chinese name: 大连人 - translation: "People of Dalian") has a name which is believed to fully comply with the said criteria, as it does not refer to any commercial brand or similar.

On the other hand, there are rumors of two other clubs that apparently could have their current names approved. The first one is *Beijing Guo'an FC*, which has been using its name for more than 25 years since its foundation. It has always played

in the top leagues (including CSL) and the name has no connection with the shareholders of the club. Then, *Shanghai Shenhua FC* could be a club meeting the exception. Although *Shenhua Group* was the club's first sponsor, the club was always located in Shanghai, did not change its name since its foundation in 1993, and the club was later acquired by its current shareholder *Greenland Group*. Therefore, despite the presence of a name connected to a commercial entity, it is 100% certain that there is no connection between the word *Shenhua* (Chinese translation: Flower of Shanghai) and the current shareholder of the club.

Therefore, it will be interesting to see what the effects will be, both in the short and medium-long term, when clubs will definitely remove the reference to their investors from their names. Will shareholders lose interest in their clubs - thus leaving the club or reducing their investments in the club - after not being able to use them as a "marketing billboard"? Will clubs strengthen their connection with the local communities and increase their income sources through a new brand with an exclusive reference to the football club?

Although football stakeholders in China do not expect significant changes in the current football system, the eventual consequences remain uncertain, considering also the strong financial measures applied by the CFA in recent years, including the new salary cap for the upcoming 2021 season.

⁵ This should be understood considering that China is a country with a population of circa 1.3 billion people, with a few cities having a population of more than 15/20 million people. For instance, *Shanghai SIPG* (Shanghai has a population of around 30 million people) has an average attendance of 21,900 spectators and an average rate of 39%, and *Shenzhen FC* (Shenzhen has a population of around 15 million people) has an average attendance of 16,279 spectators for the 2019 season and average attendance rate of 27.13%. *Guangzhou Evergrande Taobao FC* (Guangzhou has a population of around 15 million people) is the leading club with an average attendance of 45,795 spectators for the 2019 season and average attendance rate of 76.33%.



An insight to the newly amended Statutes of the Egyptian Football Association



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→ **Egyptian Football Association (EFA) - National Regulations - FIFA Regulations - Governance - COVID-19 - Force majeure**

On 29 November 2020, an extraordinary general assembly of the Egyptian

Football Association (EFA) discussed, in its meeting, the articles of the new Statutes drafted by the EFA Normalization Committee. The new Statutes consist of 89 articles. While most were approved by the assembly by separate vote per article, some articles were subject to members demanding to control the wording so as to avoid any interpretation confusion.¹

Overview of the importance of Football Associations statutes

Having statutes is one of the requirements for any national football association wishing to be admitted as a member in FIFA, as set out under Article 11 of FIFA Statutes. These statutes shall comply with the statutes, regulations and decisions of FIFA and the association's relevant confederation, as well as comply with the law of the game in force and recognize the Court of Arbitration for Sport.

An association's statutes shall state how it is organized, both administratively and financially, as well as provide for the organization of the general assembly, the board of directors, the committees, the judicial bodies, the requirements of admission and how competitions and sporting events are managed.²

The following are some considerable amendments

Article 12: EFA members (Art. 9 in the old version of the EFA Statutes)

Before the new amendments, being a member of the EFA was possible for clubs participating in *Premier A* and *Premier B* leagues, as well as for all clubs scoring 50 points or more via their participation in the events organized by EFA (3rd division league, Egy Cup, women's league etc.). Moreover, clubs that did not score the 50 points still had the right to participate and state their opinion during the EFA general assembly meeting, but with no voting rights.

Now, the EFA general assembly has fixed a quota for the adherent members, which is 104 members at maximum. It includes the 18 clubs which are evolving in *Premier A*,

36 clubs of *Premier B* (top 12 clubs of each group), 36 clubs of the 3rd division (top 3 clubs of each group), 5 clubs of the 4th division representing 5 geographical regions in Egypt, which are determined upon their sporting results, as well as the top 3 clubs of women first division, top 3 clubs of the 1st division of futsal football league and the top 3 clubs of the 1st division of the beach soccer league.

The amended article is a clear implementation of the EFA's new policy of inclusion, as unlike the old provisions, the amended article aims to make EFA an entity that represents not only big clubs of the *Premier A* and *Premier B*, but also small clubs notably those in the lower divisions, women's league and other football-related sports.

¹ www.filgoal.com

² www.cies.ch



Article 8: Rule of the Game (Art. 7 in the old version of the EFA Statutes)

This article has come to officially recognize other football-related sports under the EFA's umbrella (beach soccer and futsal). Although, these sports were already recognized under FIFA's umbrella, the EFA, until the new Statutes was enacted, had not recognized them.

Article 23: EFA committees and panels (Art. 18 in the old version of the EFA Statutes)

Likemanyamendedarticles,thisarticle clarified, in detail, the committees and panels in EFA. Moreover, it added *bona fide* provisions to avoid certain problems, like those which it had encountered in the past. Among these provisions were the ones relating to independence and impartiality. It provided that the appointment of the members of the committee shall be made independent of any external influence, and that members should provide assurances that they have not been previously convicted of a felony, and they must also retreat from any discussion or deliberation in case of the existence of conflict of interests in accordance with FIFA Code of Ethics.

Article 37: Composition of Board of Directors (Art. 30 in the old version of the EFA Statutes)

The so-called 8-year term article

Before this article, each board member had the right to serve for two consecutive terms, but the article was silent in regard to the re-election of the board member for another non-consecutive term.

By virtue of the new article, an 8-year term limit will be implemented in an ascending

order. However, during the assembly general meeting on 29 November 2020, it was confirmed that all candidates who spent 8 years on the EFA board of directors, such as *Ahmed MUJAHID*, *Saif ZAHIR* and *Hazem IMAM*, will be eligible to run for the new board. The 8-year provision in its new form will be applicable to the new board, in respect of the principle of the temporal applicability of law, which states that a new act shall not be applied retroactively.

What does the implementation of the 8-year clause in an ascending manner mean?

The new article partially preserves the 8-year provision, whereby no member, including the president and his deputy, can sit on the board for more than two consecutive or separate terms, and any partial incomplete term is counted as a full term, regardless of the reason for not completing it.

Note that previous periods spent as a member of the board of directors or as a Vice President are not considered when calculating their term as President of the Federation. Likewise, a member's terms are not counted upon their candidacy for the position of Vice President.

To sum up: X remaining in his position as a member of the board of directors for a period of 8 years does not prevent X from running for the position of Vice President or President in the next term of the 8 years. To strengthen this point, the regulations stress that the former President cannot run for the membership position later, the same applies to the Vice President. Meaning that candidates can run for higher positions after the lapse of 8 years, or the same position if only one term has been spent in it.

Qualification of a board member

To ensure that players' rights are well represented within EFA decision-making bodies, the new article came with a set of requirements for a member in order to be eligible to run for the board. Among these requirements are that a candidate shall be: a retired player, who participated in at least ten matches in *Premier A* or 20 matches in *Premier B*, or participated with one of the Egyptian national teams; or a retired Premier A referee; or a retired Egyptian national team or *Premier A* coach.

In an effort to comply with FIFA Code of Ethics, the EFA has extended the bona fide provisions to be applicable to the candidates as well. Furthermore, a board member shall not be, at the same time, elected as a representative in the general assembly or a member in an independent committee. Moreover, a board member shall not occupy any other role whatsoever, whether it would be as a player, referee in EFA-related matches, a board member in another sports federation, youth or sporting committees or an employee of the Ministry of Youth and Sports. In addition to the foregoing, a board member shall not administer games status in members committees or sub-committees; or administer whether profitably or non-profitably any sports entity with public or private status, whether in Egypt or abroad. Nonetheless, in accordance of Article 47 of new EFA Statutes, presidents, vice-presidents and members of the permanent committees (*i.e.* players' status committee, medical committee) are eligible to be board members, with the exception of the members of the Referee committee. We notice that this may cause confusion considering the fact that the EFA, in its general assembly meeting on 29 November 2020,



assured the implementation of provisions that prevent the conflict of interests.

Unlike before, where EFA had previously enlisted sports journalists, they will not be eligible to run for board positions unless they have fulfilled the above-mentioned requirements.

We can strongly agree with the EFA's approach to remedying the loopholes that existed in the previous statute, by implementing provisions that ensure that conflicts of interest will be minimized.

Article 60: Premier A Clubs Union (Art. 62/A in the old version of the EFA Statute)

Previously, this article was only addressing the union members who were elected, as well as their structure and hierarchy. Now, with the new reform, the union has become more financially independent, despite staying under EFA's umbrella, by having its own auditor and bank account.

The union will be the sole body in charge of managing (if they wish), marketing and promoting the *Premier A* league, by conducting commercial and sponsorship agreements. 85% of the revenues will be distributed according to a set of criteria which will be determined by the union board and the remaining 15% will go to EFA.

This new reform, which was approved as required by the Minister of Youth and Sports,³ is an implementation of the new EFA marketing policy, which intends to decentralize the management of the League, in favor of a body in which the *Premier A* clubs are more involved *via* their representatives. This model has been inspired by the one followed in England.

Article 60bis 1 & 60bis 2: Premier B Clubs & 3rd Division Clubs Union (Art. 62/B in the old version of the EFA Statute)

Article 60bis 1

Before the amendment, there was no union for *Premier B* clubs, it was just a committee composed of club delegates from each branch of EFA. Its role was simple, it was to assess problems related to *Premier B* club and try to find a solution. Now, the article is more sophisticated, as like the above-mentioned one related to *Premier A* clubs union, it follows the same election process, it is independent and has its own board. Moreover, it is financially independent as it has its own auditor and bank account. *Premier B* clubs union may form a committee to manage *Premier B* league, as well as be in charge of marketing and promoting the league by concluding commercial and sponsorship deals. The revenues are distributed in the same ratio as in Article 60; whereby 85% is distributed according to the criteria determined by the board and 15% to EFA.

During the last five years, *Premier B* league has proved its ability to conclude some good deals and generate revenue. Among these deals was "1xbet", the betting company, which integrated the Egyptian market and had its banners shown during *Premier B* matches, as well as sponsoring some of *Premier B* clubs.⁴ In order to conclude good deals and have a proper management of resources, EFA considered the necessity to have a *Premier B* body composed of club representatives, which will grant the preservation of the clubs' rights.

Article 60bis 2

This is a brand-new article added by the reform. For the first time, 3rd division clubs have their own body which represents their interests. It has the same legal form (3rd division clubs union) and performs the same roles as the unions mentioned above.

New articles added to the Statute

The following articles are totally new. They have been added to match the football market and the rapid development of the league, as well as the increase of disputes, which require more attention to all aspects of the game and should be organized by regulations.

Articles 12bis, 13bis, 15bis, 16bis, 17bis & 18bis: Affiliated members (complementary members)

To ensure a vast representation of all members, the new EFA Statutes admitted the possibility to accept new members *via* the board of directors. The requirements of their admissibility, resignation, suspension, dismissal, rights and duties are quasi-identical to normal members. However, the only difference is that the complementary members have do not have the right to vote during the general assembly meetings, but they are however eligible to participate and state their opinions.

Article 57: National Dispute Resolution Chamber (NDRC)

This article is a continuation of what was previously established in Article 14 of the EFA regulations on players' status and transfer, with regard to the resolution of disputes, as well as the right of

³ www.youm7.com

⁴ www.elghad.com



the Players Status Committee to create a dispute chamber and regulate its functions.

The new Article 57 determines the jurisdiction of the NDRC, as it shall rule over any contract-related disputes (*i.e.* employment contracts, match organizer's obligations, intermediary contracts, etc.). It is composed of a president, a vice-president (selected by the board upon approval from players and clubs' representatives) and 12 other members, 6 of which are selected by players' unions and the other 6 are selected by clubs' representatives or unions.

Its decisions are subject to appeal only before the Court of Arbitration for Sport (CAS).

By inserting this new article to the Statute, the EFA has finally complied with the criteria of the FIFA standard regulations for NDRC, which was approved by the FIFA Executive Committee in its meeting on 29 October 2007, and communicated to the national associations by FIFA Circular no. 1129 of 2007. Nonetheless, the procedures and governing rules of the NDRC are yet to be drafted.

Article 85: Force Majeure

This is a new article that was included in response to the COVID-19 pandemic, so as to be legally prepared in case such circumstances should occur again in the future.

The amended Statutes give the board of directors a discretionary power to act upon any matter related to *force majeure*, whether it is mentioned in the Statutes or not. The board's actions and decisions shall be in accordance with FIFA and CAF related regulations and/or any other binding laws.

It became clear that the football industry can be easily affected by global events, such as the one that we are currently experiencing. The COVID-19 pandemic showed that there is a loophole in the legal and financial system relating to football. In Egypt, the pandemic gave rise to many problems, notably regarding the execution of employment contracts. Having a lack of legislation with regards to this matter, the EFA had no choice but to postpone the season from March to August. Unlike other FAs, who have the necessary competence to issue decisions reducing salaries and/or prolonging the terms of certain contracts in accordance with FIFA recommendations of April and June 2020, the EFA left it completely to clubs and players to settle their disputes, which turned out to be ineffective especially with respect to foreign players, as the number of disputes related directly or indirectly to the COVID-19 pandemic increased.

This is why the EFA sought to implement a new legislation relating to *force majeure*, which will support it during any future unforeseen and unstoppable events.

Conclusion

It is a good step that the EFA reacted positively to the demands to amend the statute to comply with the FIFA regulation. The EFA has finally focused its attention on small clubs granting them seats in the general assembly with the possibility to participate and even vote.

EFA new Statutes has vastly minimized the conflict of interest by prohibiting members from occupying various roles at the same time, as well as limiting the

possibility to access the board of directors to the one directly involved in the football industry.

The new Article 57 related to the formation of National Disputes Resolution Chamber (NDRC) is an implementation of the decision of the FIFA Executive Committee in its meeting on 29 October 2007, communicated to the national associations by FIFA Circular no. 1129 which required association to have NDRC with specific objective criteria to ensure the legality of the proceedings and to have an efficient national judicial body with a mechanism similar to the FIFA Dispute Resolution Chamber.

We believe that along with the new Article 85 related to *force majeure*, the EFA should draft a set of guidelines for all affiliated members to show the most favorable steps to follow in order to avoid every damage possible due to any future unforeseen and unstoppable event.

COVID-19: the decision of the LFP to stop *Ligue 1* and *Ligue 2* validated on the merits by the State Council



→ **French Professional Football League (LFP) – COVID-19 – Force majeure**

State Council, 23 October 2020, no. 440810, Olympique Lyonnais and others

Due to the COVID-19 pandemic, the French Professional Football League (LFP) put an early end to the 2019-2020 sporting season. It chose to establish rankings and to maintain relegations (according to particular modalities) but gave up the organization of playoffs

between the clubs having finished 3rd, 4th and 5th in Ligue 2, as well as the return playoff match between the winner of these playoffs and the 18th in Ligue 1. Inundated during the summer by several requests for summary proceedings and suspensions to execute these measures, the State Council (Conseil d'Etat) validated them one by one. Having been asked to rule on the merits, it renewed (not surprisingly) its approval of the decisions of the LFP.

Because of the health crisis linked to the COVID-19 pandemic and the Government measures taken to face it, the Board of Directors of the LFP decided, on 30 April 2020, to end the 2019-2020 season. It recorded the *Ligue 1* and *Ligue 2* championship rankings, taking into account the number of points obtained and the number of matches played by the teams and pronounced the accession to *Ligue 1* of the clubs ranked first and second in *Ligue 2* (*FC Lorient* and *RC Lens*), as well as the relegation to *Ligue 2* of the clubs then ranked 19th and 20th in *Ligue 1* (*Amiens SC* and *Toulouse FC*). In addition, contrary to the normally applicable rules, the LFP chose not to organize the playoffs between the clubs having finished 3rd, 4th and 5th in *Ligue 2*, as well as the return playoff between the winner of these playoffs and the 18th in *Ligue 1*.

Olympique Lyonnais (deprived of a possible qualification for

the European Cup), *Amiens SC* and *Toulouse FC* (relegated to the second division), *Espérance Sportive Troyes Aube Champagne*, *Clermont Foot 63* and *Athletic Club Ajaccien Football* (deprived of a playoff for accession to *Ligue 1*) requested the suspension of this decision before the State Council, without success. Indeed, the high administrative court had validated the establishment of the rankings,¹ non-organization of playoffs, and promotion matches² and, finally, the non-implemented relegation system (State Council, 9 July 2020, nos. 441559 and 441585).

In a decision handed down on 23 October 2020, the State Council unsurprisingly rejected the

requests of the aforementioned clubs seeking the annulment of the LFP's decisions on the grounds of an excess of power.

On the competence of the LFP Board of Directors

As a preliminary observation, the State Council confirmed that, in accordance with Article 24 of the Statutes of the LFP, its Board of Directors was well qualified to put an end to the championships.

On the decision to put a definitive end to the Ligue 1 and Ligue 2

As noted in summary proceedings, the State Council recalled that, on 30 April 2020, a great deal of uncertainty was affecting the eventual restart of French

¹ [State Council, 9 June 2020, nos. 440809, 440813, 440824, Olympique Lyonnais Groupe and others, SASP Toulouse Football Club and SASP Amiens SC.](#)

² [State Council, 26 June 2020, no. 441163, Espérance Sportive Troyes Aube Champagne et Clermont Foot 63 and State Council, 6 July 2020, no. 441314, Athletic Club Ajaccien.](#)



football competitions on time. Thus, to preserve the health of all those involved in football and to allow clubs to have the necessary visibility to manage the off-season and organize the 2020-2021 season, the Board of Directors of the LFP decided, without disregarding its competence or tainting its decision with errors of fact or law (with regard to the provisions of the emergency Law of 23 March 2020 to deal with the COVID-19 pandemic), to derogate from the rules of the championships by interrupting the competitions.

Additionally, supposing that the national championships could be completed in other European countries, UEFA wished that all competitions could end before 3 August 2020. In that case, these circumstances did not affect the legality of the appealed decision. In this sense, it should be noted that the State Council recalled the absence of legal effect in the domestic law of the regulations of international sports federations.

On the decision to proceed with rankings and their modalities

Excluding a total suspension of the season, the Board of Directors of the LFP, within the framework of its regulatory power, established new methods of classification. With regard to the objective of fairness and integrity of sporting competitions, the State Council considered that the application to all clubs of the same performance index (taking into account all played matches) to establish these rankings was not vitiated by a manifest error of assessment. This solution has moreover been retained for amateur clubs.

On the decision to forget the playoff and playoff matches

Stressing once again the uncertainty that is currently affecting the evolution of the health situation and the need for visibility of the clubs' sporting future for the 2020-2021 season, the State Council considered that the LFP did not commit a manifest error of appreciation by renouncing the organization of playoff and playoff matches, *"including concerning taking into account the ethical interests and equity objectives of sport."*

On the decision to proceed with relegations

In spite of the early end of the championships, the LFP chose to maintain a system of promotion/relegation (relegation of teams ranked 19th and 20th in *Ligue 1*, promotion of teams ranked first and second in *Ligue 2*). For the State Council, this decision, which is part of the exercise by the LFP Board of Directors of its regulatory power, was not vitiated by a manifest error of assessment *"including concerning sporting equity."*

Finally, the judges affirmed that a freeze on relegations would have implied a more complex and heavier sporting calendar (with 22 teams in *Ligue 1*), which is incompatible with the uncertainties surrounding the evolution of the pandemic, the organization of the 2020-2021 season and the postponement of the European football championship.

Final remarks

It should be mentioned that this system of relegation was initially suspended by the State Council,³ which had noted the existence of serious doubt as to the legality of the LFP's decision. Indeed, in deciding to relegate the two teams ranked last in the *Ligue 1* standings, the LFP had based its decision on an agreement between the French Football Federation (FFF) and LFP that expired at the end of the 2019-2020 season (which provided for a limit of 20 clubs in *Ligue 1* and a freeze on relegations that would have increased the number of teams to 22).

However, the new FFF-LFP agreement covering the 2020-2021 to 2023-2024 seasons maintained a 20-club format for *Ligue 1*. With reference to this, the LFP was able to remedy its error of law by the decision of 26 June 2020, by confirming the relegation to *Ligue 2* of the clubs of *Amiens* and *Toulouse*.

³ [State Council, 9 June 2020, nos. 440809, 440813, 440824, Olympique Lyonnais Groupe and others, SASP Toulouse Football Club and SASP Amiens SC.](#)

The President of the French Republic announces new support measures for sport



→ **COVID-19 - French Professional Football League (LFP) - State aid**

On 17 November 2020, French President Emmanuel MACRON held a long meeting in the presence of French Football stakeholders, at the end of which new support measures were announced.

This meeting was held in the presence of *Jean CASTEX*, French Prime Minister, *Bruno LE MAIRE*, Minister of the Economy, Finance and Recovery, *Jean-Michel BLANQUER*, Minister of National Education, Youth and Sports, *Alain GRISET*, Minister Delegate for Small and Medium-Sized Enterprises, and *Roxana MARACINEANU*, Minister Delegate for Sports.

Among the participants at this meeting were presidents of national federations, associations, professional sports clubs, companies in the commercial sector, athletes and personalities from the health and sports sectors.

Aware of the social role of sport and the major difficulties experienced by the sector due to the ongoing health crisis, the President announced several new, long-awaited measures.

The President confirmed the implementation of the EUR 110 million ticketing compensation

mechanism for men's and women's clubs and organizers of sporting events, including federations¹. This exceptional aid will be calculated based on the structures' losses and dependence on ticketing. The Ministry of Sports began payments at the beginning of December 2020.

The President also announced an exemption from employers' social security contributions, excluding supplementary pensions and a contribution payment aid equal to 20% of the payroll, concerning social security contributions to be paid in October, November and December. This EUR 105 million effort will benefit clubs (with fewer than 250 employees) with virtually no revenue due to gauge restrictions and then closed-door operations.

¹ A decree adopted on 11 December 2020 provides for the creation of a State aid to the professional sports sector in order to partially compensate the operating losses of ticketing and associated catering, due to the general measures taken by the administrative authorities, prohibiting or limiting directly or indirectly the reception of the public, to cope with the Covid-19 epidemic.

At the same time, additional measures were announced:

- the eligibility of professional clubs for the State's equity loan scheme at attractive rates to consolidate the equity capital of clubs;
- the development of a relative measurement system for spectators in sports venues to improve the health situation at the beginning of 2021; and,
- the launch of a working group on the issue of players' image rights.



Player's Right to Request Disclosure of Revenues from an Agent



By Joachim RAIN
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→ **Intermediaries / Agents – Intermediary fees – Player transfer – National law**

*Regional Court of Cologne, 4 August 2020,
no. 21 O 315/19*

The Regional Court of Cologne recently rendered a decision stating that agents have to hand over to the principal (the player) anything that he has received to execute the mandate or which he has obtained (also from third parties, in particular clubs) on the occasion of the execution of the mandate.

1. On 4 August 2020, the Regional Court of Cologne rendered a decision (file no. 21 O 315/19) that has not yet become final but is noteworthy, nevertheless.

2. The facts of the case are as follows.

A player has been guided by an agency - that he explicitly mandated - to look for a top club in Russia (since he had Russian roots) after his career in Germany stagnated, and his current club indicated to him that they did not plan to play with him anymore.

Indeed, the agency managed to arrange a transfer of the player to Russia. The player was aware - as was usual - that the agency would receive commissions for their services from third parties, in particular the player's new club.

However, the player later learned that, apparently, the agency received various payments from

a number of different third parties (among them, his former club) on the occasion of his transfer to Russia that - according to the player - he had not been made aware of.

The player argued that there is usually a total budget to cover all financial liabilities on the occasion of a transfer, *i.e.* the transfer fee payable to the former club, the salary payable to the player and the commission payable to the agent. If the commission is higher than the player has been made aware of or the agent receives commissions from several parties, this may not only have an impact on the player's share of the total budget but may also give rise to doubts as to whether or not the agency truly represents the player's interests or, rather, is putting the player into a deal for selfish motives and makes the player believe that the terms offered to the player were the best available to him.

Therefore, the player requested before the Regional Court of Cologne the disclosure of all agreements the agency entered into on the occasion of his transfer to Russia as well as all benefits received by the agency from any third party.

3. The Court accepted the player's request for disclosure based on the following deliberations.

The legal relationship between the player and the agency must be classified as a "*mandate*". The mandate is governed by Sections 662 ff. of the German Civil Code.¹

Section 666 of the German Civil Code obliges the agent to keep the principal informed about the business he has been mandated with. The right laid down in Section 666 is not a self-purpose but serves to assist the principal in determining claims he might have against the agent.

¹ [German Civil Code, Sections 662 ff.](#)



In other words, if it is impossible that the principal may have any substantial/financial claims or other legitimate interests against the agent, the principal cannot request disclosure based on Section 666 of the German Civil Code.

In the case at hand, the Regional Court of Cologne finally left it open, whether or not the player had claims against the agency since, for the purpose of granting a claim based on Section 666 of the German Civil Code, it is sufficient that there is a possibility of the existence of such claims.

In that regard, the Court ruled that, in general, the agent is obliged to hand over to the principal anything that he has received to execute the mandate or which he has obtained (also from third parties) on the occasion of the execution of the mandate.

This obligation is laid down in Section 667 of the German Civil Code and even includes donations and other benefits the agent receives from a third party, especially if they give rise to an influence to the detriment of the principal, in particular - but not only - to execute the mandate in the best interests of the principal.

The Court assumed that payments of third parties who are interested in hiring the player's services based on the lowest conditions possible might fall under this category. However, it did not explicitly conclude under which conditions this is the case in the relationship between a player and an agent, in which it is rather typical that a third party remunerates the agent.

Nevertheless, the decision, even if it is not yet final, is remarkable since it puts certain obligations on agents to pass on any payments these agents have received from

third parties, in particular clubs. This is especially the case where an agent does not make a player fully aware of all revenues the agent might obtain on the occasion of mediating a transfer agreement.

Legally speaking, this decision is not too surprising, since in the end it simply reflects an application of the law, by which the relationship between an agent and the player is governed by, particularly Sections 666 and 667 of the German Civil Code.

However, for agents who do not fully disclose all revenues they receive after mediating a transfer agreement, this decision (if it is confirmed in an appeal procedure and actually held that an agent is obliged to hand out benefits that he has received, but not revealed, to the player) may have a massive impact on the industry.

In that case, it would be highly recommendable for agents to fully disclose all revenues they receive to the players they manage.

However, suppose without such disclosure, a player assumes lower revenues on the agent's side and is not prepared to accept that the agent receives a more significant portion of the total budget than they had assumed (at the cost of the player). In that case, players might object to the excessive remuneration of their agent and insist on receiving a part of the agent's portion instead.

It will be interesting to monitor the further development of this case.



Match-fixing: the Ethics Committee of HFF exonerates *Evangelos MARINAKIS*, *Olympiakos FC* and *Atromitos FC*



By Aspa SOULOUKOU
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→ **Hellenic Football Federation - Match-fixing - Referee decisions - Evidence - Integrity**

*HFF Ethics Committee, decision n° 6/2020,
25 September 2020*

The Ethics Committee of the Hellenic Football Federation (HFF) recently exonerated Mr Evangelos MARINAKIS (picture), Olympiakos FC and Atromitos FC from manipulating matches and predetermining sporting results for betting purposes.

The Ethics Committee of the HFF has jurisdiction to investigate (Investigation Department) and judge (Adjudicatory Department) the conduct of officials, referees and clubs. According to the 21 April 2020 final report of the Investigator of the HFF Investigation Department, Mr *Evangelos MARINAKIS* and several officials and referees were accused of allegedly acting in a way that harmed the integrity of several matches and their organization during the 2014-2015 sporting season. These clubs and individuals were accused of obtaining commercial benefits for themselves or third parties through monetary payoffs by betting.

After long and extensive proceedings, the following was concluded. At the contested games, there were indeed arbitrary decisions made by the match official but in the absence of any other evidence (specific witness statements, transcripts of recorded telephone conversations,

the affirmation of the competent authorities about betting, etc.), these doubts could not lead to the safe judgement that the refereeing at the contested matches was deliberately partial. That is because the above accusations regarding the referee's decisions do not have an objectively defined evidential background. They constituted subjective judgements, attached to the nature of the sport, and were not connected to specific facts which would show the willingness and acceptance of the involved referees to perform their duties according to indications of the accused people and clubs in the context of a prior arrangement.

The relevant witness statements did not show any evidence of a previous manipulation arrangement concerning factual events that occurred during the matches. On the contrary, most of the witnesses stated that the referees were capable referees with excellent performance and without

attributing anything reprehensible to them. It was also noted that the accused referees were given a satisfying grade at the contested matches by the competent arbitration observers. Furthermore, the referees were not accused either at the penal or disciplinary level regarding the writing of their relevant reports. In their reports, as officials, there was no specific fact that showed intentional refereeing errors characterized as such, which would constitute evidence regarding the manipulation of the contested matches.

It is worth mentioning that *Atromitos FC* and its officials were vaguely accused of not using four of their registered players at one match against *Olympiakos FC*, resulting from a deliberate arrangement between officials of both teams. The accusations were based exclusively on Mr *Panagiotis FYSSAS'* statements, which were found contradictory and, therefore, were overturned by other legal elements.



Lastly, the Ethics Committee of the HFF took into consideration the document UEFA sent to the HFF on 28 April 2020, according to which none of the contested matches was suspected for illegal betting, as there was no reference of them in the service records of the Betting Fraud Detection System, as well as the 11 March 2020 document from the Greek betting company (formerly state-owned) OPAP in response to the 11 February 2020 request of the Investigation Department of the Ethics Committee of the HFF. The said documents confirmed that OPAP had no knowledge of any inside and relevant information concerning a possible manipulation of the results of these matches. Therefore, it agreed with the judgement in determining that there was an absence of an aim to manipulate the results.

Under the aforesaid context and by the extensive and detailed decision no. 6/2020, all accused football stakeholders were exonerated from the disciplinary accusations.

The analysis of a Greek court decision accepting an agent's claim as admissible despite the existence of an arbitration clause



By Aspa SOULOUKOU
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→ **Intermediaries / Agents – Intermediary fees – Coach – Coach contract – Arbitration clause – Domestic disputes – National courts – FIFA – Hellenic Football Federation – Jurisdictional competence – Court of Arbitration for Sport (CAS)**

Second Instance Court of Thessaloniki, decision no. 1089/2020

After a long judicial saga that lasted nearly 7 years, the PAOK was ordered to pay a foreign agent the commission due following the dismissal of the team's coach, the agent's client.

A foreign football agent and Greek Football Club *PAOK FC* signed a professional agent's contract for services provided in signing a coach's contract (Mr *DONIS*) and his assistants.

In 2013, soon after the loss of the semifinal game of the Greek Cup of the 2013-2014 season, *PAOK FC* fired its head coach, Mr *DONIS*, and his assistants alleging defamation. After several long drawn out procedures before both the relevant Committees of the Hellenic Football Federation (HFF) and civil courts, it was determined that *PAOK FC* had no just cause for firing Mr *DONIS* and his team.

Meanwhile, given that according to the agent's contract, any potential dispute should have been lodged before FIFA competent bodies, the agent lodged his claim before FIFA, despite the fact that FIFA has no jurisdiction at all regarding the disputes arising from agent services provided for in a coach's employment contract. FIFA obviously rejected his claim, and thus the agent lodged an appeal before CAS, which rejected his appeal as well.

In the aforesaid context, the agent filed a claim to the civil courts of Thessaloniki. The first instance court rejected his claim as inadmissible based on the arbitration clause,¹ and thus the agent filed an appeal before the Second Instance Court of Thessaloniki, which upheld the appeal by its decision no. 1089/2020 and ordered *PAOK FC* to pay the claimed amount plus interest and legal expenses. Despite that, *PAOK FC* refused once again to pay the agent, and the latter was forced to start an enforcement procedure against *PAOK FC*, which tried to prevent the execution procedure by filing an injunction request. At the hearing, all the arguments of *PAOK FC* were rejected, and thus *PAOK FC* was finally forced to pay the agent some seven years later.

¹ See [Football Legal # 12, p. 206](#)



The Ethics Committee of the Hellenic Football Federation convicts several Greek *Super League 1* clubs



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→ **HFF Ethics Committee – National law – Criminal law – Governance**

HFF Ethics Committee, decision no. 4/2020

The Ethics Committee of the Hellenic Football Federation (HFF) convicted several Greek clubs of the Super League 1 for violating the Ethics Code. The sanction was imposed on all clubs that had voted in favor of Mr GKAGKATSI (picture) and particularly in favor of him holding his position as Managing Director of Super League despite the fact that he had been indicted for embezzlement by the Greek justice system.

During 2016 and despite the fact that there was a final indictment against Mr GKAGKATSI for embezzlement to the grade of felony, *Super League* (currently *Super League 1*) hired him as its managing director and, in doing so, violated Article 3 of Law no. 2725/1999 (namely the Greek Sports Law).

Surprisingly though, the competent Minister of Sports at that time, had not yet issued a sentence verifying the ipso jure and automatic removal of Mr GKAGKATSI, which is provided for in the above-mentioned Law no. 2725/1999. The said Minister was forced to act and apply the Law and its provisions, only after receiving the petition of *Olympiacos FC*, which asked both the Super League and the Minister of Sports to implement the Law. Following *Olympiacos FC*'s petition in March 2020, the Minister was forced to issue - some months later - the above-mentioned decision on June 2020.

Meanwhile, and prior to the decision of the Minister of Sports, *Super League* rejected *Olympiacos FC*'s petition acting in this way as it was contrary to what is provided for by the Law. For this reason, the Ethics Committee of the HFF convicted the 12 *Super League* clubs (among others *AEK Athens FC* and *PAOK FC*) who had voted in favor of Mr GKAGKATSI through decision no. 4/2020. The aforementioned 12 clubs filed an appeal against decision no. 4/2020, and the case is still pending before the Appeal Committee of the HFF.

Dutch Court Annuls the Fine imposed by the Dutch Data Protection Authority on an Amateur Football Streaming Service



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→ **Data protection – Personal Data – Data collection – General Data Protection Regulations (GDPR) – Broadcasting rights – National courts – National law – Social media – Fine – European Court of Justice (ECJ)**

District Court Midden-Nederland, 23 November 2020, ECLI:NL:RBMNE:2020:5111

In the Netherlands, an amateur football streaming service, VoetbalTV, has won an important legal battle against the Dutch Data Protection Authority, Autoriteit Persoonsgegevens (AP). The AP had imposed a fine of EUR 575,000 on VoetbalTV, which was annulled by the District Court Midden-Nederland (Court) on 23 November 2020. The reason for this is that the AP had applied an incorrect interpretation of the General Data Protection Regulation (GDPR). The AP had incorrectly assumed that a purely commercial interest can never qualify as a legitimate interest ground for the purposes of data processing under the GDPR.

The interpretation of the legitimate interest established by the Court in these proceedings is relevant in a broad context. The GDPR applies throughout the European Union, and the interpretation of the term “*legitimate interest*” should be the same in every Member State. Therefore, the interpretation of the Dutch Court is also relevant to the other Member States. In addition, the ground of legitimate interest is a frequently used ground for processing personal data, both by sports clubs and other relevant parties. The *VoetbalTV* judgment confirms that the threshold for an interest to be “*legitimate*” is low. In this article, we will explain the decision of the Court and its consequences in more detail.

Background

VoetbalTV is a video platform for Dutch amateur football that makes video recordings of amateur football matches of seniors and youth players older than 13 years, on instructions of football clubs. *VoetbalTV* was founded in 2018. The matches are recorded *via* smart cameras, provided by *VoetbalTV* to the football clubs and installed around the pitch. Football clubs that participate have to pay a monthly fee to *VoetbalTV* and the the camera’s installation cost. At the beginning of 2020, about 2,500 to 3,000 matches were recorded and broadcasted per month. The *VoetbalTV* platform enables users, such as players and their family and friends, to watch amateur matches live and watch the recording afterwards. The platform also shows “*highlights*” of matches, such as goals and

goal-scoring opportunities, which are selected by the platform’s own staff. Users can also analyse matches, collect and share data with other users. *VoetbalTV* also offers an analytical tool that can be used by trainers and analysts. The *VoetbalTV* app is being used by more than 500,000 people *VoetbalTV*.

The AP is an administrative body responsible for supervising the GDPR and the Dutch GDPR Implementation Act (UAVG). In mid-2018, the AP launched an investigation into *VoetbalTV* and the privacy of players. On the basis of its investigation, on 16 July 2020, the AP decided to impose a fine on *VoetbalTV* in the amount of EUR 575,000 for the unlawful processing of personal data. The AP accused *VoetbalTV* of having made video recordings of a great number of amateur football

¹ District Court Midden-Nederland 23 November 2020, ECLI:NL:RBMNE:2020:5111.



matches without a legitimate ground, and subsequently disseminated these recordings to a large audience *via* the *VoetbalTV* app and its analytical tools. In the AP's opinion, *VoetbalTV* acted contrary to Article 5(1)(a), in conjunction with Article 6(1), of the GDPR. The AP accused *VoetbalTV* of having infringed the right to respect individual privacy and the right to the protection of personal data of a great number of data subjects, including many minors (*i.e.* underage football players who were recorded). As a result of the acts of *VoetbalTV*, these data subjects have (partly) lost control over their personal data. The AP considered this to be a serious violation that justified a high fine. *VoetbalTV* appealed against this decision to the Court.

Journalism Exemption

In the appeal proceedings, *VoetbalTV* relied first of all on the exemption for journalism.² *VoetbalTV* argued that the AP is not competent to impose a fine for the processing of personal data because of this exemption. According to *VoetbalTV*, it follows from European case-law that the journalism exemption must concern activities that have as their objective the disclosure to the public of information, opinions or ideas, regardless of the transmission medium. *VoetbalTV* believes that this exemption is applicable here. According to *VoetbalTV*, the AP disregarded the informative value and the social relevance of (integral) sports broadcasts when it imposed the said fine.

The Court considered that the journalism exemption applies to the processing of personal data

that takes place only (exclusively) for journalistic purposes.³ In this case, the Court concluded that recording football matches and broadcasting them to the public did not exclusively serve a journalistic purpose. The broadcasting of amateur football matches could not be regarded as a disclosure to the public of information, opinions or ideas, as European case-law requires. The matches had insufficient informative value to meet this requirement since they concerned amateur sports and games. The images did not provide any information on celebrities (such as famous football players), nor do they contribute to any public debate. The Court concluded that, even though some newsworthy information could be found among the images *VoetbalTV* collected, the overall number of thousands of matches that had been broadcasted could not be regarded as "*journalism*". Therefore, the Court decided that the making of recordings and broadcasting of all these matches was not justified based on the exemption for journalism.

Legitimate Interest

The fine was imposed by the AP on the ground that *VoetbalTV* did not need to process personal data in order to defend the legitimate interests of any party. Therefore, in the opinion of the AP, *VoetbalTV* was processing personal data unlawfully and failed to comply with Article 6 (1)(f) of the GDPR. According to the AP, a legitimate interest is an interest that has been identified as a legal interest in (general) legislation or elsewhere. Such an interest must be protected by law, be considered worthy of protection, and must be respected and enforceable. For an interest

to be designated as a legitimate interest, it must have a more or less urgent and specific nature that arises from a (written or unwritten) rule or principle of law; in a way, it has to be inevitable for such a legitimate interest to be defended. Purely commercial interests and the interest of maximum profitability are not specific enough and lack an urgent "*legal*" nature. Therefore, the AP believes that they cannot be designated as legitimate interests. The core of the activities of *VoetbalTV* is the processing of personal data; it earns money with this processing. The AP believes that this can never be a legitimate interest. If the performance of this core activity could be designated as a legitimate interest, this would mean that the subsequent test of necessity and weighing of interests would become devoid of substance.

VoetbalTV disputed this position in Court. *VoetbalTV* believes that a negative test should be used to answer the question of whether it has a legitimate interest. In a negative test, "*legitimate*" means "*not contrary to law*", The AP applies a positive test by arguing that *VoetbalTV* must have a legal interest, which is wrong according to *VoetbalTV*.

The Court considered first of all that three conditions must have been met for a legitimate interest to serve as a ground for data processing.⁴ The first condition is that the interest pursued by *VoetbalTV* must be a legitimate interest. If it is, it must be assessed whether the processing of personal data is *necessary* to defend that legitimate interest. A test must also be applied against the principles of proportionality and subsidiarity. The third condition is that the interests of the controller and those of the data subjects must be weighed against each other.

² Art. 85 GDPR in conjunction with Art. 43 of the Dutch GDPR Implementation Act (UAVG).

³ Recital 153 in the GDPR; Art. 43 of the UAVG.

⁴ See *inter alia* [Judgment of the ECJ, 29 July 2019, Case no. C-40/17, ECLI:EU:C:2019:629](#).



The Court then considered that in the case-law of the European Court of Justice (ECJ), no clear definition of “*legitimate interest*” can be found. The Court could therefore not retrieve from this case-law the AP’s interpretation that - in summary - the interest should be a legal interest. However, the Court considered the opinion of the Advocate General in the ECJ’s ruling in the Fashion ID case ECJ’s ruling⁵ to be relevant. The Advocate General held in that matter that a legitimate interest must be interpreted in such a way that no type of interest is excluded per se, as long as the interest is legal itself. The Advocate General based this opinion, among other things, on the opinion of Article 29 of the Working Party (WP29, the predecessor of the European Data Protection Board - EDPB). This led the Court to conclude that the question as to whether an organization that processes personal data has a legitimate interest must be answered by applying a negative test. The essence of this test is that the controller is not allowed to pursue an interest contrary to law. According to the Court, the legitimate interest must be assessed based on a negative test, corresponding with recital 47 of the GDPR, which mentions “*direct marketing*” as an example of possible legitimate interest. This interpretation matches that of *VoetbalTV*.

As a consequence, the Court found that the AP should have interpreted the legitimate interest in a more open and flexible way, rather than adhering to a strict application. The AP ignored the fact that the term “*legitimate*” interest should not serve as a threshold but as an outer boundary. The AP’s interpretation that *VoetbalTV* is basically only interested in capitalizing on personal data, and

that this interest can never be a legitimate interest disregards the fact that the ECJ precisely prohibits the exclusion of specific legitimate interests in advance.

According to the Court, the AP had to examine the interests of *VoetbalTV* and then consider whether *VoetbalTV*, by broadcasting the amateur football matches, was unacceptably infringing the privacy of the data subjects. How the AP had to perform this test follows from the judgments of the ECJ. In brief, this means that *VoetbalTV* must itself assert its legitimate interest in processing personal data and must act according to the said interest. Next, it is the AP’s task to assess, on the basis of the objectives asserted by *VoetbalTV*, whether the processing of personal data is necessary for these objectives. It is then up to *VoetbalTV* to explain the extent to which it collects and processes personal data, which legal arrangements it has made to do this, and how it ensures that there is an appropriate relationship between the infringement of the privacy of the data subjects and the interest *VoetbalTV* pursues (proportionality and subsidiarity). After that, the AP will have to weigh the asserted interests against the infringement of privacy of the data subjects, including, in this case, minors. The aim is that the AP looks at the actual acts of *VoetbalTV*, checks whether its objectives match with its articles of association and whether the processing of personal data is actually pursuing its objectives. If the AP starts from the interests asserted by *VoetbalTV*, it can - unlike the AP assumes - indeed perform a test of necessity and a balancing of interests.

On the basis of the foregoing, the Court considered *VoetbalTV*’s appeal to be well-founded. The Court annulled the decision of the AP in which the fine was imposed.

Bankruptcy of VoetbalTV

Before discussing the decision in more detail, we will briefly describe the run-up to this fine. Around May 2019, the AP contacted *VoetbalTV* for the first time with an investigation report about the processing of personal data by *VoetbalTV*. After that, on 6 November 2019, the AP concluded in a final investigation report that *VoetbalTV*’s data processing violated the GDPR. This led to a pre-notification of enforcement on 22 November 2019. On that date, *VoetbalTV* was threatened with a fine, but no fine was actually imposed, and a long period of uncertainty began. *VoetbalTV* had no possibility of lodging an objection or appeal against the pre-notification, but only against the actual decision to impose a fine. This decision took so long - with all the commercial consequences - that *VoetbalTV* went to court on 20 May 2020 because the AP failed to make the said decision within a reasonable timeframe. This happened six months after the initial pre-notification, and one full year after the AP had first contacted *VoetbalTV*. Such a judicial process is unusual, as normally, supervisory authorities can be expected to make decisions without such a long delay. Two months later, on 16 July 2020, the AP finally announced its decision: it imposed a fine of EUR 575,000 on *VoetbalTV*. This fine automatically became the focus of the proceedings that *VoetbalTV* had initiated. In the course of these proceedings, on 11 September 2020, *VoetbalTV* filed for bankruptcy, giving as reasons the COVID-19 crisis and the continuous clashes with the AP. According to *VoetbalTV*, the slow decision-making process contributed to its bankruptcy. At this moment, it is uncertain whether there will be a restart after bankruptcy.

⁵ [Judgment of the ECJ, 29 July 2019, Case no. C-40/17, ECLI:EU:C:2019:629.](#)



Relevance

The focal point of this judgment is the interpretation of the ground of legitimate interest in the GDPR. A debate had been ongoing for quite some time in the Netherlands about the scope of that legal basis. On 1 November 2019, the AP published an *"explanation of the standard of legitimate interest"* on its website. In this explanation, the AP wrote: *"Another example of something that does not qualify as a legitimate interest is the mere serving of purely commercial interests, maximum profitability [...]"* This was broadly met with dissenting opinions from the market. As has also been made apparent by the Court in the *VoetbalTV* judgment, this interpretation finds little support in the text and explanation of the GDPR, the case-law of the highest European Court, or Article 29 of the Working Party guidelines, the predecessor of the EDPB. The AP appears to have applied a stricter interpretation on its own initiative, which the Court summarized as a *"positive test"*: there has to be a legal provision under which the interest is legitimate. This is at odds with the prevailing opinion in favour of a *"negative test"*: the interests may not be contrary to law. Based on this judgment, the negative test has become the provisional starting point. Provisional, because the AP may still appeal against this judgment. It is unknown whether the AP will do so, but it seems likely, as the fine was annulled and the AP's interpretation was rejected.

The decision is also relevant because a legitimate interest serves as an important ground for data processing in sport. Although we have to await the outcome of a possible appeal and *VoetbalTV's* future is uncertain due to its bankruptcy, according to the Court, a commercial interest as the

sole reason for the processing of data can no longer be rejected in advance. The decision could also be relevant in respect of other fines that are and continue to be imposed by the AP. In March 2020, the AP imposed a fine of EUR 525,000 on the *Royal Dutch Lawn Tennis Association* for the unlawful sale of members' data to sponsors. In that decision, the AP also relied on the *"positive test"* and on the position that purely commercial interests cannot qualify as legitimate interests. It will be interesting to see whether the *VoetbalTV* judgment will have any effect on the *Royal Dutch Lawn Tennis Association's* case.

KNVB implements rules to deal with premature termination of professional football competitions



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→ **Royal Dutch Football Association (KNVB)**
- COVID-19 - National Regulations -
Force majeure

In this article, the author will provide an overview of the saga relating to the premature termination of the 2019-2020 football season in the Netherlands, which eventually resulted in court proceedings, followed by an overview of the amendments to the Regulations and their effect on a potential premature termination of future domestic competitions.

The COVID-19 outbreak has had and continues to have a major impact across society worldwide, including sports. After a disruption of several months, most national and international football competitions could complete the 2019-2020 season. However, several domestic leagues were terminated prematurely, such as the French *Ligue 1*, the Belgian *Pro League*, and the Dutch *Eredivisie* and *Eerste Divisie* (the first and second divisions).

While the 2020-2021 football season is underway in most countries, the much anticipated "second wave" of the coronavirus is hitting the world hard. Consequently, a disruption of the current football season cannot be excluded. The Royal Netherlands Football Association (KNVB) has anticipated such a possible occurrence and decided to amend the Regulations for Professional

Football Matches (Regulations)¹ in order to provide clarity in the event of a premature termination of domestic professional football competitions.

The 2019-2020 season

On 13 March 2020, following a decision of the Dutch government to cancel all events involving more than one hundred people to curtail the spread of the coronavirus, the KNVB announced the suspension of all football competitions in the Netherlands until at least 6 April 2020. Approximately 75% of the matches had been played in the Dutch top-flight up until that moment. On 31 March 2020, the Dutch Government extended the ban on major events requiring a particular permit until 1 June 2020, even if organized without spectators. This effectively meant

that professional football matches could not be played until that date. At that point, considering that the health and safety of all parties involved in professional football were vital, the KNVB and the first and second league organizers *Eredivisie CV* (ECV) and *Coöperatieve Eerste Divisie* (CED) jointly stated that the worst-case scenario of premature termination of the football season appeared increasingly likely. Thereafter, on 21 April 2020, the ban on major events was once again extended by the government until 1 September 2020, striking a massive blow to the professional football sector. As a consequence, the Board of Professional Football of the KNVB (Board) expressed the intention not to continue playing the 2019-2020 competitions.

Eventually, on 24 April 2020, after having consulted UEFA, clubs, players, coaches, and the KNVB Supervisory Board, the

¹ Available here (in Dutch only): www.knvb.nl



Board took the inevitable decision to definitively and prematurely terminate the 2019-2020 season, considering the situation of *force majeure* it was facing. It was the first time that the Dutch professional football competition ended prior to its completion², a scenario that was long considered impossible, and that was, consequently, not foreseen in the Regulations. However, the Regulations do stipulate in Article 1 par. 6 that the Board has the power to decide in situations not foreseen in the same³. As a result, the Board is, in principle, authorized to determine *ad hoc*, whether or not there would be a champion, which clubs would participate in next season's UEFA club competitions, and whether or not promotion and/or relegation would be applied. Based on this discretion, the Board took the following decisions.

1. First, it decided that no champion would be crowned in the two professional leagues. The Board stated that, under the circumstances, it was not appropriate to speak of championship titles. Therefore, it only confirmed the first place of the highest-ranked clubs in both leagues without awarding any trophy.

2. Second, the Board followed UEFA guidelines, pursuant to which, in the event of a prematurely terminated competition, clubs shall qualify to the UEFA club competitions on sporting merit, and the procedure for selecting clubs is to be based on objective, transparent and non-discriminatory principles.⁴ On account of these guidelines, the Board decided to grant the tickets to UEFA club competitions based on the league table as it stood.

Considering that the KNVB Cup final could not be played, the Board decided to grant the Cup winner's UEFA Europa League ticket to the highest-ranked club behind the two clubs that qualified for the 2020-2021 UEFA Champions League.⁵

3. As to the issue of whether or not promotion and/or relegation was to be applied, the Board could not rely on any UEFA guidelines. The Board reckoned there were three ways to resolve the issue: 1) promotion only, 2) no promotion and no relegation, 3) promotion and relegation. The Board considered that option 1) was not feasible due to organisational difficulties as two teams would have to be added to the *Eredivisie* in the 2020-2021 season. With two options left, the Board decided to consult the first and second league clubs during a meeting on 24 April 2020 in order to explore whether there was a clear majority supporting either of the options. The poll resulted in 16 clubs being in favour and 9 clubs against promotion and relegation, while 9 clubs "voted" blank. The Board concluded that there was no clear preference for either of the scenarios. Consequently, within its decision-making power and taking into account the many remaining rounds in the leagues, the Board decided not to apply promotion and relegation.⁶

The allocation of tickets to UEFA club competitions was particularly bitter for *AZ Alkmaar* and *FC Utrecht*, who finished in second and sixth place, respectively. *Ajax*

FC and *AZ Alkmaar* were level on points, while the latter had the better head-to-head record, having beaten *Ajax FC* home and away. However, *Ajax FC* had a more favourable goal difference than *AZ Alkmaar* (+45 and +37, respectively). Consequently, in line with Article 17 par. 4 lit. a) of the previous edition of the Regulations, pursuant to which goal difference is decisive in case two clubs are level on points, *AZ Alkmaar* finished second and was allocated the "worse" UEFA Champions League ticket.

FC Utrecht finished in sixth place with three points behind *Willem II*, a game in hand and a better goal difference than the latter (+16 and +3 respectively). More importantly, *FC Utrecht* qualified for the KNVB Cup final against *Feyenoord FC*, which had been scheduled for 19 April 2020. Nevertheless, *FC Utrecht* was left empty-handed after the Board's decision to prematurely terminate the KNVB Cup tournament.

Both *AZ Alkmaar* and *FC Utrecht* turned to UEFA to challenge the above-mentioned decisions of the Board. *AZ Alkmaar* claimed the first place in the league, arguing that the head-to-head record is a more objective criterion than goal difference to determine the final ranking.⁷ *FC Utrecht*, only one victory away from direct qualification to the group stage of the UEFA Europa League, maintained that the KNVB had not made the maximum effort to try to reschedule the Cup final. However, after UEFA backed the Board's decision as to the qualification to its international club competitions, both clubs decided not to pursue further legal action.

2 Professional football was introduced in the season 1954-1955. The last time a football season was not completed was in the season 1944-1945, due to World War II.

3 Article 1 par. 6 of the Regulations provides that "The Board of Professional Football decides in cases not foreseen in these Regulations".

4 Available here: www.uefa.com

5 As such, first league leaders *Ajax FC* qualified for the group stage of the UEFA Champions League and runners up *AZ Alkmaar* entered the second qualifying round of the same competition. *Feyenoord FC*, in third place, was granted the ticket to enter the UEFA Europa League group stage, while *PSV Eindhoven* (fourth) and *Willem II* (fifth) entered the qualifying round of the same competition.

6 As such, second league leaders *SC Cambuur-Leeuwarden* and runners up *De Graafschap*, 11 and 7 points clear respectively, were denied promotion, while *RKC Waalwijk* and *ADO Den Haag* were assured another season at the highest level.

7 This is arguable. By way of comparison, goal difference is decisive in the English *Premier League*, the German *Bundesliga* and the French *Ligue 1*, whereas the head-to-head record prevails in the UEFA Champions League, the Spanish *La Liga* and the Italian *Serie A*.



Court proceedings

The real controversy turned out to be the decision denying the promotion of *SC Cambuur-Leeuwarden* and *De Graafschap* and the procedure leading to such decision, as these two clubs took the KNVB to court in an attempt to obtain a ruling confirming that the Board's decision was voidable or unreasonable.

At this point, it is worth noting that the KNVB is an association and, therefore, has legal personality based on Article 2:26 of the Dutch Civil Code (Civil Code).⁸ The bodies of an association, such as its board, the supervisory board and the general assembly, can take decisions. According to Article 2:15 of the Civil Code, a decision of an association is voidable in the following situations: 1) if it violates legal or statutory provisions that regulate the decision-making process, 2) if it violates the principle of reasonableness and fairness laid down in Article 2:8 of the Civil Code, or 3) if it violates an internal set of regulations. However, the chances to successfully challenge a decision of an association in court are relatively limited, as courts only apply a marginal standard of review.



On 14 May 2020, the civil court of Utrecht rendered its decision. The judge found that the Regulations, including the "*Promotion and Relegation Scheme*" (Scheme), only provided for a situation in which a competition ends in a

regular manner. As the Regulations and the Scheme are silent on the issue of promotion and relegation in the event of a prematurely terminated competition, the Board had the authority to independently make a decision, pursuant to Article 12 of the Scheme.⁹ The judge found that the decision of the Board did not violate legal or statutory provisions, including the Scheme.

As to the question of whether the procedure leading to the Board's decision or the substantive decision violated the principle of reasonableness and fairness, the judge held that the decision was not unreasonable to such an extent that it was to be cancelled. The Board had to make a decision, as doing nothing was not an option. The interests of all clubs were taken into account. The fact that there were clubs whose interests were harmed by the decision was not sufficient to consider the decision unreasonable. The procedure leading to the decision did not violate the principle of reasonableness and fairness either, although the judge did point out that the procedure could have been carried out in a better way. The KNVB conducted a poll among the clubs but was not bound by its outcome. At the end of the day, the Board was authorized to decide. Since it had the formal power to decide and had retained this power, there was no faulty procedure. Consequently, all claims of *SC Cambuur-Leeuwarden* and *De Graafschap* were dismissed. Considering that the interests of the clubs were duly taken into consideration and that the Board was formally authorized to decide, the court's decision seems to be rather logical.

With the decision of the court and UEFA's confirmation of the clubs listed to participate in its club competitions during the 2020-2021 season, this legal saga came to an end. However, the three above-mentioned issues and the court procedures that followed highlight the challenges of ending a suspended competition fairly, knowing that some clubs will disagree with whatever the resulting decision may be.

Following these events, *Ajax FC*, *AZ Alkmaar*, *Feyenoord FC*, and *PSV* agreed with the KNVB to launch a solidarity fund in order to support professional football clubs that are suffering financially due to the COVID-19 pandemic.¹⁰ The four aforementioned clubs contribute to the fund by paying part of the fees they will receive from UEFA due to their participation in the latter's club competitions during the 2020-2021 season. In addition, the KNVB, its main sponsor ING and the men's and women's national teams contributed significantly to the fund. During the General Assembly of Professional Football on 18 June 2020, a majority of clubs voted in favour of the distribution of part of the solidarity fund to *FC Utrecht* (EUR 600,000), *SC Cambuur-Leeuwarden* (EUR 425,000) and *De Graafschap* (EUR 375,000), under the condition that the said clubs would not pursue further legal action against the decisions of the Board.¹¹ The KNVB emphasized that the aforementioned payments from the solidarity fund are to be considered a "*gesture*" to mitigate the financial and sporting loss suffered by the said clubs following the premature termination of the 2019-2020 season, rather than actual compensation.

⁸ An (unofficial) English translation of the Dutch Civil Code can be accessed here: www.dutchcivillaw.com

⁹ Article 12 of the Scheme provides as follows: "*In situations not foreseen or in which, in the opinion of the Board, a deviation is necessary due to special circumstances (...), the Board decides.*"

¹⁰ Interestingly, the proposal to introduce a solidarity fund had already been made by *AZ Alkmaar* at the beginning of April 2020, before the final decision to prematurely terminate the competitions was taken.

¹¹ Curiously, one club did not attend the General Assembly: *AZ Alkmaar*.



Amendments to the Regulations

Furthermore, the KNVB decided to appoint a working group in order to propose amendments to the Regulations aimed at avoiding *ad hoc* decisions in case a similar situation occurs in the future.

On 8 September 2020, pursuant to Article 31 par. 3 lit. a) of the KNVB Statutes, the Board issued an executive decree by means of which Articles 2 and 17 of the Regulations were amended, in accordance with the advice of the working group, as follows:¹²

New Article 2 par. 7

If in the opinion of the Board, the professional football competitions and the KNVB Cup tournament (competitions) cannot be completed due to *force majeure* or other unforeseen circumstances, the Board is authorized to decide to prematurely terminate these competitions, after having heard the delegates referred to in Article 18 par. 7 of the Regulations for Professional Football.¹³

Before deciding to prematurely terminate the competitions, the Board shall (evidently) make a maximum effort to complete these competitions. For the sake of clarity, the Board is competent to judge whether or not there is a situation of *force majeure* or any other unforeseen circumstances as a result of which the competitions cannot be completed. The decision to prematurely terminate the season will apply to all competitions, thereby excluding the possibility to prematurely terminate an individual competition.

New Article 17 par. 5 lit. a)

In case the Board has decided to terminate the competition prematurely in accordance with Article 2 par. 7 of the Regulations, the ranking will be determined by taking into account the following elements (in chronological order in case the previous element is not decisive): points achieved, goal difference, goals scored, head-to-head record.¹⁴

If at the moment of the premature termination of the competition, not all clubs have played the same number of matches, the average number of matches played is decisive with regard to the following elements (in chronological order in case the previous element is not decisive): points achieved, goal difference, goals scored and, where applicable, away goals scored.

Whereas the final wording of the new provision literally says "[...] and, where applicable, away goals scored", the commentary to the amended provision stipulates that "*the average head-to-head result*" is decisive in case the average points achieved, goal difference and goals scored are equal. Although not described explicitly, this appears to mean that the number of away goals scored in (a) head-to-head match(es) is decisive. The commentary to the amended provision further clarifies that if only one head-to-head game has been played at the moment of the premature termination of the competition, the result of the said match will thus be taken into account.

New Article 17 par. 5 lit. b)

In case the Board decides to terminate the competition prematurely in accordance with Article 2 par. 7 of the Regulations, promotion, and/or relegation will only be applied to those clubs that have already been promoted and/or relegated irrevocably on the basis of the ranking referred to in Article 17 par. 5 lit. a) of the Regulations.¹⁵

Furthermore, the new Article 17 par. 5 lit. b) stipulates that in case all clubs in the first league and the second league have played at least 85% of the matches of the respective league in the relevant season, by way of derogation from the first part of the present provision, it will be determined on the basis of the ranking referred to in Article 17 par. 5 lit. a) of the Regulations which clubs will qualify for the championship titles, UEFA club competitions, and promotion and relegation.

New Article 17 par. 5 lit. c)

In the event that competitions are prematurely terminated and not all clubs in the first league and the second league have played at least 50% of the regular number of league matches, all league results will be cancelled and Article 17 par. 5 lit. a) of the Regulations will not apply, *i.e.* no final ranking will be determined.

In this respect, the author observes that the latter provision does not stipulate how it will be determined which clubs qualify for the UEFA club competitions of the following season, which could cause uncertainty. However, this could potentially be determined

¹² Available here (in Dutch only): www.knvb.nl

¹³ These delegates are representatives of the professional football clubs, as well as the Player Council and the Coach Council.

¹⁴ The head-to-head record is determined by taking into account the following elements (in chronological order in case the previous element is not decisive): points achieved, goal difference, goals scored, away goals scored.

¹⁵ This could lead to 16, 17, 18, 19 or 20 participants in the first league (currently 18 participants) and 22, 21, 20, 19 or 18 participants in the second league (currently 20 participants).



following UEFA guidelines or on the basis of the final ranking of the previous season.

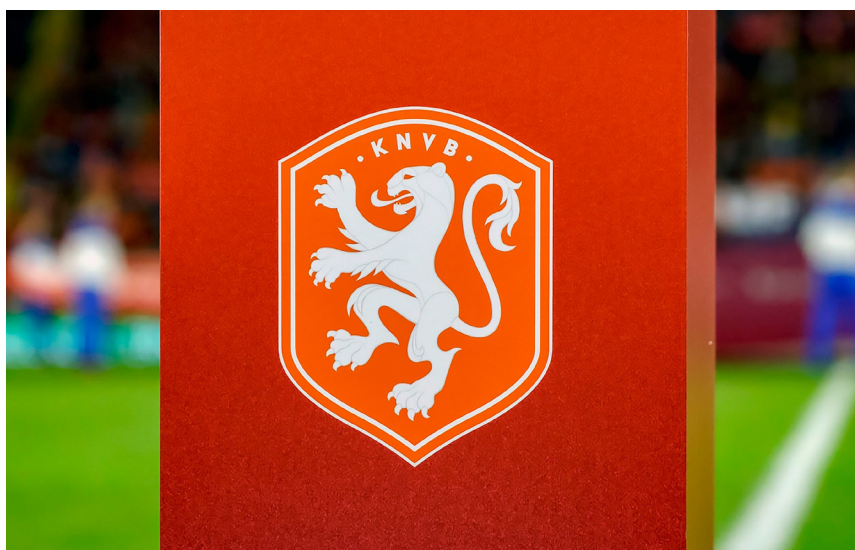
Finally, within the aforementioned executive decree, the Board communicated that the KNVB Cup Regulations will be amended to stipulate that, in the event the Board decides to prematurely terminate the KNVB Cup tournament, the Cup winner's UEFA Europa League ticket shall be granted to the highest-ranked club behind the clubs that qualify for the UEFA Champions League. The remaining tickets to the UEFA Europa League will be passed on to the next clubs in the ranking.

Conclusion

With the above-mentioned amendments to the Regulations, the Board followed the advice of the working group and, to a great extent, codified the *ad hoc* decisions taken after the premature termination of the competitions in the 2019-2020 season. Evidently, the author hopes that the COVID-19 pandemic will be over soon in order for life (and football) to get back to normal. Nevertheless, in case of further disruption to the sporting world and the premature termination of professional football competitions in the Netherlands again, the amended Regulations provide more clarity. As a result, the clubs will (largely) know where they stand and the situation can hopefully be resolved peacefully, outside of courtrooms.



Modified KNVB Licensing System due to COVID-19



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→ **Royal Dutch Football Association (KNVB)
- Club licensing - COVID-19 - National
Regulations - Financial control**

The Dutch licensing system for professional football used by the Royal Dutch Football Association (KNVB) has undergone major changes for the 2020-2021 season as a consequence of (the government measures in response to) the COVID-19 virus. This article discusses what the licensing system entails and what the (most important) changes are: which parts have changed and why?

Licensing system

With the licensing system, the KNVB strives to guarantee the integrity, continuity, and (undisturbed) course of the football competitions as much as possible. The licensing system also aims to guarantee the continued existence of clubs by improving quality determining factors regarding:

- finances (by means of periodic reports);
- infrastructure and safety (through the annual safety audit);
- the organization, including, for example:
 - the organization of youth training;
 - the legal structure; and,
 - the interpretation of the work organization and administration.

The KNVB operates a licensing system for both the *Eredivisie* and the First Division (professional football) and the Second and Third Division (amateur football). The two licensing systems are different in terms of objectives, processes and content.¹

Unlike most UEFA countries, the professional football licensing system in the Netherlands for the national license has a dynamic character. Contrary to a static licensing system, where clubs² have to re-apply for a license every year, the dynamic character of the Dutch system entails that a national license, once obtained, continues to be valid as long as the club is competing in a professional football league.³ Therefore, the

dynamic system saves the clubs a lot of (administrative) work. However, the club's national license may lapse or be revoked if it repeatedly fails to comply with the licensing requirements.

The licensing system focuses on the financial management of clubs. However, the KNVB does not intend to take the place of the director(s) of the various clubs: the clubs themselves, for example, have to deal properly with the financial resources available to them.

The implementation of the licensing system is overseen by a Licensing Committee and a Licensing Appeals Committee, both of which are independent of the KNVB. The bodies consist of members with mainly legal and financial expertise. It is important to note that the KNVB guarantees the clubs' confidentiality with regard to the information provided under the licensing system.

¹ The authors do not discuss the licensing system for amateur football in this article. More information can be found at www.knvb.nl

² The KNVB officially uses the term 'professional football organization' (in Dutch: 'BVO'). Where this article refers to a club, this means a BVO.

³ The current (dynamic) KNVB licensing system has been in force since the 2004/'05-season. Before that, the KNVB had an annual (static) licensing system for decades.



Licensing requirements

The Licensing Committee assesses whether a club meets certain licensing requirements. The KNVB has two categories of licensing requirements: A- and B-requirements. For each licensing requirement, the licensing regulations⁴ stipulate to which category it belongs. A violation of an A-requirement results in (a risk of) more severe measures than a violation of a B-requirement.

The A- and B-requirements are further divided into five areas, with various criteria:⁵

- Sports (8 criteria);
- Organizational and administrative (17 criteria);
- Legal (4 criteria);
- Infrastructural (22 criteria);
- Financial (14 criteria).

In order to determine whether a club fulfils the requirements, certain documentation is to be delivered annually by the clubs on fixed dates.

Financial Rating System (FRS)

A large part of the financial requirement is the so-called "Financial Rating System" (FRS), which is used to determine the financial position of clubs. Various financial reports (annual figures/forecasts, biannual figures and (optionally) a budget) are to be submitted to the Licensing Committee at predetermined dates. The assessment based on the FRS takes place once a year.

⁴ Available at www.knvb.nl, as well as other relevant (official) documents and information.

⁵ These areas are further elaborated in the licensing guidelines.

Action plan

In case of a low FRS-score, clubs must submit an action plan. The action plan shall state how and when a club aims to meet the applicable (financial) licensing requirements again. The aforementioned plan applies until the club shows a structural improvement in its financial position. There is a structural improvement if the club achieves a sufficient FRS-score at two consecutive measuring moments. The duration of an action plan is, therefore, at least two seasons.

Under these circumstances, the club must also participate in a so-called "club development scan", which is carried out by an external party. The aim of this scan is to advise whether and how the club's organization as a whole could be improved.

In addition to determining the financial position of clubs based on an FRS-score, there are two catch-all clauses which, regardless of the FRS-score, (may), lead to the obligation to draw up an action plan immediately.⁶

Improvement of negative equity

The licensing regulations include the continuing obligation to improve a club's negative equity by 5% if and where applicable. Whether a club's equity is negative is assessed only once a year on the basis of its annual figures.

⁶ The safety net provisions apply if, in the opinion of the Licensing Committee, it appears that at any time a club is (or has been) more than three months behind in meeting its payments to its (former) employees, the CFK, the Tax authorities, other Dutch clubs or the KNVB; or if a club has not submitted a balanced liquidity forecast by (normally) 1 October/November at the latest.

Measures and sanctions

Failure to comply with obligations under the licensing system may lead to measures or sanctions being imposed on clubs, which can vary in content and consequences and may even have consequences for obtaining a UEFA license.⁷ The sanction depends (partially) on the type of infringement (A- or B-requirement).

Changes to the 2020-2021 season

As a result of the impact of the COVID-19 pandemic, various adjustments have been made to the licensing system for professional football organizations, specifically for the 2020-2021 season. Most clubs will not be able to look beyond the 2019-2020 and 2020-2021 seasons. This has led to a licensing system in which the focus is more short term instead of long term. The changes were introduced in the Implementing Decree adjusting season 2020-2021 Professional Football Licensing Regulations as a result of COVID-19" (Implementing Decree).⁸

As mentioned, the primary objective of the licensing system is to ensure the continuity and thus liquidity of professional football competitions, including clubs. From this perspective, the KNVB deemed it necessary to suspend the obligations within

⁷ In order to participate in the UEFA Champions League and UEFA Europa League, a club must comply with the licensing requirements drawn up by UEFA: the UEFA Club Licensing and Financial Fair Play Regulations (Edition 2018). UEFA's licensing requirements are not addressed in this article. For more information please see www.uefa.com. The UEFA license is also primarily issued by the KNVB. UEFA only executes a check.

⁸ This Implementing Decree entered into force on 28 September 2020. The amendments to the Licensing system are explained in Annex 1 to the Implementing Decree.



the licensing system connected to the improvement of the financial position, which relate to the medium and long term.

Moreover, the KNVB noted that these obligations will apply again in the near future. The KNVB realized that it is necessary for clubs to be able to make a fundamental transition to a new, sustainable and financially sound future. However, clubs cannot completely lose sight of the long(er) term. After all, if clubs focus only on the short term, the improvement to the desired level (e.g. a sufficient FRS-score) will be more difficult to achieve.

In light of this, the KNVB has made the changes outlined below.

No budget in 2020-2021

According to the KNVB, submitting a budget is not meaningful for the 2020-2021 season. The reasons given for this measure are that (1) there are too many uncertainties potentially impacting the budget, as a consequence of which there is a risk of false certainty, (2) the submission of the budget would be (too) close to the submission of the forecast, (3) a budget could not be (standardly) provided with an 'accountant's report', and (4) the start of the competition in the second week of September 2020.

Annual figures for the 2019-2020 season and forecast for 2020-2021

With the annulment of the budget requirement, the forecast for the 2020-2021 season is the most important document to determine a club's financial position. In view of the fact that the forecast is often based on annual figures, both the annual figures and the forecast must be submitted at the same time. The annual figures for

2019-2020 and the forecast for 2020-2021 were to be submitted by no later than 2 November 2020.

If a club fails to submit a balanced liquidity forecast - subject to an extra six-week period - it may face sanctions.

Financial Rating System (as part of the annual figures for 2019-2020 and forecast for 2020-2021)

An FRS-score will be calculated for each club on the basis of the 2019-2020 annual accounts and the 2020-2021 forecast. However, there will be no obligation to undergo a club development scan or to submit an action plan in relation to an insufficient FRS-score.

(Subsequent) action plan

Insofar as a club should have submitted an action plan on 8 April 2020 or 15 June 2020, this obligation will be suspended for one year. Already imposed standards will (have) lapse(d). Nevertheless, a sufficient FRS-score based on the annual 2019-2020 documents and the forecast for 2020-2021 will be taken into account with a view to the structural improvement of the financial position.

Improvement of negative equity

If the negative equity has not improved sufficiently according to the annual 2019-2020 figures, and, therefore, the relevant club does not comply with the (regulatory) mandatory improvement of the negative equity, no sanctions will be imposed.

Specific licensing requirements related to disclosure of financial matters

Concerning disclosing the state of affairs as regards financial matters, the KNVB considers it of utmost importance that such requirements shall be complied with. One of the reasons for this is that COVID-19 should not lead to a lack of transparency. Therefore, these requirements will continue to apply in full.

Finally, the KNVB notes, in the explanatory memorandum, that dispensation may be granted per club or per licensing requirement if necessary.

Conclusion

In light of the measures taken by the Dutch Government to fight the COVID-19 pandemic, the KNVB introduced short term changes to its licensing system. The main objective of these changes is to enable clubs to survive the erratic course of competitions and additional financial hardship due to the COVID-19 crisis. In view of this, the KNVB suspended financial and administrative licensing requirements in order for clubs not to get into insurmountable trouble on licensing and fear for their existence.



Changes in the FUR Regulations on the Status and Transfer of Players



By Eugene KRECHETOV
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→ Football Union of Russia (FUR) – National Regulations – FIFA RSTP – Transfer Matching System (TMS) – National team – Nationality – Bridge transfer – TPO/TPI of Russia (FUR) – National regulations

Surprisingly, during the year 2020, the Football Union of Russia (FUR) Regulations on the Status and Transfer of Players were revised five times - on 15 May, 9 June, 6 July, 24 July, and 7 August 2020.

Besides changes of a purely technical nature, the following important amendments were introduced:

- Most procedures relating to players' passports, registrations and management of competitions need to be processed through the new FUR Digital Platform. Simultaneously, the Domestic Transfer Matching System (DTMS) was implemented;
- By analogy, the prohibition of bridge transfers was implemented; and,
- Finally, the Third Party Influence (TPI) rules were amended by an express restriction to include in loan agreements any payments depending on the respective player's participation or non-participation in matches against the club that had loaned the player.
- A new status of players - Legionnaire - was introduced. From now on, any player who is not entitled to play for any national team of Russia, Belarus, Armenia, Kazakhstan, or Kirgizstan shall be considered as a Legionnaire player, with some limitations to be applied to these players;
- Similarly to FIFA's Regulations, for the season 2020-2021, players would be allowed to be registered with a maximum of three clubs and be eligible to play official matches for three clubs as well;



FUR Updates its Rules on Working with Intermediaries



By Eugene KRECHETOV
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→ **Intermediaries / Agents - Football Union of Russia (FUR) - Intermediary fees - National Regulations - FIFA RSTP - Representation contract**

On 30 September 2020, the Executive Committee of the Football Union of Russia (FUR) approved new Regulations on Working with Intermediaries that come into full force as of 1 January 2021, however, certain changes will apply immediately.

First of all, FUR has deprived foreign companies of the ability to be registered as intermediaries in Russia. Only legal entities established in Russia may act as intermediaries from 2021. A foreign intermediary may work in Russia only as a physical person.

As an alternative solution, foreign intermediaries are allowed to work in Russia without registration based on a cooperation agreement with an intermediary, duly registered in Russia, and provided that all payments will be effected through this Russian-registered intermediary.

The annual income of intermediaries, tax declarations, and a detailed list of payments effectively received by the intermediary from players, coaches, and clubs is subject to disclosure to FUR.

In addition, each intermediary is required to inform FUR on a quarterly basis about all their employees, such as scouts, managers, lawyers, accountants, and so on.

A wide range of restrictions has also been implemented in

relation to minors. From now on, minors below the age of sixteen may not enter into agreements with intermediaries, while minors between the ages of 16 and 18 may unilaterally terminate any agreement with an intermediary without just cause with no risk of any negative consequences whatsoever.

As for minors under the age of 16, intermediaries are strictly prohibited from even contacting them, whether directly or indirectly. The prohibition includes any personal contact and any electronic communications, including *Messenger* and other social networks.

Intermediaries' accreditations will not be divided into different categories, as they were before, so any registered intermediary will be entitled to represent players, coaches, and/or clubs. According to the previous regulations, there were different categories of intermediaries' accreditations, allowing them to either represent players and coaches or clubs, while only the PRO-category were entitled to represent anyone with no limitation.

In line with this, the registration fee was decreased from RUB 10 million (approx. EUR 110,000) to RUB 50,000 (approx. EUR 550), however, all applicants will be required to pass an exam.

Finally, all players and clubs are prohibited, under the threat of sanctions, to even contact non-registered intermediaries, directly or indirectly.

As for the currently registered intermediaries, their accreditations will expire 1 January 2021. However, provided that they meet all requirements stipulated in the new Regulations, they may obtain a new accreditation valid until the expiration of the residual term of the accreditation issued before the year of 2021. Following which, they will have to be registered *de novo* in accordance with all general requirements, including passing the new exam.

Representation contracts entered into before the end of 2020 will be respected.



Following the massive criticism of the referees' work, FUR introduce a Disciplinary Code for referees and match inspectors



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→ **Football Union of Russia (FUR) – National Regulations – Referee**

Within the global refereeing reform, implemented by the Football Union of Russia (FUR) in October 2020, FUR has introduced a Disciplinary Code especially designed for referees and match inspectors.

According to the new Code, a disciplinary infringement is an action or inaction of a referee or a match inspector that breaches regulations of competitions, Rules of the Game, relevant FUR rules, or ethics rules.

A referee or an inspector may be sanctioned if (1) the Expert and Judicial Commission concludes that he made a mistake and (2) the said mistake is sanctionable under the new Code.

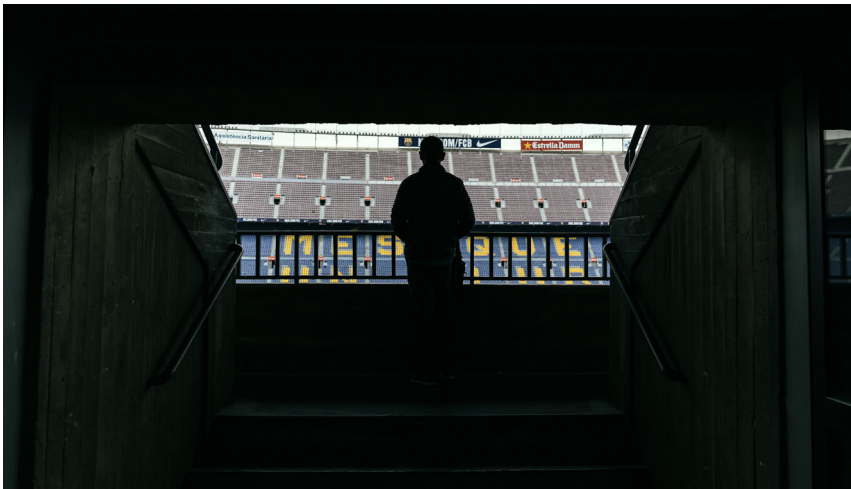
The respective body may initiate a disciplinary procedure on the basis of any information about an infringement contained in match protocols, reports, and petitions of match officials, FUR officials and bodies, as well as based on petitions filed by players, clubs and leagues.

There is a closed list of sanctions, which is however pretty wide: warning, reduction of appointments (calculated for a specific number of rounds), suspension for a certain number of rounds, suspension until the end of the season, suspension until a particular event, removal from the list of referees/inspectors (the referee or match inspector cannot be re-included in the list within at least one year after the exclusion), or reduction of the remuneration (for a match or several matches).

Decisions are subject to appeal (except for some categories) to the Referee Disciplinary Body with further possibility to appeal before the Court of Arbitration for Sport or a national arbitration tribunal admitted by the FUR Executive Committee.



FC Barcelona under the Threat of Bankruptcy



By Ana CORTÉS BENDICHO
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→ **Bankruptcy - Financial control - COVID-19 - Player contract - Salaries - National law - National courts**

The economic situation left by the COVID-19 pandemic on FC Barcelona is dire. So dire that, in 2021, the club could go into bankruptcy. The losses caused by the temporary suspension of the 2019-2020 season, to which must be added, in the current season, those due, among other reasons, to the lack of public and tourists and its early elimination from the Champions League are expected to amount to more than EUR 300 million. Additionally, other circumstances such as the poor economic management of recent years and the resignation of FC Barcelona's Board of Directors, including its President Mr BARTOMEU, have led the club into a situation of insolvency which it is trying to remedy.

The Management Board, chaired by *Carles TUSQUETS*, who is provisionally in charge of the Catalan club until the next presidential elections are held, is trying, round the clock, to take drastic measures to avoid a debacle. It is not having it easy, given that its possibilities for action, as an interim Management Board are limited, given that it only has the capacity to call elections and carry out the acts that are essential to maintain the entity's regular activity.

The Negotiations with Players

The most imperative measure is to reach a salary reduction agreement with the players and executives of the club.

The salvation of the club depends on its players, whose salaries and bonuses are its most significant financial burden. Despite savings amounting to EUR 42 million that

the agreement adopted between the club and the players in May 2020 effected, such savings have not been enough to avoid a potential insolvency situation.

With the ultimate objective of saving the club, and keeping in mind the unmovable figure of EUR 190 million, which needs to be reduced to avoid insolvency proceedings, several meetings have been held in October and November 2020 amongst the lawyers of the players, those of the Spanish Association of Footballers (AFE) and those of the club.

The club proposed a postponement of 30% of players' salaries, to be paid within the contractual years of each player. This solution however was not accepted, and the consultation period concluded without an agreement on 11 November 2020.

Nevertheless, and knowing that the acceptance of a salary reduction by the players is their only way

out, the club started a new period of "reflection" to see "if the proposals that have been left on the table can still be accepted."

Especially problematic is the case of *FC Barcelona's* superstar *Lionel MESSI*, since in addition to his high salary, there is a large bonus that he will receive in the event that he decides to leave at the end of the season (as is stipulated in his contract). This would certainly sign the death certificate of the club's economy.

The Necessary Bankruptcy Proceedings requested by the Creditor Company "Muro Cortina Modular Renting"

While the club is struggling to reduce its deficit, the club's creditors are growing impatient.

One of these creditors, the entity *Muro Cortina Modular Renting*



(MCM), has become tired of not collecting the EUR 3.5 million that it says the club owes it for the construction of the façade of *FC Barcelona's* grassroots facility "*La Masia*". Therefore, *MCM* has filed a claim before Barcelona's Commercial Court number 12 requesting that the club be declared in bankruptcy.

Spanish Law (Royal Legislative Decree 1/2020 of 5 May 2020¹) establishes, as a basis for the bankruptcy of creditors, the current insolvency (when the debtor cannot regularly comply with its obligations) or the imminent insolvency (when it is foreseen that the debtor will not be able to regularly and punctually comply with its obligations). It also distinguishes two types of bankruptcy according to who requests it: voluntary - if the insolvent party requests it - or necessary - when it is a creditor or several of them who request it from a judge.

In the latter case, the claim submitted by the creditor must be accompanied by legal documents proving his credit against the respondent and should express external facts revealing the debtor's state of insolvency.

The document provided by *MCM* is a contract for the construction of the aforementioned façade, dated 22 December 2010, from which it derives a payment obligation that expired on 30 June 2017. As proof of the club's imminent insolvency, *MCM* refers to the ongoing negotiations with the players to reduce their salaries. The company also requested the judge to adopt an interim order to appoint an independent bankruptcy administrator, to replace the management board chaired by *Carles TUSQUETS*.

The claim has not been admitted by the Commercial Court Number 12 of Barcelona, which is responsible for hearing the case, because it applied an exceptional measure approved in April 2020 as a result of the COVID-19 pandemic, according to which no person is obliged to file for voluntary bankruptcy, even if they meet the conditions for it, until 31 December 2020 and, if necessary bankruptcies are filed, such as that of *MCM*, they will be suspended until 1 January 2021.

In addition, the judge indicated that if the club presents voluntary insolvency proceedings before the end of 2020, it will be processed as voluntary (with the advantage that the entity maintains financial control) and not as necessary, even though the application for *MCM* was made earlier (in which case the economic management would be granted to a judicial administrator).

Time is running out for *FC Barcelona*, and the threat of bankruptcy hangs over them if they do not find a solution to their economic problems soon.

¹ www.boe.es



Changes in Spanish Legislation related to the Sports Sphere and the Activity of Betting Companies



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→ **Betting – Sponsorship – Spanish Professional Football League (LaLiga) – National law**

According to the latest notifications sent by the Ministry of Consumer Affairs through the publication of a new Royal Decree in the Official State Bulletin (BOE) of Spain, any commercial activity and connection of betting companies with sports organizations will be prohibited, including football clubs.

This is creating tension between these entities and the sports sphere. The Minister of Consumer Affairs notified the CEOs and Presidents of 25 football clubs that all sponsorship agreements with betting companies should be terminated at the end of the current sports season. This is the main requirement of the Royal Decree regulating the activity in the sector of betting and betting-related games, which will most probably be in force on 30 August 2021. This new legislation will undoubtedly have negative consequences for betting companies.

According to the Royal Decree's draft, current sponsorship contracts should be extended within the transition period which, however, cannot exceed the current sports season.

As of now, 13 of 20 football clubs performing in the Spanish *La Liga* are sponsored by betting companies: *Sevilla FC*, *Valencia CF*,

Real Betis, *Granada CF*, *Levante UD*, *Deportivo Alavés* and *Cádiz CF* are putting the logos of betting companies to their kits while *Athletic Bilbao*, *Getafe CF*, *RC Celta*, *Real Madrid CF*, *Elche CF* and *CA Osasuna* include betting companies to their roster of sponsors and promotional materials.

” The clubs of LaLiga would lose up to EUR 90 million per year “

Most football clubs requested that a moratorium of three years be imposed on such limitations. The main objective of such a measure is to terminate the current and valid sponsorship agreement in the normal course. However, the Ministry of Consumer Affairs is skeptical about such a measure and the requirement to terminate the sponsorship contracts at the end of the current season is still on the table.

LaLiga President, Mr Javier *TEBAS*, in one of his interviews, indicated that the clubs of *LaLiga* would lose up to EUR 90 million per year due to the new restrictions and the total prohibition to link betting activity to football entities. According to him, it would be more reasonable to strictly regulate the relationship between betting companies and sports clubs and not prohibit it outright. Mr *TEBAS* also mentioned that he would make all possible efforts for the transition period of three years to be implemented.

The text of the Royal Decree also includes the limitation of advertising by betting companies and games on television with only a slot available from 1 am to 5 am for such advertising. The Royal Decree extends the prohibition of bookmaker advertising to sports kits and “loyalty” discounts for the fans of a team at the moment of registration



Spanish Sports Council allows LaLiga Games on Fridays and Mondays



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→ **Spanish Football Federation (RFEF) – Spanish Professional Football League (LaLiga) – Broadcasting rights – Calendar – National courts – National law – National Regulations**

CSD Resolution, 16 October 2020

The President of the Spanish Sports Council, Irene LOZANO (picture), has decided to allow Friday and Monday LaLiga fixtures. This has been one of the hottest points in the tense relationship between the Royal Spanish Football Federation (RFEF) and LaLiga.

LaLiga wants matches to be played on Fridays and Mondays to have ten different kick-off times per weekend. However, this goes against RFEF's decision of keeping all matches on the weekend between Saturday and Sunday. The Federation's belief is that weekend scheduling would help supporters attend matches, and so the RFEF banned matches on Fridays and Mondays.

This long-standing dispute has had several milestones.

On 26 July 2019, the RFEF Competition Judge, not as a competition and disciplinary body but by a delegation of the RFEF President, issued a resolution prohibiting the dispute of matches on Fridays and Mondays. The resolution was appealed by LaLiga before the Spanish Sports Council (CSD) and a commercial court.

On 9 August 2019, the Commercial Court number 2 of Madrid decided as a provisional measure that until it decides on the merits, there

would be games on Fridays but not on Mondays. This order was appealed by LaLiga before the Provincial Court, which revoked it on 1 June 2020.

On 27 May 2020, the Commercial Court issued a judgment rejecting LaLiga's claim.

On 1 June 2020, the Provincial Court of Madrid issued an order that upheld LaLiga's appeal against the judicial order of 9 August 2019, revoking it and granting the precautionary measures allowing games on Fridays and Mondays.

On 14 July 2020, LaLiga filed an appeal before the Provincial Court of Madrid against the judgment of the Commercial Court number 2 of 27 May 2020 and requested before the Commercial Court the maintenance of the precautionary measures agreed by the Provincial Court.

On 16 October 2020, when the judge was yet to rule on the precautionary measures, the CSD

surprised everyone by anticipating the judge's order and resolving the conflict of competence in favor of LaLiga. Therefore, there will now be games on Fridays and Mondays.

The decision of the Provincial Court on the merits of the matter is still pending, although it has already advanced its criteria in the order of 1 June 2020, favorable to LaLiga.

The CSD, an autonomous body within the Ministry of Culture and Sports with the power to regulate and mediate in conflicts between federations and leagues, has concluded that employers (LaLiga) have the power to schedule matches, according to the Sports Law, the agreement coordination signed by the RFEF and LaLiga and its statutes. The affected parties can present a contentious-administrative appeal against the resolution within a period of two months, and RFEF showed its will to file such an appeal.

The ruling of the CSD, signed by its President, Irene LOZANO, authorizes LaLiga to hold first and second division matches on Fridays and up to 20 games per season on Mondays with, "in principle, only one game per day." The CSD also requests that Monday matches must be used mainly to reschedule and recover postponed or suspended matches "for health reasons related to the COVID-19 pandemic or other eventualities" and to maintain the principle of equivalence between clubs, that is to say, it is not always the same team that plays on Mondays.



No Relegations for the 2019-2020 Season of the Turkish *Super Lig*



By Emin OZKURT
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→ Turkish Football Federation (TFF) –
Turkish Super League – Relegation –
COVID-19

The Turkish Football Federation (TFF) lifts team relegations for the 2019-2020 season in top-tier Super Lig, 21 teams to play next season.

On 29 July 2020, the TFF announced that no teams would be relegated from the league because of the coronavirus pandemic.

Ankaragücü, Kayserispor and Yeni Malatyaspor finished in the relegation places 2019-2020 season but will not drop down to the second division.

At the end of the 2020-2021 season, four teams will be relegated from the Super Lig. Therefore, the 2021-2022 season will be played by 20 teams. Relegation was thus canceled for the 2019-2020 season in the TFF 1st League, TFF 2nd League, and TFF 3rd League. The new foreign players' rule, which was postponed by one year, will not be applied in the aforementioned season.

Turkish Football Federation President Nihat ÖZDEMİR (picture) stated, after speaking to the Minister of Youth and Sports Dr Mehmet M. KASAPOĞLU, that the

"Clubs Association Foundation President Mr. Sepil submitted a series of recommendations by its member clubs, including a written petition to our board of directors. Before starting our leagues, the last seven teams in the league table made the same request. We evaluated the recommendations by the Clubs Association Foundation at the meeting of the TFF board of directors. Therefore, no teams will be relegated from the Super Lig after the heavily affected 2019-2020 season (free translation)."

Regarding the fact that the one-year postponement will also affect the new regulations on foreign players, Mr ÖZDEMİR said: *"Another recommendation of the Clubs Association Foundation is that the foreign player and player eligibility rule decided by our board of directors be postponed for one year. We also evaluated this request. In line with the unanimous decision we have taken, the*

change will be implemented from the 2021-2022 season, not from the 2020-2021 season (free translation)."



The Broadcasting Rights Problem



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→ **Broadcasting rights - Turkish Football Federation (TFF) - Turkish Super League - COVID-19 - Governance**

The well-known Qatar-based broadcasting company, beIN Media (beIN), struggled to perform its obligations under its agreement with the Turkish Football Federation (TFF) due to the pandemic and requested a payment discount.

After long and tough negotiations between beIN and TFF, no agreement was concluded until November 2020 despite the fact that the 2020-2021 football season had already started in September 2020. This issue was revealed by the clubs' chairmen in a number of meetings to put pressure on beIN, so the Qatari media outlet would comply with the terms of the said agreement.

Following the aforementioned meetings, beIN came up with a new offer. At the beginning, the clubs did not welcome it and claimed that they had already amended the 2019-2020 media rights agreement and thus, they did not have any intention to do so again. beIN, on the other hand, stated that the said amendment was made before the COVID-19 pandemic. Now, the world faces an unprecedented situation and the agreement must be amended again for the sake of the clubs and the company.

The President of the TFF, *Nihat ÖZDEMİR*, who has been in contact with both the clubs and beIN, has offered the financial support of *Spor Toto*, an official sports institution, to lower tension as clubs fear losing money if the media rights contract were to be amended.

Finally, at the end of September 2020, the Minister of Youth and Sports, Dr *Mehmet Muharrem KASAPÖĞÜ*, announced that an agreement was reached for the 2020-2021 season.

However, one can only speculate that this issue will again be brought to the table in 2021.



Football in Uruguay amidst the Pandemic



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→ **COVID-19 - Player's health - Uruguayan Football Association (AUF) - Players' Union - Player contract - Salaries - Player transfer - Calendar**

In 2020, the COVID-19 pandemic impacted football worldwide, and Uruguayan football was no exception. In this article, we will briefly outline the consequences of the pandemic on Uruguayan football.

Uruguayan rules concerning the suspension of football amidst the pandemic

On 13 March 2020, once the first four cases of the COVID-19 infection were confirmed in Uruguay, the Government issued Decree 93/20, which regulates the measures to be adopted in order to prevent the spread of the disease. Article 1 of Decree 93/20 declared a national health emergency, while Article 3 suspended all public gatherings (including sporting events) until further notice from the Uruguayan Government.

That same day, the Executive Committee of the Uruguayan Football Association (AUF) resolved *"the suspension until further notice of all official matches organized by AUF, in all categories and all disciplines."* At the same time, it reiterated to *"all clubs, players, technical directors, organizers of competitions, as*

well as the general public, the importance of attending to the general measures established by the Uruguayan government in order to prevent the spread of COVID-19." At the time of the suspension, the Apertura Tournament of the 2020 Uruguayan Championship was in full swing, having only played its first three dates.

Finally, on 14 March 2020, the National Sports Secretariat of Uruguay (SENADE) announced that all Uruguayan sports activity be suspended.

Vacation Advance due to COVID-19

With the suspension of all sports events, including football matches, AUF and the Uruguayan Professional Players' Association (MUFP) agreed that players could take ten days of the mid-season vacation in advance. Therefore, from 23 March to 5 April 2020, players were on fully paid leave. Obviously, they then could not enjoy their mid-season vacation (which would normally have been in May or June 2020).

Based on this agreement, 13 First Division clubs agreed with their players to advance the vacations. Other clubs, however, decided to put their players on furlough, as will be explained in the next section.

Unemployment benefits

As a result of the pandemic and the suspension of Uruguayan football, many players were put on furlough (before or after the said vacations), which is governed in Uruguay by Law 12.570 of 23 October 1958. The aforementioned law has been modified several times.

According to Uruguayan Law, unemployment benefits are granted to workers who, against their will, suffer a reduction in their working hours, their employment contracts are suspended altogether, or they are dismissed. Workers who resign their positions or are dismissed for misconduct are excluded from receiving unemployment benefits. Workers earning income from other activities or who own companies are also entitled to unemployment benefits.

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As to the conditions that must be met for a worker to be entitled to unemployment benefits, the Law states that workers wishing to receive unemployment benefits should have worked in the 12 months before becoming unemployed and remained on a company's payroll for at least six months or 180 days, whether continuous or not, at one or more companies. However, as a result of the pandemic, these requirements were made more flexible, and it was established that monthly workers who had worked for three to five months in the last 12 months and laborers who had worked between 75 and 149 working days might also be eligible for unemployment benefits.

The amount of benefit to be received by each worker is equivalent to 50% of the worker's average monthly nominal remuneration in the last six full months before the suspension of the employment relation. This percentage may be increased to 70% when the worker has a family or dependent children. However, as of January 2020, the maximum unemployment benefits amounted to UYU 44,606 (EUR 870). Whereas the minimum unemployment benefits amounted to UYU 5,574 (approx. EUR 110).

It should be noted that the maximum amount of time that workers may receive the benefit is equal to four months, although it is possible to request an extension.

As a result of the pandemic however, in March 2020, special unemployment benefits were established for workers who, as a result of the COVID-19 crisis, have their working hours reduced by at least six days a month, either by full days or 50% of their usual hours. In such cases, the company must continue to pay their salary according to their working hours, while the Uruguayan Social Bank

will pay 25% of the amount the worker would have been entitled to receive before the start of the crisis.

In conclusion, in Uruguay, footballers and coaches have the right to access unemployment benefits. Consequently, clubs can put their employees on furlough to apply for unemployment benefits without this implying contractual non-compliance.

This is what happened in Uruguay during the months of April, May, and June 2020; we must add that AUF, for its part, put all the technical bodies of the national teams and a large part of its administrative employees on furlough on a rotating basis.

Agreements between players and clubs on salaries

Of course, the suspension of football catalyzed a series of conflicts between players and clubs, especially regarding the payment of salaries. However, we are not aware of any conflict having reached AUF or FIFA jurisdictions.

In most cases, clubs, players and coaches have reached agreements to reduce salaries (in some cases, the reduction was as high as 75% of the salary), which were then paid back to the player as football activity slowly restarted. First, footballers resumed training activity from their homes during the lockdown. Then, they started training in special facilities whilst respecting the health protocols. Finally, friendly and official matches were authorized by the Uruguayan authorities.

In many cases, clubs also agreed to pay footballers and coaches the difference between what they had received as unemployment benefits and their contractually agreed salary.

End of Players' Contract and Special Transfer Window

In Uruguay, it is common for a player's employment contract to expire on 30 June or 31 July of each year. Although FIFA, in its April 2020 Recommendations, suggested that contractual terms should be extended so that clubs could count on players to finish all championships postponed by the pandemic, this was not the case in Uruguay.

As a result, many players were released in June and July 2020, and because there was no transfer window, they could not sign with a different Uruguayan club.

Therefore, in July 2020, the AUF Congress approved a special transfer period that expired on 7 August 2020, one day before the scheduled restart of the *Apertura* Tournament.

During this special transfer window, First Professional Division clubs could sign two additional players for the remainder of the *Apertura* Tournament, as long as the player had not played for another Uruguayan club in the first three dates of the said *Apertura* tournament (which was suspended due to the pandemic in March 2020). It should be noted that loan transfers did not count as one of the two possible transfers.

Restart of the Uruguayan Championship

After five months of suspension, the *Apertura* Tournament restarted on 8 August 2020. The Uruguayan authorities decided that all matches would be played without spectators and be broadcasted.

Once the *Apertura* Tournament finished on 14 October 2020,



the *Torneo Intermedio* began (a tournament that takes place between the *Apertura* and *Clausura* Tournaments). The winner qualifies for the Uruguayan Super Cup final together with the winner of the Uruguayan Championship.

The 2020 *Clausura* Tournament is currently taking place and would normally be concluded, together with the Uruguayan Championship finals, in December of each year. However, for 2020, it will now conclude in February 2021 and will qualify Uruguayan teams for the 2021 CONMEBOL-organized competitions.

The best-known case was a COVID-19 outbreak that affected several Uruguayan national football team members, including players and officials. The said outbreak started during the South American qualifiers for the 2022 FIFA World Cup, which led to AUF being sanctioned by the Uruguayan Ministry of Public Health.

Testing and Positive Cases Protocols - Violations and Sanctions

The Uruguayan Government (National Secretariat of Sports and the Ministry of Public Health) agreed with the Uruguayan Football Association on a series of protocols to be followed in training, matches and quarantine in the case of a positive test result. In the latter case, the agreed protocol requires a 7-day quarantine period and a double nasal swab (at the beginning and the end of the quarantine period). Furthermore, a “*sanitary bubble*” in order to put the whole team in quarantine would also be created if a player tests positive.

A more flexible protocol was agreed with CONMEBOL concerning Uruguayan clubs or players taking part in CONMEBOL-organized competitions.

In Uruguay, some matches have been suspended or canceled altogether due to positive COVID-19 tests. In related news, some teams have been sanctioned for not respecting the relevant COVID-19 protocols regarding quarantine periods.

— Community —



Olli Rehn Appointed Chairman of the FIFA COVID-19 Relief Plan Steering Committee

On 11 August 2020, Finnish politician *Olli Rehn* was appointed as the chairman of the FIFA COVID-19 Relief Plan Steering Committee. Currently, Mr *Rehn* is serving as Governor of the Bank of Finland as well as deputy chairman of the FIFA Governance Committee. He is also a member of the Governing Council of the European Central Bank and a former Vice President of the European Commission.



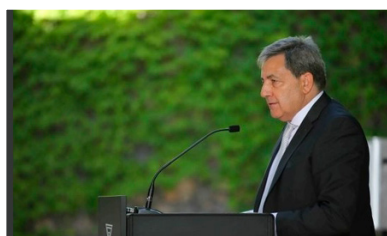
Vincent Ven Joins UEFA as Head of the Anti-Match-Fixing Unit

On 17 August 2020, *Vincent Ven*, a seasoned lawyer with dual Swiss and Hongkongese citizenship, replaced *Nicholas Raudenski* as Head of the UEFA Anti-Match-Fixing Unit. Mr *Ven* previously served as FIFA's Head of Integrity from December 2017 to March 2020. He had also performed the functions of integrity manager and legal counsel at FIFA from 2014 to 2017. It is Mr *Ven's* second experience at UEFA after working at the media services and player registration departments from 2012 to 2014.



FIFPRO and World Leagues Forum Sign Cooperation Agreement

On 14 December 2020, FIFPRO and the World Leagues Forum (WLF) signed a three-year cooperation agreement to develop a more effective collaboration between both football stakeholders. Thanks to this agreement, both entities will be able to establish a more direct and strong relationship. Amidst the current pandemic times, FIFPRO and the WLF believe that there is a need for a more robust and engaged dialogue between professional footballers and competition organizers.



Newly Elected FA Presidents

On 10 July 2020, Mr *Fernando Gomes* was re-elected as the President of the **Portuguese Football Federation (FPF)**. Mr *Gomes* (picture), a Portuguese economist, former basketball player and *FC Porto* board member, serves a third four-year term as FPF President. In 2015, he was elected to the UEFA Executive Committee, becoming UEFA Vice President in 2017. He was also appointed as a European member of the FIFA Council in September 2017.

On 8 August 2020, *Ari Lahti* was re-elected as the President of the **Football Association of Finland**.

Mr *Lahti*, a Finnish businessman, is to serve a first four-year term as *Suomen Palloliitto* President after being re-elected for a second time since his first two-year term in January 2018. Before being elected a football official, Mr *Lahti* was the owner of the Finnish side *Kuopion Palloseura*, as well as a former employee of the Bank of Finland and founder of investment company *Ice Capital*.

On 22 August 2020, the **Burkinabé Football Federation (FBF)** elected Mr *Lazare Bamsse*, a Burkinabé football executive and current chairman of *Étoile Filante de Ouagadougou*, for a four-year term as its President. Mr *Bamsse* replaces Mr *Sita Sangaré*, who headed the FBF between 2012 to 2020 as President of the FBF. On 11 March 2020, Mr *Sangaré*, an army colonel, was refrained by the Chief of the Defense Staff of the Burkinabé's army from accepting a third term as President of the FBF.

On the same day, the **Football Kenya Federation (FKF)** re-elected Mr *Nick Mwendwa* for a second four-year term. Mr *Mwendwa*, a Kenyan businessman, owner of local football club *Kariobangi Sharks FC* (first division), and football executive, has headed the FKF since February 2017.

On 21 September 2020, *Luis Rubiales* was re-elected as the President of the **Royal Spanish Football Federation (RFEF)**. Mr *Rubiales*, a former Spanish professional football player, is to serve a four-year term as RFEF President after being re-elected for the first time since an initial two-year tenure that started on 17 May 2018. Before being elected a football official, Mr *Rubiales* represented several clubs at the highest level in Spain and served as the chairman of the Association of Spanish Footballers from March 2010 to November 2017. Currently, Mr *Rubiales* also serves as UEFA Vice President and he is a member of the UEFA Executive Committee.

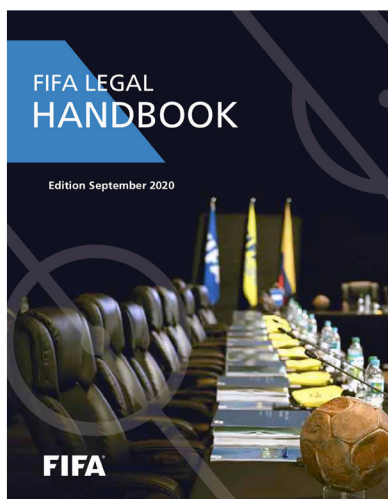
On 26 October 2020, the **Football Association of Slovenia (NZS)**

re-elected Mr *Radenko MIJATOVI* for a second four-year term as its President. Mr *MIJATOVI* is a former Slovenian professional footballer and international FIFA futsal referee.



Vincent LABRUNE elected President of the French Football League

On 10 September 2020, *Vincent LABRUNE* was elected head of the French Professional Football League (LFP). He was ahead of *Michel DENISOT*, long announced as the big favorite to succeed *Nathalie BOY DE LA TOUR*. It will be up to him to pacify the relations between the different actors and obtain the support of French football around its axes of reform.



FIFA's Recent Publications

On 27 August 2020 and 9 September 2020, FIFA [made public](#) its first annual report concerning the activity of the [FIFA Disciplinary and Ethics Committees](#), as well as

its first-ever [Anti-Doping activities report](#), a [TPI and TPO manual for football agreements](#), FIFA's [Guide to Submitting a Minor Application](#), [a snapshot of the International Transfer Market for June-October 2020](#), and its [Compliance Handbook](#) (October 2020 edition). In late September 2020, it published its 2020 edition of the [FIFA Legal Handbook](#). In related news, FIFA released its [first-ever Players' Status report](#). Finally, on 11 September 2020, the first-ever [FIFA Women's Football Administrator handbook](#) also came to light.

Lastly, on 1 December 2020, FIFA made public its first-ever Report on Intermediaries in International Transfers, which provides a comprehensive summary of the situation of football intermediaries during 2020. The 12-page FIFA Intermediaries Report offers readers a detailed and comprehensive overall picture of the moderate decrease in the number of clubs having employed intermediaries and intermediary commissions. These decreasing figures are undoubtedly due to the impact of the COVID-19 pandemic. According to the FIFA Report, 16,433 international male professional football transfers were completed in the FIFA TMS in 2020. Only 3,346 of these involved at least one intermediary.



ECA's 2019-2020 Annual Report

On 3 November 2020, the European Club Association (ECA) released its 2019-2020 Annual Report, which details ECA's key activities and developments during this turbulent football season. The 2019-2020

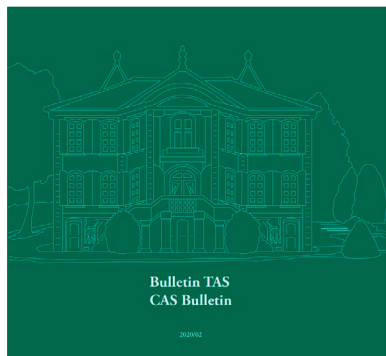
season was marked by the COVID-19 pandemic, which had a seismic impact worldwide. The 2019-2020 Annual Report describes the role ECA has played and continues to pay, helping football actors to cope with the [COVID-19 crisis](#). The report, which is made up of six main sections dedicated to ECA's strategic goals, also features details of [ECA's work throughout the past season](#).

On 2 September 2020, the ECA also released the "*Fan of the Future: Defining Modern Football Fandom*" Report. It highlights how fans from all over the world live out their passion for football. The markets covered by the report were Brazil, Germany, India, the Netherlands, Poland, Spain, and the United Kingdom. The 51-page report divides fandom into six groups or categories: fans who follow football closely for social currency, moderate fans who keep up to date with the latest football news, "*tag-along*" fans whose interest is only prompted by their family or friends, club loyalists, football fanatics, and fans who prefer to play rather than watching.



FIFPRO Survey on the Impact of the COVID-19 on Female Players

On 11 November 2020, FIFPRO released the results of a survey outlining the impact of the ongoing coronavirus pandemic on women's football across 62 different countries. The survey is based on data collected from different national players associations from 62 different countries and was collected from July to October 2020, amidst the end of the first COVID-19 wave and the beginning of the pandemic's second wave. These 62 countries correspond to about 95 percent of FIFPRO's membership.



Publication of the CAS Bulletin 2020/2

The Court of Arbitration for Sport (CAS) has published its CAS Bulletin 2020/2. It includes articles and commentary, as well as an overview of key case-law awarded by CAS in the second half of 2020. The CAS Bulletin 2020/2 contains CAS award [2019/A/6525](#), in which the Panel analyzed the issue of the wording of sell-on clauses in the context of transfer agreement concluded between Spanish side *Sevilla FC* and French club *AS Nancy Lorraine* regarding *Clément LENGLET*. It also contains several important decisions issued by the Swiss Federal Tribunal, including the very interesting [Trabzonspor's ruling](#) concerning an alleged match-fixing scheme in Turkish football. Other relevant football awards included in the CAS Bulletin are: [CAS 2019/A/6388](#), concerning a terrible case of abuse female footballers in Afghanistan and the eligibility award CAS 2019/A/6179 between the Gambia Football Federation v. the Confédération Africaine de Football and the Fédération Togolaise de Football. Finally, the 125-page long 2020/2 CAS Bulletin includes four commentaries: an article regarding the new Swiss International and Domestic Arbitration law, by Italian attorney-at-law Mr *Guido CARDUCCI*; an analysis on the problem of experts in the hot tub in CAS proceedings, authored by professor of law Ms *Doriane L. COLEMAN* and Queen's Counsel Mr *Jonathan TAYLOR*; a commentary concerning the regulatory framework of

FIFA in cases dealing with the international transfer of minor players, coauthored by attorneys-at-law Ms *Despina MAVROMATI* and Mr *Jake COHEN*; and finally, an article describing CAS jurisprudence in cases of sporting succession of football clubs, written in [Spanish](#) by CAS Arbitrator Mr *Jordi LÓPEZ BATET*.



AIAF New Executive Committee

Following AIAF's General Assembly and online elections, the AIAF Executive Committee has just been renewed for a 4-year term.

Patricia MOYERSOEN (France) has been elected President of AIAF for a third consecutive term. *Horacio GONZÁLEZ MULLIN* (Uruguay) was elected Vice President. *Christophe BERTRAND* (France) was reappointed Treasurer and *Carol COUSE* (UK), a new member of the ExCo, was appointed General Secretary.

The other elected members of the ExCo are: *Martin AULETTA* (Argentina), *David CASSERLY* (Switzerland), *Daniel CRAVO SOUZA* (Brazil), *Juan de Dios CRESPO PÉREZ* (Spain), *Sébastien LEDURE* (Belgium), *Marcos MOTTA* (Brazil), *Rodrigo ORTEGA SANCHEZ* (Argentina) and *Emin OZKURT* (Turkey).

Willem-Alexander DEVLIES joins Atfield

Atfield recently added *Willem-Alexander DEVLIES* as the newest member of its expert sports law team. His experience as a sports lawyer includes acting on behalf of athletes, clubs, intermediaries and sports federations, as well

as acting as an *ad hoc* clerk in arbitration proceedings before the Court of Arbitration for Sport in Lausanne.



Paolo LOMBARDI joins our Editorial Board

The founder of *Lombardi Associates*, *Paolo Lombardi*, obtained his degree from *Padova University* (Italy). He completed the FIFA International Masters in Management, Law, and Humanities of Sport, and holds a Master's Degree *Honoris Causa* in International Law from the *Superior Institute de Derecho y Economia - ISDE* (Spain). *Paolo* has been active in the football market since 2002 when he joined FIFA in the Players' Status Department. He acquired in-depth experience of player transfers and disputes while deputy head of this department and he also oversaw activities relating to players' agents. After five years, *Paolo* became Head of the FIFA Disciplinary and Governance Department and was responsible for disciplinary, doping, football governance, and ethics-related matters throughout the football world. After almost a decade at FIFA, he founded *Lombardi Associates*. He has built a strong reputation as a leading practitioner in football law. The *Football Legal* team is very proud to welcome him to its Editorial Board.