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# UEFA's Financial Fair Play case against AC Milan: Special considerations after the CAS press release

During the UEFA Europa League licensing process for the 2018/2019 season, the Investigatory Chamber of the UEFA Club Financial Control Body ('CFCB') opened proceedings against Italian football club AC Milan looking into, *inter alia*, potential violations of the break-even requirement further to the UEFA Financial Fair Play ('FFP') Regulations. Ultimately the Adjudicatory Chamber of the CFCB found that AC Milan did in fact violate the break-even rule, and after AC Milan appealed its decision to exclude the club from participating in the next UEFA club competition for which it would otherwise qualify for the next two seasons, the Court of Arbitration for Sport ('CAS') partially upheld the appeal and sent the matter back to the CFCB for reconsideration. Although at the time of publication the conclusion of this case is yet to be confirmed, it can be assessed as part of a discussion of the issues with respect to FFP decisions and the procedures behind them, as Juan de Dios Crespo Pérez and Paolo Torchetti, of Ruiz-Huerta & Crespo Sport Lawyers, explain.

AC Milan, winners of 18 FIFA and UEFA trophies and 18 scudetti, is one of the most recognisable brands in world football. Despite their notoriety the rossoneri are not immune from the financial problems that have plagued the football world, nor are they exempt from the reach and applicability of the new regime governing club football known as FFP.

As the 2018/2019 season approached, and the UEFA Europa League licensing process was under way, the CFCB opened proceedings against AC Milan to investigate, *inter alia*, possible violations of the break-even requirement further to the UEFA FFP Regulations. After finding that AC Milan did in fact make such a violation, the Adjudicatory Chamber of the CFCB chose to exclude the Italian giants from participating in the next UEFA club competition for which it would otherwise qualify over the following two seasons.

AC Milan appealed this decision to the CAS, which partially upheld the appeal

and sent the case back to the UEFA CFCB for reconsideration. The CAS Panel specifically ruled that AC Milan failed to fulfil the break-even requirement and that the sanction of excluding AC Milan from participating in the next UEFA Club competition for which it would otherwise qualify in the next two seasons is annulled as it is disproportionate.

At the time of publication of this article, the ultimate resolution of this dispute is still pending. Perhaps the merits of the FFP violations shall ultimately become public and a discussion can be had concerning the contents of the FFP Regulations. For the moment, however, the *AC Milan* case presents legal commentators with some interesting issues, with respect to both the private nature of FFP decisions and certain procedural considerations.

## Privacy of UEFA FFP decisions and settlements

As mentioned above, at the moment the CAS has sent the case back to the UEFA CFCB for redetermination. The

CAS has not released a decision with merits or grounds addressing any legal arguments, but has only issued a press release describing the general terms of the decision. The CAS media release has only specified that the club "had failed to fulfil the break-even requirement set out in Articles 58 to 63 of the applicable UEFA Club Licensing and Financial Fair Play Regulations<sup>1</sup>." This is particularly broad and it is difficult, from the information publicly available, to ascertain how AC Milan, with any legal specificity, violated the break-even requirement. The information publicised by the UEFA CFCB does not add any specificity.

There are several components to the break-even requirement in Articles 58 to 63. Therefore, AC Milan could have transgressed one or more of the follow legal requirements in addition to the general basic break-even principle:

- relevant income and/or expenses could have been incorrectly included or excluded based on the nature of the purpose and/or character

## The CAS Panel via its press release stated that the Adjudicatory Chamber is in a better position than the CAS Panel to issue a new and proportionate disciplinary measure on the basis of the current financial situation of the club.

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- of the income or expense<sup>2</sup>;
- as there was a foreign investment into the club there could have been an issue that arose regarding the conversion of foreign funds, either inadvertently or as an intentional transaction to create a financial benefit<sup>3</sup>;
- as the break-even requirement is calculated over several reporting periods and an aggregate deficit can be reduced by a surplus from the total break-even results from the previous two reporting periods, it is unclear if AC Milan was in violation for how many of the three reporting periods<sup>4</sup>; and
- capital contributions from equity partners or related parties can be made to cover the 'acceptable deviation,' however such contributions must be unconditional and be at fair market value, and as it appears that there was a refinancing of the debt of the club, it is possible that these rules were triggered<sup>5</sup>.

Moreover, the break-even requirement is not simply a raw calculation of income and expenses to regulate the acceptable deviation. In addition to this calculation, there are two other financial tests that are applicable within the FFP Regulations cited by the CAS press release. Clubs must also respect the 'going concern' test which is an auditor's opinion with respect to the annual and/or interim financial statements, which looks at income and expense flows term to determine if the club can operate in the short term<sup>6</sup>.

In addition, there are negative equity rules where clubs must demonstrate that its net liabilities position has not

deteriorated relative to the comparative figure contained in the previous year's annual or interim financial statements<sup>7</sup>.

The result is that as there are no public decisions issued on this case at this moment any discussion on the merits would be pure speculation. There are some rumours in the public domain as to the precise nature of the transgressions, however it would be imprudent to comment on them at this point. This is symptomatic of a greater issue within this area of law as the only information available with respect to binding jurisprudence for practitioners to better under the application of the FFP Regulations is when a CAS appeal decision is released. On the other hand, it is understandable that minus an appeal, both UEFA and clubs wish to keep such sensitive financial information confidential.

### Delegation of FFP monitoring to domestic associations

The CFCB is established as the central agency that administers and oversees the FFP Regulations. One of the CFCB's specifically enumerated areas of jurisdiction is to determine whether a member association or a club has fulfilled its obligations under the FFP Regulations<sup>8</sup>. It is note-worthy that the Italian authorities failed to take any official public action against AC Milan. That UEFA had to intervene and review AC Milan's accounts for the purpose of granting the UEFA licence to compete in Europe for the 2018/19 season is curious if the transgressions are severe. This is because the domestic fair play regulations must be at least as

stringent as the UEFA FFP Regulations.

The initial enforcement of the FFP Regulations is delegated from the UEFA CFCB to the UEFA member associations, the football associations of each country. The member association is required to communicate with the UEFA CFCB, act as an intermediary ensuring all the relevant documentation is submitted by the clubs, and generally carry out the responsibility to act as the first review stage and implementation of the FFP Regulations and in time according to the relevant schedule<sup>9</sup>. The member associations have the right to request compliance audits at any point<sup>10</sup>.

The member association can delegate this function to the domestic league where the national association (i) is affiliated with UEFA and has accepted UEFA statutes, regulations and decisions in writing; (ii) the association is responsible for the running of the top domestic championship; (iii) has agreed that the domestic association will use the monies forward to it by UEFA to enforce the FFP licensing requirements; and (iv) where the member association has agreed to, *inter alia*, implement all FFP Regulations, to fully cooperate with UEFA, to allow UEFA access to verify the operation of the decision making bodies, to submit to audits conducted by UEFA, and to issue appropriate sanctions<sup>11</sup>.

Therefore the UEFA member association is liable and responsible for the proper implementation of the club licensing system where this functions has been delegated to the specific league<sup>12</sup>. This is precisely the case in Italy, where



1. The Court of Arbitration for Sport media release: 'AC Milan v. UEFA: The Court of Arbitration for Sport (CAS) annuls the sanction and refers the case back to UEFA to issue a proportionate disciplinary measure.' Lausanne, Switzerland, 20 July 2018.
2. Article 58 UEFA FFP Regulations.
3. Ibid. Article 60(4).
4. Ibid. Article 60(6).
5. Ibid. Article 61.
6. Ibid. Article 62(3)(i).
7. Ibid. Article 62(3)(ii).
8. Ibid. Article 3(1).
9. Ibid. Article 55(1).
10. Ibid. Article 71.
11. Ibid. Articles 5(3) & Annex II.
12. Ibid. Article 5(2).
13. CAS 2011/A/2670 *Masar Omeragic v. Macedonian Football Federation*.
14. CAS 2013/A/3139 *Fenerbahçe SK v. UEFA*, see CAS 2007/A/1217, para. 12.4; CAS 2012/A/2762, para. 122.

there are domestic fair play regulations for Serie A teams administered by the Lega Pro applying the 'Manuale delle Licenze Nazionali.' Presumably, the Italian domestic regulations have undergone a compliance process where the national rules at least mirror the UEFA regulations. If this is the case, which it is, then it does not add up that UEFA has found severe transgressions of its FFP Regulations, but the Italian authorities have not.

One of the sanctions under the Italian regulations is the relegation of a club. Perhaps the Lega Pro did not have the appetite or political will to apply its own regulations where one of the possible outcomes was the relegation of the club. This view is, of course, pending a review of the details of the merits of the case which are yet to be released, but given the general legal framework that national associations are responsible for the implementation of the FFP Regulations and that UEFA acts as a gate keeper, the situation is indeed curious.

#### **New facts and the principle of proportionality**

The CAS Panel concluded that some important elements have not been properly assessed by the CFCB Adjudicatory Chamber and/or could not be properly assessed at the time when the CFCB issued its decision. Specifically, the CAS Panel noted that AC Milan's current financial situation improved as a result of the recent change in the club's ownership.

Parenthetically, the CAS Panel acknowledged that the decision of the Adjudicatory Chamber of the CFCB to exclude AC Milan from the UEFA club

competition was not proportionate. As a general proposition the principle of proportionality dictates that the most extreme sanction must not be imposed before other less onerous sanctions have been exhausted<sup>13</sup>. Moreover, CAS has declared that "the steady line of CAS jurisprudence provides that the sanctions imposed must not be evidently and grossly disproportionate to the offence<sup>14</sup>."

As the press release is not specific on these points, it is not clear whether this was the result of these new facts. What is clear, however, is that the law as applied to facts leads to the formulation of tribunal decisions and it is likely that the new facts did indeed affect the application of the proportionality principle.

#### **Conclusion: ripe for settlement**

During the procedure at the UEFA administrative stage, the CFCB refused to enter into a negotiated settlement as offered by AC Milan. The CAS Panel rejected AC Milan's request to order UEFA to enter into a settlement agreement. Instead, the Panel decided to refer the case back to the Adjudicatory Chamber of the CFCB. The CAS Panel via its press release stated that the Adjudicatory Chamber is in a better position than the CAS Panel to issue a new and proportionate disciplinary measure on the basis of the current financial situation of the club.

This comment and approach is interesting for several reasons. Firstly, audits involving the review of financial statements and their underlying source documents can

be quite complicated. Such a review would require the expertise of several certified financial experts such as accountants and may even require that such work is undertaken under the direction of a lawyer should legal issues of interpretation arise.

This may be beyond the scope of a CAS Panel, particularly if the CFCB did not consider these new facts. Moreover, such an approach has the effect to limit the costs of the CAS arbitration as it is possible that the CAS Panel would have to employ certified financial experts to review the documentation. In effect, the Panel recognises that given the complicated nature of FFP audits the CFCB may be in a better position to do so.

Secondly, the decision to refer the case back to the CFCB will give the parties the opportunity to enter into a voluntary agreement, so long as the principles in the CAS decision are respected. If the parties can come to an agreement, this result would ensure that an acceptable outcome will be respected by both UEFA and AC Milan, while limiting the opportunity for a dispute to be again heard before the CAS. It would appear that the CAS Panel's approach was a sensible and appropriate one in the circumstances from the perspective of judicial economy.

Of course, all of this can change pending the final result. For the moment, however, some interesting legal issues have arisen as we all wait patiently for public clarification on the matter.