Financial Fair Play and the Court of Arbitration for Sport

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Abstract:

This article examines four major Financial Fair Play (FFP) cases that have come before the Court of Arbitration for Sport (CAS). Although significant previous work has addressed FFP in European football, there is a major gap where its treatment at the CAS is concerned. In addition to creating substantial holes in the effectiveness of FFP regulations, the progression of the four cases discussed have let some of FFP's most egregious offenders avoid sanctions they would consider damaging. In considering two especially important cases, this article argues that Paris Saint-Germain and Manchester City have provided ample guidance for transforming mediocre clubs through disguised equity infusions to circumvent FFP until a sustainable revenue structure is created. For the CAS, the case line resulting in major FFP offending clubs escaping meaningful sanctions builds upon a body of anti-doping jurisprudence that has had the effect of shifting the cost-benefit analysis of rule breaking. This failure in both the FFP and CAS realms leads into a larger emergent policy reform conversation.

Keywords: Court of Arbitration for Sport; Financial Fair Play; UEFA; Football; Arbitration

Introduction

While the Union of European Football Associations (UEFA) Champions League has become the most sought after trophy for the world's best football clubs, much of the off-field narrative has become dominated by Financial Fair Play (FFP). As the governing body for European football, UEFA implemented FFP in response to some clubs spending well-beyond their revenues and adversely impacting competitive balance as well as the financial stability and sustainability of peers who may have felt compelled to match spending. Despite the FFP-era seeing continued on-field polarization in some major leagues (Franck, 2018), several major clubs have run afoul of FFP regulations and received substantial punishments from UEFA, including suspension from the Champions League. Particularly notable culprits have included clubs controlled by state-related entities. In response, some clubs have appealed these sanctions to the Court of Arbitration for Sport (CAS), the leading arbitration body for international sporting disputes.

Although much has been written on FFP, as well as cases before the CAS, there is a significant gap where FFP cases before the CAS are concerned. In addition to purely legal interest, this gap is relevant to informing the economic and finance based discussion on these subjects. As we will see, in several notable instances the CAS has struck or reduced sanctions where major media coverage has portrayed clear violations. Through an exploration of four key flashpoints, this work argues that the forum of CAS jurisprudence has substantially reshaped the impact and efficacy of FFP, allowing the most significant violators to escape meaningful penalties prior to changing their competitive and commercial realities to the point where FFP is much less relevant.

After an overview of the FFP system and the CAS, the article focuses on four cases where the CAS has ruled on a violation of FFP regulations by a major club: AC Milan,

Galatasaray, Manchester City, and Paris Saint-Germain. Following an overview and analysis of each case, with a particular focus on the latter two, the article moves to a broader discussion of how the cases relate, how the decisions may be explained, and how this line of arbitration decisions have impacted FFP in European club football. Additionally, I touch on parallels to the impacts of CAS jurisprudence in Olympic sports and situate these outcomes in the context an emergent policy reform discussion.

Methods

This study uses document review and synthesis of primary and secondary sources common in legal scholarship. Starting with primary case law sources, documents were then reviewed for their prospective relevance as well as potential leads for searching for subsequent documents. Once preliminary application was assessed, documents were analysed and synthesized across as appropriate under the thematic headings of FFP and the CAS. This snowball process was repeated using search engines and academic databases until no new relevant documents were discovered.

Financial Fair Play (FFP)

What is FFP?

As part of the UEFA club licensing system, FFP requires clubs to limit financial losses. Specifically, relevant club revenues must match expenditures, subject to allowable losses within a particular three year monitoring period (UEFA, 2018a). These allowable deviations have ranged from €5 million to €45 million, and under the 2018 rules were limited to €30 million. Deviations over €5 million are possible if club owners inject equity to offset deficits. Relevant revenues include broadcast rights, ticketing, commercial activities, prize money, "other operating income," profit on player sales, and profits on disposal of fixed assets (2018a, p. 83). Relevant

expenditures are effectively limited to transfer fees and wages. Spending on stadiums, training venues, women's teams, as well as youth and community development is exempt.

Violations of FFP can result in fines, squad size restrictions in UEFA competitions, and suspensions from UEFA competitions (the Champions League and Europa League). A potential suspension from the Champions League, widely considered the top club soccer competition in the world, is especially serious for top clubs. Beyond prestige, the Champions League is financially lucrative: participants received up to €117 million in revenue from the 2018/19 campaign, with 10 clubs receiving in excess of €80 million (UEFA, 2018b). For clubs missing national league qualification thresholds or subject to FFP suspension from the Champions League, the penalty is compounded as lost revenue potential from the Champions League will make future FFP break-even thresholds more difficult to meet.

Unlike club licensing which is typically handled by national football associations, FFP is administered by the UEFA Club Financial Control Body (CFCB) (UEFA, 2018a). The CFCB consists of an investigative and adjudicative chamber. The former may open an investigation upon its own initiative or referral (UEFA, 2020). A chief investigator collects evidence and establishes facts, akin to a judge in a civil law inquisitorial system. There are five ways the chief investigator may resolve a case: dismissal, conclusion with consent of the defendant, a settlement agreement, disciplinary measures with consent of the defendant, or referral to the adjudicative chamber (UEFA, 2019). Investigative body discipline is limited to warnings, reprimands, and a maximum fine of €200,000.

In additional to referral from investigative chamber, the adjudicatory chamber may take cases from its chair or upon request from affected parties (UEFA, 2019a). Under article 16(2) of the CFCB procedural rules, a review may be undertaken by the CFCB chair within 10 days of a

decision. The adjudicatory chamber consists of five members, including a chair and two vice-chairs. At least three members (including the chair) who have attended the deliberations make decisions by a simple majority, with ties broken by the chair. The adjudicative chamber can dismiss a case, impose discipline, and uphold, modify, or overturn investigative chamber decisions.

The adjudicative chamber also has a more substantial menu of disciplinary measures available than the investigatory chamber. These include deduction of points in UEFA competition, withholding UEFA competition revenues, prohibition or restriction of player registration for UEFA competitions, disqualification from UEFA competition, suspension from future UEFA competitions, and stripping of titles or awards (UEFA, 2020). An affected party may appeal decisions to the CAS (UEFA, 2019a).

Why does FFP exist?

FFP is a response to what former UEFA president Michael Platini termed "financial doping" by certain clubs spending well-beyond their revenues and thus threatening competitive balance as well as financial sustainability (BBC, 2019). In the 2000s, a wave of wealthy owners largely from Russia, the United States, and the Middle East, began acquiring European clubs and spending hundreds of millions on players in the pursuit of trophies, often with no relation to revenues. Some of these acquisitions, notably Manchester City and Paris Saint-Germain, are closely linked to state actors. Other clubs were acquired though leveraged buyouts, whereby future team profits are used to pay loan interest. This practice has weakened otherwise financially strong established teams such as Manchester United (Conn, 2018). With strong correlations found between spending and performance in football (Szymanski, 2010), and management having a form of moral hazard incentive to win in the short term or lose their jobs,

competitors may feel pressure to participate in an arms race risking longer term financial stress. Indeed, despite strong revenue growth throughout the late 2000s, by 2011 63% of European clubs in top-divisions reported an operating loss (UEFA, 2012).

What is the effect of FFP?

FFP serves a somewhat similar cost-control function to a salary cap in North American leagues. However, instead of being calculated at the league revenue level, FFP uses the club as the unit of analysis and includes coverage of all club income and expenses, as opposed to only salaries. Unlike luxury taxes for spending above a soft cap such as those seen in North American baseball and basketball, there is also no election to pay a penalty instead of compliance – any fine is subject to the CFCB process.

A frequent criticism of FFP is that it entrenches existing high spending and profitable teams at the top of a hierarchy by making it more difficult for new disruptors to spend on an equal plane until revenues match (Franck, 2018; Sass, 2014; Szymanski, 2014; Vopel, 2013). Assuming on-field success breeds significant excess revenue opportunities relative to less successful competitors, and given the literature showing the strongest indicator of on-field performance is spending, there would seem to be little room for lower revenue teams to realistically catch up through better management. Indeed, an analysis of the 2012-2018 period by Franck (2018) found that absolute revenues grew stronger at larger clubs that also became more dominant on the field, although Freestone and Manoli (2017) did not find evidence of declining competitive balance in the English Premier League (EPL).

At the same time, FFP provides clubs incentives to fully develop commercial revenue sources that they may not otherwise care about if increased spending from a wealthy owner could fully meet its competitive needs. Likewise, clubs are incentivized to run their soccer

operations efficiently. Specifically, FFP can deter especially irresponsible overpayment for new players, as well as disposal of existing players for below market value.

In the early years of FFP, some soccer economists thought that the regulations would serve to suppress transfer spending and team quality (Madden, 2015; Peeters & Szymanski, 2012). However this has seemingly not been the case, with UEFA club transfer spending increasing from €2.99 billion to €8.01 billion between 2009 and 2018. Although in the early years of FFP the big five European leagues (England, France, Germany, Italy, and Spain) declined as a collective percentage of UEFA transfer spending from 82% in 2009 to 70% in 2013, perhaps reflecting a push toward compliance by larger clubs, this had shifted back to 85% by 2018 (UEFA, 2019b). The expected suppression of transfer fees may have been undermined by the significant increase in broadcast revenues over the same period, especially for the EPL where yearly total television revenues went from €1.255 billion in 2012-13 to €3.555 billion by 2018-19. Indeed, the massive increase in broadcast revenues in the 2010s has in some ways relieved the potential for FFP violations in the latter part of the decade for some big five league clubs in precarious positions.

The FFP Literature

In addition to work on the economics, efficiency, fairness, and potential agency issues of FFP, as well as the impact on particular leagues, some FFP literature has focused on its relationship with law (Ghio et al., 2019; Schubert, 2014; Szymanski, 2014). Legal-based work on FFP has primarily centred on European Union (EU) competition law. In particular, articles have examined whether UEFA FFP is a violation of EU anti-competition statute, or has been granted an effective exemption from EU competition law, or how the rules would be treated at the European Court of Justice (ECJ) (Kaplan, 2014; Lindholm, 2010; Long, 2012). Despite academic

work indicating that FFP may be a violation of EU competition law, the ECJ has not held to this end or even adjudicated on the merits (Serby, 2016).

Instead, the most significant challenge to FFP has come through challenges of particular violations as opposed to the validity of the system itself. These appeals have gone through the CAS, the exclusive jurisdiction for most disputes between UEFA, clubs, and associations under the UEFA statutes. Accordingly, the CAS is the most influential legal body governing the FFP system. Despite this status and significant recent cases concerning Manchester City and Paris Saint-Germain, the literature has not covered this aspect of FFP.

CAS Overview

The CAS is an independent international arbitration body for sporting organizations that elect for its jurisdiction. Based in Switzerland, the CAS was established by the International Olympic Committee (IOC) in 1984, and has most substantially overseen disputes related to the Olympic Games (CAS, 2021). The CAS has derived much of its power through international sporting federations inserting procedure clauses in their dispute resolution processes making the CAS their appellate body. In light of a 1993 challenge at the Swiss Federal Tribunal which saw issue with the CAS' potential conflict of interest with the IOC, the CAS reformed into its current independent entity in 1994.

The 1994 Code of Sports-related Arbitration governs the procedure and organization of the CAS (CAS, 2021). In place of the IOC, the International Council of Arbitration for Sport (ICAS) was created to oversee the operation and finance of CAS. The ICAS consists of 20 members, all of whom must be experienced jurists in the areas of sport law and arbitration. Additionally, the 1994 reforms bifurcated arbitration into an ordinary and appeals division, reflecting an intent to distinguish between appeals from a sporting body and actions of single

instance. Each division is headed by a president. Beyond arbitration, there are also advisory and mediation procedures. The advisory procedure is non-contentious and serves to provide sporting bodies with reference opinions.

There are over 150 CAS arbitrators, appointed by the ICAS for renewable four year terms. Under the CAS Code, arbitrators must be "personalities with a legal training and who possess recognized competence with regard to sport" (CAS, 2021). Arbitrators are proposed by the IOC, international sporting federations, and National Olympic Committees, although some are chosen from outside sporting organizations. Arbitrators can sit on panels under either procedure and panels consist of either one or three arbitrators. In addition to headquarters in Lausanne, there are permanent offices in Denver and Sydney, as well as ad hoc divisions for certain mega-events (the Olympics, World Cup, Commonwealth Games, and UEFA European Championship), with the objective of timely dispute resolution. CAS arbitration decisions are appealable to the Federal Supreme Court of Switzerland. Successful appeals are relatively rare and typically procedural in nature (see Glienke, 2012; Mavromati, 2014).

There are two broad categories of CAS disputes: commercial and disciplinary. The former concern contracts and civil liability. These matters are settled under the ordinary division. The disciplinary form of CAS disputes generally concerns appeals from a sporting body. Although doping cases are the most common, discipline disputes can extend to on-field matters or those found off the playing field, such as FFP.

Arbitration decisions do not traditionally create binding precedent in the same way as judicial decisions in a common law system and the CAS Code does not address the issue of precedent (Lindholm, 2019). However, the CAS has regularly cited its own cases, and when panels have addressed the issue of precedent, there has been consistent sentiment proposing that

CAS panels should take the same approach as previous decisions unless the case is distinguishable or the ruling was in error. Lindholm (2019, p. 94) has argued that through a strongly trending "habit of adherence" the CAS has created de facto stare decisis. Also notable is the regular citation by panels of unpublished decisions, accounting for roughly 20 percent of citations. As we will see, adherence to other CAS decisions may even extend to contemporaneous panels on analogous matters.

Literature on the CAS

The CAS related literature includes general pieces centred on the history and development of the CAS (see Gilson, 2006; Kane, 2003; McLaren, 2009; Raber, 1998; Reilly, 2012) as well as the need for an independent dispute resolution mechanism for sporting disputes (McLaren, 2000), and the development of a "lex sportiva" (Casini, 2011). Others have focused on the CAS role in doping disputes (Fitzgerald, 2000; Oschutz, 2001), the Olympic context (McLaren, 2001; Raber, 1998; Reilly 2012), track and field (Bersagel, 2012), player contracts (Harris, 2000), as well as gender and genetics issues (Camporesi, 2019; Foster, 2012; Lenskyj, 2018). Some have even criticized the court for perceived unfairness (Gotlib, 2015) or for being overly punitive (Maciel, 2016). Although there has been soccer based work focused on the effectiveness of CAS decisions, racism (Wynn 2011, Vasilyev 2018), match fixing (Deakes, 2014; Sultanoglu et al., 2018), contract disputes (Wei, 2012), transfers (Dabscheck, 2009), and protection of minors (Yilmaz, 2018), there is a void concerning the CAS and FFP.

CAS and UEFA

Despite a gap in the academic literature concerning the CAS and FFP, there have been several important cases concerning FFP. This section will overview the case history of two clubs with

more traditional ownership structures, as well as two clubs effectively held by state actors. These cases also cover four domestic leagues in UEFA.

AC Milan

Traditionally one of Italy's most successful clubs, AC Milan experienced a performance decline and major financial losses by the mid-2010s. In 2017, AC Milan was sold by long-time owner Silvio Berlusconi to a Chinese investor for a total of €740 million (CAS, 2018a). The new ownership subsequently took out a loan indirectly from American hedge fund, Elliott Management, for €202 million to conclude the deal. However, the Chinese owners defaulted on a debt payment, allowing Elliott to gain ownership. At the same time, the financial losses combined with a spending spree from the Chinese ownership brought FFP scrutiny to a head.

With several seasons of losses far exceeding those allowable under FFP, AC Milan was not offered a voluntary agreement with UEFA in December 2017 (CAS, 2018a). The CFCB investigatory chamber subsequently referred the matter to the adjudicative chamber, which found that AC Milan had violated the breakeven requirement between 2014 and 2017. As a result, the club was banned from UEFA competitions for two years. Using the expedited procedure under R52(4) of the CAS Code, AC Milan appealed the UEFA decision as disproportionate under principles found in both Swiss privacy law and EU competition law. The club argued that the CFCB should have instead entered into a settlement agreement.

In addition to an audio file of the CFCB adjudicatory chamber dealing with the matter, the expedited proceedings saw the CAS Panel order production of unredacted settlement agreements for Paris Saint-Germain and Manchester City. Citing "exceptional circumstances" in R56 of the CAS Code, the expedited procedure had the panel accept late submission of a new

document forecasting club revenues for the 2017/18 season (CAS, 2018). These new submissions may have been of significant weight for the decision (Mavromati, 2018).

Also at issue was the decisive reference date: whether it should be at the time of the CFCB decision, or the CAS panel? If the former, as argued by AC Milan, then this posed problems for finding the CFCB decision at the time was disproportionate based upon facts not then present (2018).

Although AC Milan advocated for a fresh hearing under the full review powers of R57, UEFA preferred a review standard of sanctions being "evidently and grossly disproportionate to the offence" (CAS, 2018a, p. 38). The latter, as cited by the panel, had been regularly used by previous CAS panels. However the panel distinguished this matter from those centered on state interference in sports federations. From here, the panel found no limits or exclusion on its power to review the facts and law.

The panel subsequently addressed the merits, finding that offering a settlement agreement is within the discretion of the CFCB investigatory chamber. However, flaws were found with the adjudicatory chamber's factual assessment, namely that factual findings should have been made at the time of hearing as opposed to at the time of the referral. The panel held that with new ownership at the time of hearing that substantially improved AC Milan's financial position, the facts had sufficiently changed to find the suspension disproportionate (CAS, 2018a).

Galatasaray

As with AC Milan, the frequent Turkish champions have had consistent issues with meeting FFP requirements since FFP's inception. Galatasaray is owned by club members, with some share capital issued. In 2016, Galatasaray received a one season UEFA ban, reflecting a €164 million loss over the previous three seasons (Toksabay, 2016). Consistent with other clubs running afoul

of FFP, Galatasaray was back under the CFCB's microscope within a year with a reported break-even aggregate deficit beyond €30 million (CAS, 2018b).

Unlike with AC Milan, the CFCB investigatory chamber decided to conclude a settlement with Galatasaray on June 13, 2018 (dated June 5) (CAS, 2018b). On June 25, the CFCB chairman informed the club that the adjudicatory chamber would review the decision. On October 5, the adjudicatory chamber decided to reject the settlement agreement based on the grounds that it was not an appropriate procedural method of implementing FFP regulations. Instead the matter was referred back to the investigatory chamber for further examination of the break-even breach and circumstances.

The issue was whether the 10 day limit in article 16(1) of the CFCB procedural rules for adjudicatory chamber review of the investigative chamber meant 10 days to refer the decision for review, or 10 days to complete the review? Article 16(1) reads as follows:

> 1 Any decision of the CFCB chief investigator to dismiss a case or to conclude or amend a settlement agreement or to apply disciplinary measures within the meaning of Article 14 (1) (c) may be reviewed by the adjudicatory chamber on the initiative of the CFCB chairman within ten days from the date of communication of the decision to the CFCB chairman (CAS, 2018b, p. 11).

In finding for Galatasaray, the sole arbitrator first took a textual approach, seizing upon syntax ("reviewed") to infer that "the 10-day time limit refers to the period within which the entire review proceedings have to be carried out rather than the time limit by which the review proceedings must be initiated…" (CAS, 2018b, p. 13). This was complemented by analyzing the intent of the review period, and deducing that a 10 day limit was consistent with the objective of UEFA FFP regulations to "protect the integrity and smooth running of the UEFA club competitions" (2018b, p. 13). Accordingly, the appeal was upheld and the June 5 settlement agreement was found binding and final.

Most notably perhaps, UEFA at the CAS did not argue for the adjudicatory chamber's interpretation of the 10 day limit. In a statement after the case, UEFA outlined that "[f]ollowing a legal assessment made, with support of external legal counsel, concerning the interpretation of the above-mentioned article, UEFA concluded that indeed there were strong arguments supporting the interpretation presented by the club" (Panja, 2019). As we will see, by taking this position the effectiveness of the FFP system may well have been substantially undermined.

Clubs held by state-related entities

The player market and balance of power in European leagues have been significantly impacted by the introduction of state-related entities engaged in club ownership. In particular, two clubs have emerged to transform the landscape: Manchester City and Paris Saint-Germain. Manchester City was purchased by the Abu Dhabi United Group (ADUG) in 2008, a private equity company owned by Sheikh Mansour bin Zayed Al Nahyan, a member of the Abu Dhabi Royal Family. At the time Manchester City was a mid-table EPL team, but has since won the league five times and transformed into one of the largest spenders in the world.

Three years later in 2011, Qatar Sports Investments acquired Paris Saint-Germain (PSG). Qatar Sports Investments is a subsidiary of the Qatar Investment Authority, the sovereign wealth fund of Qatar (Panja, 2019). Although PSG is historically one of France's most successful clubs, the club had disappointing on-field and revenue performances in the 2000s. After the Qatari purchase, ownership explicitly set their sights on winning the Champions League, investing over €1 billion on player transfers in less than a decade.

Club ownership by state-related entities has been criticized for legitimizing regimes with serious human rights violations (in the case of Qatar) and forcing competitors to engage in spending beyond their means. These capital inflows from state-related actors have also upset

traditional league power dynamics. As noted, the influx of state-related money from Manchester City and PSG was heavily influential in creating the impetus for FFP regulation in the first place. Obvious sub-issues include the extent to which other state-related actors can provide sponsorship revenues to offset losses for break-even purposes, the non-arm's length nature of these sponsorships, and assessing the fair market value of these sponsorships. While these revenue assessment issues may seem central to deciding FFP violations, they have not necessarily been deciding factors at the CAS.

Paris Saint-Germain (PSG)

PSG's aggressive spending after being acquired by Qatar soon drew FFP scrutiny. In February 2014, the investigatory chamber opened an investigation into alleged break-even infringements, resulting in a settlement agreement in May of the same year (CAS, 2018c). In the view of the investigatory chamber, PSG complied with the settlement agreement and met the break-even for this three year period ending in 2016. Subsequently, PSG was released from the settlement regime in April 2017.

However with the acquisition of Neymar and Mbappé for over €360 million in transfer fees, PSG once again came under the investigatory chamber's lens (CAS, 2018c; Panja, 2019). On June 13, 2018, chief investigator Yves Leterme (a former Belgian prime minister) found that these transactions did not violate the aggregate break-even permitted loss threshold of €30 million for 2015, 2016, and 2017 (CAS, 2018c).

How did the chief investigator get to this decision? The answer lay in the valuation of sponsorships, which allowed PSG to generate sufficient revenue to offset transfer expenses within the break-even window. For major European clubs, sponsorships running into to the tens of millions per season are common and have legitimate commercial value. However for teams

less established at the peak of performance, global fan base, and media attention, sponsorships that would let them organically generate revenues to facilitate top level and FFP compliant spending are a more difficult proposition. The solution for PSG (and as we will see Manchester City), was to have state-related companies pay seemingly well above market value sponsorship rates, and then attempt to justify the sponsorships when FFP scrutiny followed.

One particularly lucrative agreement was a reported five year €1.075 billion deal with the Qatar Tourism Authority for "nation branding" (Dupre, 2018). Other Qatar-linked sponsorships included Qatar National Bank (€15 million per season for a sleeve logo and in-stadium branding) and the telecom Ooredoo (€10 million per season for naming the training facility) (Sportune, 2018). These were accompanied by major deals from Nike to supply kit (€25 million per season) and Emirates for shirt sponsorship (€25 million per season) (2018). Both the Nike and Emirates sponsorships preceded Qatari ownership.

The Qatari sponsorships were placed under investigatory chamber scrutiny. With the Qatar Tourism Authority contract, the chief investigator hired the sport marketing firm Octagon to conduct an independent assessment (Panja, 2019). A opposed to €200 million per season, Octagon came up with a value of under €5 million. PSG presented its own study from Nielsen showing a valuation similar to what the club claimed. Instead of commissioning a third study, Leterme accepted the Nielsen valuation and in some calculations even used figures higher than Nielsen. With these calculations, PSG was found to have only lost €24 million over the relevant break-even period, keeping the club in FFP compliance. Although other members of the investigatory chamber strongly disagreed with these conclusions, the CFCB rules leave the decision to the discretion of the chief investigator.

On June 22 the CFCB chairman officially dissented from the chief investigator and informed PSG that the decision would be reviewed by the adjudicatory chamber (CAS, 2018c). This was followed on July 6 by a letter notifying PSG that the judgment stage had been opened in accordance with article 19(3) of the procedural rules. On September 19, the adjudicatory chamber decided to refer the matter back to the chief investigator. In the words of the chairman, "[t]he decision to close the case was manifestly erroneous" (Panja, 2019).

Soon after on October 3, PSG made an appeal to the CAS (CAS, 2018c). The primary grounds of appeal was the 10 day review period for the adjudicatory body, the same issue present in the Galatasaray case. Similarly to Galatasaray, UEFA in January 2019 applied for their own adjudicatory chamber's decision to be set aside and the investigatory chamber decision of June 13 to be made final. In deciding on the merits, the panel was left in the position of observing that both parties wanted the chief investigator's decision to be confirmed as binding. Accordingly, the panel found that the 10 day time limit in article 16(1) "refers to a review, as opposed to the initiative to review" (CAS, 2018c, p. 15). More specifically, the panel found that the rules should be interpreted to allow for 10 days of review upon receipt of the investigatory chamber decision by the CFCB chairman – so if the decision was received June 13, the review needed to be concluded by June 24. In making this determination the panel cited directly the same effective findings by the sole arbiter in the Galatasaray case.

Manchester City (MCFC)

As with PSG, MCFC's ownership had embarked upon a path of expenditures considerably exceeding revenues in a longer term plan to transform a middling club into a global powerhouse. Manchester City was one of the first major targets of FFP. Competitors alleged that MCFC supplemented arm's length sponsorships with those from a range of state-owned companies

related to the club's ownership that greatly exceeded their fair commercial value. These sponsorships included Etihad Airways, telecom Etisalat, the Abu Dhabi Tourism and Culture Authority, and Aabar Investments, a petrochemical investment firm.

Like their counterparts at PSG, the alleged MCFC violations resulted in a settlement agreement dated May 16, 2014 covering the 2013/14 through 2015/16 seasons. The sanctions included a transfer spending cap for 2014, and capped losses of €20 million in 2014 and €10 million in 2015 (UEFA, 2014). If MCFC complied with the conditions, they would be reimbursed €40 million of a €60 million fine. The investigatory chamber found in April 2017 that MCFC had complied with the agreement and could subsequently exit the settlement regime (CAS, 2020).

In late 2018, a new investigation was prompted by media reports based upon leaked or hacked emails from MCFC's computer systems (CAS, 2020). At issue was the substance of sponsorship payments by two state-related companies: Etisalat and Etihad Airways. To the investigatory chamber, the leaked emails appeared to provide "compelling evidence" that Etisalat's and much of Etihad's sponsorship payments were really disguised equity funding from ADUG routed via the companies (CAS, 2020, p. 7).

The investigatory chamber sent the case (the "referral decision") to the adjudicatory chamber on May 15, 2019 on the allegations of disguised equity payments, false financial submissions by MCFC, and failure to cooperate with the investigation (CAS, 2020, p. 7). On February 20, 2020, the adjudicatory chamber substantiated the violations and imposed a two season suspension and €30 million fine on MCFC. In its reasons, the penalty was justified as a response to "by far the most serious breach of the regulations to have been referred to the

Adjudicatory Chamber taking into account, in particular, the seriousness, repetition and intentional nature of the conduct" (CAS, 2020, p. 13). MCFC appealed this decision to the CAS.

Whereas the Galatasaray and PSG cases were resolved on relatively narrow issues, there were a range of procedural and factual issues at play for Manchester City at the CAS. The major procedural issues included the authenticity and admissibility of the leaked emails, due process, the effect of the settlement agreement and whether limitations applied to particular aspects of the allegations. With the emails, since MCFC disclosed original copies to the CAS, the panel found that there was no need for an analysis of whether potentially criminally obtained emails should even be admissible. Under the CFCB procedural rules "All means of evidence" can be entered, with no specification for how evidence is obtained – there is no common law concept of fruit from the poisonous tree (UEFA, 2019a, p. 4). However the panel also evaluated Swiss law, finding a need to balance between fact finding and MCFC's personality rights (CAS, 2020).

On the due process front, the panel held that the media coverage of the leaked emails had not created implied bias in the CFCB investigation (CAS, 2020). Likewise, the panel rejected MCFC's assertion that the issues at hand were already subject to the settlement agreement. The alleged settlement agreement breaches were not the same as those before the panel and "did not immunize MCFC from any possible further and different charges" (CAS, 2020, p. 50).

However time barring was a more fruitful arena for MCFC. Although the CFCB procedural rules outline a five year prosecution bar, there is no clarity on when a prosecution is deemed to have begun. The panel rejected both UEFA and MCFC's respective arguments for the date of investigation and the date of sanction. Instead of considering some form of precedent, the panel went to the Oxford English Dictionary definition of prosecution. From here, the panel majority found that the appropriate threshold was the issuance of the referral decision, May 15,

2019 (CAS, 2020). Accordingly, the limitation ran back to May 15, 2014. As the Etisalat payments at issue were made in 2012 and 2013, the panel found the limitation to apply to where these payments were concerned. The Etihad payments prior to the 2013/14 season were likewise time barred, but those in the 2014/15 and 2015/16 seasons could be prosecuted.

Although the Etisalat payments were time barred, the non-limited Etihad payments were open to consideration for sanction. UEFA alleged that the leaked emails showed that two separate payments by Etihad of £8 million and £59.5 million respectively represented the actual sponsorship payment from Etihad and the disguised equity contribution by ADUG. However, the majority was satisfied that while a prima facie case for violation was made out, the counter-factual evidence and testimony provided by MCFC was sufficient to preclude finding a violation. Even though UEFA was unsuccessful, their submissions made a pertinent point that "[n]o sensible explanation has ever been provided by MCFC as to why: i) ADUG was arranging payments on behalf of Abu Dhabi-based partners" (CAS, 2020, p. 31).

Still, the panel found that MCFC's failure to provide complete email chains and witnesses requested by the chief investigator substantiated a violation of article 56 requirements to cooperate with CFCB investigations (CAS, 2020). This failure to cooperate resulted in a reduction of the €30 million fine to €10 million. With the two season UEFA ban rescinded, the decision was seen as a major victory for MCFC that undermined FFP's viability (Wilson, 2020).

Discussion

The recent history of FFP at the CAS has underlined multiple key failures by UEFA. First, the FFP rules have been undermined by poor drafting. Namely the effectiveness of the entire FFP investigatory system has been threatened by the CAS finding that the 10 day limit applies to completion of the appeal as opposed to an option period to consider referring a case to the

adjudicative chamber. Although a more purposive approach may have found that the 10 day limit could have most reasonably been interpreted to mean allowing 10 days for the adjudicative chamber to digest and consider the investigatory chamber's findings for a prospective appeal, the ambiguous language left open an alternative understanding. If this vulnerability was identified by UEFA's own counsel at the CAS, it should have been anticipated, flagged, and addressed during the drafting stage.

However UEFA also failed to fight for an interpretation of the 10 day limit that could have saved its cases against the strongest FFP offenders. In Galatasaray, instead of putting forward the best arguments, UEFA waved a white flag upon receipt of advice that the textual approach in finding 10 days meant the entirety of the review opportunity had strong merit. Despite its drafting failures and the textual starting point of interpretation in Swiss law, UEFA had the opportunity to present evidence of its legislative process and intent in hopes of persuading the CAS of a position that could protect the FFP system from a critical failure. Such arguments may have been more persuasive than the CAS' dictionary analysis. Instead, UEFA conceded the point on Galatasaray, which created effective precedent for the contemporaneous PSG decision, allowing one of FFP's two largest exploiting forces to walk away unscathed. Why did UEFA cede this crucial point?

In PSG, UEFA was also undermined in the first instance by its own chief investigator accepting seemingly inflated non-arm's length sponsorships at face value in break-even calculations. This was despite the investigatory chamber's independent evaluation finding that these sponsorships had a market value a fraction of that claimed by PSG. Again, this was a finding the CFCB chairman held "manifestly erroneous" in the ill-fated appeal. One explanation of the chief investigator's finding is that the Nielsen valuation commissioned by PSG was

sufficiently more compelling than Octagon's. With neither report public, the relative merits are only comparable through secondary accounts.

Another prospective explanatory path centers on conflict of interest, UEFA politics, and corruption. PSG chairman Nasser Al-Khelaifi, a minister without portfolio in the Qatari government, was elected to the UEFA Executive in January 2019, just in advance of the Galatasaray decision the following month. In supporting Al-Khelaifi, the president of the German football association outlined that "[w]ith a function in the Executive Committee, Al-Khelaifi will be even more integrated into the rules of UEFA. This increases his responsibility, in general and, of course, especially for his club and their adherence to Financial Fair Play" (Deutsche Welle, 2019). However the head of La Liga digressed, outlining that the move violated "all reasonable rules of good governance" (2019).

The controversy may have stemmed from a contemporaneous investigation into Al-Kehlaifi by the Swiss Office of the Attorney General. Stemming from Al-Kehlaifi's role as chair of beIN Media Group, the investigation centered on suspected bribery, fraud, criminal mismanagement, and forgery relating to the media rights for the 2026 and 2030 World Cups (Brown, 2019). This investigation eventually resulted in charges of criminal mismanagement. As FIFA entered a settlement agreement with Al-Kehlaifi and Swiss law requires a complainant for a bribery prosecution to move forward, the bribery charge was withdrawn (Panja, 2020).

Although Al-Kehlaifi was acquitted of the remaining Swiss charges in October 2020, a separate French investigation into multi-million dollar bribes surrounding Qatari bids for hosting the World Athletics Championships led to corruption charges for Al-Kehlaifi in May 2019. Reflective of his executive appointment, Al-Khelaifi is generally considered one of the most significant influences in UEFA (Panja, 2020). Beyond PSG, beIN Media Group holds

international broadcast rights for Ligue 1 and Middle Eastern rights for the EPL, representing a potential lucrative source of revenue for clubs and competitions, or at least a moneyed player that can bid up rights.

In addition to criminal allegations surrounding Al-Kehlaifi personally, there are numerous allegations of bribery, corruption, and impropriety surrounding Qatar's World Cup bid. Starting in 2011, investigative reporting claimed FIFA executive committee members from the African, CONCACAF, and Oceania federations received payments in return for voting for Qatar (Scott, 2011). These payments were alleged to have been organized by Mohammed bin Hammam, president of the Asian Football Confederation (Bond, 2014), who was Al-Kehlaifi's predecessor as the most important person in Qatari football. However bin Hammam, who The Guardian portrayed as having "acted like the head of a crime organization" in FIFA elections (Conn, 2014), received a lifetime ban from FIFA after being separately charged with offering bribes in relation to his FIFA presidency campaign. Indeed, the ensuring years brought a stream of FIFA corruption charges that ensnared much its executive as well as FIFA president Sepp Blatter and UEFA president Michel Platini.

More recently in 2020, criminal indictments from the US Department of Justice alleged that three FIFA South American executive committee members accepted bribes to vote for Qatar's bid. In total, over half of the 22 people who voted on awarding the 2018 and 2022 World Cups have been accused of malfeasance in relation to their votes, if not criminally charged (Panja, 2020). An additional two voters were already excluded from the final ballot after having been secretly recorded selling their support. Qatar denies all accusations.

From this history of corruption and malfeasance allegations in pursuit of Qatar's strategic sporting (and specifically football) objectives, come legitimate questions of whether the same

actors accused of impropriety in relation to the World Cup bid and media rights would have found bribery to be a problem solving mechanism for Qatar's premier club sport property? The Champions League is by far the most valuable trophy PSG can win and a suspension from the competition could greatly undermine its strategic objectives. Even if there is no evidence of criminal dealing in the PSG case, is there potential that backroom deals were cut to protect PSG from a Champions League ban in return for future considerations from a partner with the power to bid up broadcast rights?

With Manchester City, the tactics were more in the realm of hiding equity investments as sponsorship spending to meet break-even requirements. The calculation may have been that within a decade, initial overspending on players could translate to results that would garner legitimate revenues whereby the desired level of spending could consistently remain within allowable net losses under FFP. MCFC's vulnerability lay in the build-up phase where it was not a successful enough club to attract arm's length sponsors at rates sufficient to cover the spending necessary to climb the EPL and Champions League hierarchy. The key legal strategy response was reliance on a limitation to protect activity circumventing the break-even requirement.

Indeed, the outcomes for both PSG and Manchester City have validated business strategies of disguising sponsorship spending to circumvent FFP regulations, finding traction in procedural means at the CAS to further thwart FFP investigations and buy time to change the commercial reality, making FFP less relevant for either club. Even where ascendant clubs are caught red-handed in violation of FFP, the AC Milan decision has provided further protection through liberal and club friendly interpretation of proportionality in punishment.

Considering impacts on sport more broadly, the line of decisions on FFP have continued a thread whereby the effect of CAS decisions is to allow rule-breakers to skirt or reduce

substantial sanctions. In the late 2010s, some of the highest profile CAS decisions have concerned Russian doping. A range of CAS decisions have led to significant reductions in penalties imposed upon individual athletes, federations, and the Russian Olympic Committee arising from repeated and well-evidenced state-sponsored doping over several Olympic cycles (Schubert & Hamil, 2018). One more prominent example was the 2018 overturning of twenty-eight athlete bans and reinstatement of 2014 Olympic results where Russian intelligence services had swapped test samples through a hole in the wall of the doping control lab (Homewood, 2018). More recently, the four year Russian ban from major sporting events by the World Anti-Doping Agency (WADA) was reduced by the CAS to two years in a decision also allowing athletes to compete as neutrals from Russia in Russian colors (Bowden, 2020). In the words of the US Anti-Doping Agency chief executive, the decision was "a catastrophic blow to clean athletes, the integrity of sport, and the rule of law" (2020).

Much as the financially unsustainable overspending that prompted FFP was thought of as financial doping, the CAS' reduction of penalties and risk associated with being caught in violation of the rules alters the cost-benefit calculation of cheating for both compulsive state dopers such as Russia, and ambitious football clubs looking to spend beyond the FFP limits. Although the CAS may be committed to rule of law, fair procedure, and due process in sport, the broader unintended consequences with both its Russian doping and FFP case line has often been to embolden and provide respite to those who wish to exploit the rules. However, in the FFP instance, UEFA's failures have had a substantial role in facilitating these unintended consequences.

Policy Reform?

The failure of the FFP system to provide substantial deterrent to clubs spending well-beyond their football revenue means has spurred an impetus to reform within UEFA. Although FFP may have been intended to have competitive impacts akin to salary caps in closed North American leagues, a more explicit transplant of a salary cap may emerge. In particular, the soft cap of the National Basketball Association (NBA) or Major League Baseball (MLB) may be instructive. With a soft cap, clubs spending above a league-determined threshold will have to pay a tax on each additional dollar. The tax can be progressive based upon brackets above the cap or spending over the cap in previous seasons. Taxes are then typically redistributed to lower revenue clubs.

For UEFA, a soft cap removes many difficulties associated with policing the break-even requirement. Such a cap could be framed at the level of European competition, or potentially through a requirement for member associations to have caps within complaint bounds. A blended cap level could also be based upon national league and European competition revenues and club on-field performance, removing the need to assess club-specific revenues focusing review on more readily transparent spending on player wages and transfers. Providing some degree of decentralization to member associations may better avoid competition law issues that, while beyond the scope of this discussion, will likely be a challenge for prospective regulation.
If clubs wish to spend beyond a cap threshold, their taxes can be made sufficiently punitive to either dissuade spending or force these clubs to subsidize their competitors. Alternatively, tax revenues may be directed toward assisting sustainability throughout football pyramids, development of the women's game, or horizontal equity among football associations.

Salary caps combined with revenue sharing has been viewed as having pro-competitive effects in leagues such as the National Football League (NFL) and National Hockey League (NHL), where clubs are largely financially stable and there is substantial parity in sporting

outcomes. However, the NFL and NHL caps are hard caps where clubs cannot exceed the cap through paying a tax. In MLB and the NBA, the competitive effects of the soft caps are more ambiguous, although less wealthy clubs in both leagues have experienced major success.

At the CAS level, the body of decisions has also emphasized that intent must be framed through clear regulations at the sport governing body level. The CAS will only interpret and enforce the regulations as drafted by governing parties. In some FFP, and perhaps most notably in Russian doping cases, stronger penalties have been overturned through interpretation of proportionality within governing body regulations. While requirements for proportionality in penalties are often rightly intended to protect individual athletes from power imbalances, calculated circumvention of regulation or cheating by powerful state or state-related actors should not be afforded the same safeguard.

Sport governing bodies can refer to CAS treatment of proportionality in revising regulations to make clear that proportionality should not apply where well-resourced state-related actors are cynically gaming the system. Part of this approach may take inspiration from anti-organized crime regulation, where acts as part of a larger corrupt organization or conspiracy will be punished more harshly. Alternatively, certain sport governing bodies may wish to opt-out of CAS jurisdiction altogether and form their own adjudicative bodies. While scandals in FIFA and UEFA mean that these organizations likely have credibility deficits as barriers to reform implementation relative to perhaps WADA, the viability and relative merits of such reforms may make for valuable future work.

Conclusion

This article has evaluated four major instances of alleged FFP violations that have been adjudicated before the CAS. The progression of these cases has steadily created gaping holes in

the efficacy of UEFA FFP regulations and has allowed clubs popularly perceived to have committed the most egregious violations to escape meaningful sanctions. The CAS' textual approach to interpretation has revealed the inadequacy of UEFA's regulatory drafting as well as structural fissures between the investigatory and adjudicatory functions in FFP enforcement.

Two clubs controlled by state-related entities, Paris Saint-Germain and Manchester City, have proven especially adept in avoiding penalties that would jeopardize their respective Champions League pursuits, despite spending that seems to have clearly run afoul of the break-even requirement. In skirting FFP, these clubs have laid blueprints for transforming also-rans into global elite clubs via disguised equity infusions to build on-field success that can eventually be sustained through legitimate external revenue generation. In assisting these clubs to escape meaningful punishment, the CAS has added to a body of doping related decisions that have had the effect of letting cheaters avoid or substantially mitigate sanctions, thereby altering the cost-benefit calculation of rule breaking in elite sport and setting the stage for the prospect of substantial regulatory reform to address these gaps. In identifying these gaps, this paper intends to beneficially interface with a larger emergent reform discussion.

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