

To what extent is the regulation of sport effective in terms of financial management of clubs? An evaluation of corporate and financial governance, in the context of failing football clubs and salary cap clauses.

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1. Introduction: Sport as ‘business’

Modern professional sport organisations are largely similar to any other serious, well-structured, and profit-driven business enterprise.¹ The multi-billion-pound Premier League football clubs, National Basketball Association (NBA) teams, and North American Major League Baseball franchises are three leading examples of how successful professional team sports entities invariably depend upon their leadership to provide sophisticated financial management skills.² Often, these enterprises are revenue-generating behemoths employing hundreds of people: the athletes who provide the club with its public face are only one business operations aspect. The notion that professional sport ‘is just a game’ is far-removed from any contemporary corporate and financial governance reality. As the world’s most popular sport (as measured in terms of participation, media audiences, and revenues), football provides numerous, excellent examples of the sport – business dichotomy.³

¹ See further Michael Green and Tony Ghaye, ‘To What Extent Do Football Organisations and Networks Allow Individuals to “Thrive”?’ (2018) 23(1/2) *Managing Sport and Leisure* 1, 6; House of Commons, ‘Football Governance’ (2010) [Online] Available: <<https://publications.parliament.uk/pa/cm201011/cmselect/cmcomeds/writev/792/fg57.htm>> [26 August 2020].

² Of numerous examples, see Sopan Deb ‘Do You Understand the N.B.A. Salary Cap? Imagine Enforcing it’ (20 August 2019) [Online] Available: <<https://www.nytimes.com/2019/08/20/sports/basketball/nba-salary-cap.html>> [25 August 2020].

³ Marc Patrick Schneider and Simon Karlin ‘Alternative club financing models versus third party ownership regulations’ (2017) 15(1) *W.S.A.* 12, 15.

English football had its first professional players in the late 19th century, and there is no doubt that successful clubs have usually had an equally professional management cohort.⁴ As the ‘world game’ (‘beautiful game’) grew within an increasingly globalised late 20th century sport landscape, the precedent-setting 1996 *ASBL v Bosman* decision effectively changed the international football player transfer system irrevocably.⁵ Greater player mobility - where clubs could no longer significantly control where players chose to play - directly contributed to a remarkable rise in players’ salaries.⁶ Clubs with aspirations of competing at elite national, or regional levels (such as the Champions League) must compete for elite playing talent. Television and lucrative corporate sponsorships are revenue sources that clubs in the top national leagues see as essential to their ability to sign and retain the best players.⁷ Match day attendance, and supporter enthusiasm are also linked to competitive success.⁸ A club is perhaps best understood as: an intricate business structure, one where its financial planners, accountants, and marketing personnel are as critical to overall club success as the players, coaches, and training staff.⁹

However, in the post-*Bosman* era, football’s global and affiliated governing bodies came to the following realisation: in the pursuit of the best players - building the strongest, most competitive teams - clubs with the best-resourced ownership would likely gain insurmountable advantages.¹⁰

The ‘just a game’ adage no longer applies to most top-level professional sports: it rarely reflects the attitudes of individual players who seek to maximise their earning potential. Players will

⁴ John Harding, *Behind the Glory: 100 Years of the PFA* (Breedon Books, 2009), 12.

⁵ *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* (C-415/93) [1996] All E.R. (EC) 97 (ECJ).

⁶ See: (i) Samar Shams ‘Farewell to free movement’ (2017) 178(Mar) *Emp. L.J.* 13, 15; (ii) *Olympique Lyonnais SASP v Bernard and Newcastle United FC* (Case C-325/08) [2010] 3 CMLR 14 (ECJ).

⁷ *Ibid.*

⁸ Jan Łukomski, ‘On the finalisation of international football transfers and professional football players’ contracts’ (2020) *Int Sports Law J* 4, 8.

⁹ Alastair Chapman and David Gallagher ‘It’s a funny old game’ (2015) 14(11) *Comp. L.I.* 6, 7.

¹⁰ Chris Davies, ‘Labour market controls and sport in light of UEFA’s Financial Fair Play Regulations’ (2012) 33(10) *E.C.L.R.* 435, 444.

usually seek and accept club transfer offers where they will earn the greatest income. Occasionally, particular clubs might attract players via commercial endorsement opportunities.¹¹ More often, ‘deep pocket’ club ownership groups can outbid rivals unless governing body rules prohibit this.¹² And yet, the *International Federation of Association Football* (FIFA),¹³ and *Union of European Football Association* (UEFA, of which the England Premier League is a member) are bound by financial fair play (FFP) rules. These are central to understanding how football seeks to maintain competitive balance between all clubs, and to a lesser degree, within national leagues.¹⁴ If such FFP rules are regarded as fundamental (arguably, an appropriate ‘fair play’, or ‘fairness’ synonym), they should be enforced consistently. FFP compliance might forbid clubs from paying excessive executive salaries, negotiating player transfers that they cannot afford, or otherwise living beyond their financial means. Conversely, wealthy individual or corporate ownership would be prohibited from propping up an otherwise money-losing club.¹⁵ The FFP rules, and their underlying football competition rationales, are explained more fully below, with reference to English company law, financial and corporate governance concepts (collectively referenced here as corporate governance).¹⁶

¹¹ Ibid.

¹² Norman Clarke, ‘How financial regulation affects competition across Europe’s big five football leagues’ (2014) *Jun LawInSport* 1, 4.

¹³ Of earlier examples, see UEFA ‘Financial fair play: all you need to know’ (2015) [Online] Available: <<http://www.uefa.com/community/news/newsid=2064391.html>> [24 August 2020].

¹⁴ Premier League ‘What is Financial Fair Play?’ (2017) [Online] Available: <<https://www.premierleague.com/news/102374>> [25 August 2020].

¹⁵ Ibid.

¹⁶ ICAEW ‘What is Corporate Governance’ (2018) [Online] Available: <<https://www.icaew.com/technical/corporate-governance/overview/does-corporate-governance-matter>> [25 August 2020]. The methodological approach is largely doctrinal, including an extensive review of the literature. See also Andrew Crane, Dirk Matten, and Laura Spence, ‘Corporate Social Responsibility in a Global Context’ (2013), in: *Corporate Social Responsibility: Readings and Cases in a Global Context*, 2nd edition, Crane, Matten, and Spence, eds., Abingdon: Routledge, pp. 3-26 [Online] Available: <<http://ssrn.com/abstract=2322817>> [27 August 2020]. On the research methodology see John Creswell and David Creswell, *Research design: Qualitative, quantitative, and mixed methods approaches* (5th edn, Sage, 2018), 3-12, 40, 50.

The recent Manchester City FFP proceedings are discussed – and the initial UEFA sanctions – alongside the reasons as to why these were overturned via a subsequent Court of Arbitration for Sport (CAS) appeal. Arguably, FFP is a flawed, often unworkable football club governance mechanism.¹⁷ Alternative governance and sport financial management options are offered here, including the salary caps used in NBA and other professional sports to achieve similar objectives. The conclusion reinforces the core argument: from an overarching sports best practices perspective, FFP has theoretical appeal, but is beset by significant practical failings.¹⁸

2. Modern sport governance concepts and football: a challenging business dynamic

Modern professional sport and commercial business operations were formerly distinct concepts: they may now be regarded as largely synonymous. It is useful here to set out why sport and business might be understood as two sides of the same commercial coin, with corporate governance principles applying in the football club examples explored here.¹⁹ Corporate governance is a well-known concept, with numerous definitions referencing the general duties of corporate directors concerning their company's best interests.²⁰ It is understood here as the different methods by which corporate leadership must manage, operate, and direct their company's operations, and the reasons underpinning such leadership.²¹ Effective corporate governance is a

¹⁷ *Manchester City FC v UEFA* (Case 2020/A/6785) (CAS, 2020) (a detailed ruling that exceeds 90 pages)

¹⁸ The research is underpinned by three questions: (1) Using European football as the primary example, do current professional sports financial management regulations (FFP) provide sufficient deterrence against club financial misconduct? (2) Are football club corporate governance principles different than those applicable in any other corporate environment? (3) Are salary caps a viable football financial management – FFP option? These questions and their analysis provide the basis for possible reforms to current football FFP approaches.

¹⁹ See further Jonathan Michie and Christine Oughton 'The Corporate Governance of Professional Football Clubs in England' (2005) 13(4) *Corporate Governance* 517, 519; Sahiba Gill, Edouard Adelus and Francisco de Abreu Duarte 'Whose game? FIFA, corruption and the challenge of global governance' (2019) 30(3) *E.J.I.L.* 1041, 1066.

²⁰ Andrew Keay 'The impact of enlightened shareholder value' (2019) 4 *J.B.L.* 304, 327.

²¹ ICSA 'What is Corporate Governance?' (2016) [Online] Available: <<https://www.icsa.org.uk/about-us/policy/what-is-corporate-governance>> [25 August 2020].

direct reflection of strong, assertive corporate leadership, where company directors devise and execute clear strategies to achieve all stated company objectives.²² It logically follows that sound corporate financial management is an essential corporate governance component – companies cease to exist where they cannot satisfy their financial obligations.²³

From the 1992 *Cadbury Committee* study until the present day, various English and Welsh (EW) government and private sector initiatives have been undertaken to better understand how corporate governance principles can be assembled into a single company law provision.²⁴ The current Companies Act 2006 (CA 2006) Part 10 (director’s duties framework) assists in linking general corporate governance to what is expected from any modern sport, or football club corporate leadership.²⁵ Amongst various, specifically enumerated duties - such as avoiding personal conflicts of interest, and exercising reasonable judgment -²⁶ EW directors are required to take into account all company stakeholder interests when making decisions.²⁷ These ‘company best interests’ duties’ oblige directors to consider how their decision-making might impact shareholders, creditors, employees, customers, and the wider community.²⁸ How these concepts translate in terms of football clubs and their business operations merits consideration.

Effective corporate governance and sound fiscal management are inextricably linked: football governance issues, and the specific challenges faced by clubs when attempting to keep their

²² G.J. Rossouw, ‘The ethics of corporate governance: crucial distinctions for global comparisons’ (2009) 51(1) *Int. J.L.M.* 5, 9.

²³ Insolvency Act 1986 ss.213, 214 duties re insolvent trading.

²⁴ Sir Adrian Cadbury, *Cadbury Committee: Report of the committee on the Financial Aspects of Corporate Governance* (HMSO, 1992), as also discussed by Company Lawyer, ‘Government reviews progress on implementing Kay Review’ (2015) 36(1) *Company Lawyer* 11, 12.

²⁵ Companies Act 2006, s.170-181.

²⁶ *Ibid*, ss.173-176.

²⁷ *Ibid*, s.172(1)(a)-(f).

²⁸ *Ibid*; see also Chris Hodge et al, ‘Untangling corporate governance’ (January 2017) ICSA [Online] Available: <<https://www.icsa.org.uk/about-us/policy/what-is-corporate-governance>> [25 August 2020], 2-4.

budgets under control, are not a recent phenomenon. The comprehensive 2005 Michie and Oughton assessment of EW football club governance weaknesses predates the CA 2006 Part 10, but the authors' core propositions remain relevant.²⁹ Michie and Oughton observed that professional football has two 'peculiarities:' the first is that when individual clubs agree to form a league, those clubs and the league administration (such as the Football Association and its Premier League),³⁰ are presenting a 'joint product' whose quality (measured by consumer appeal) depends on effective cooperation between competing clubs.³¹ League structure is differentiated from many traditional commercial enterprises and what true business competition really means. The clubs are sporting rivals, in the sense that each is trying to win a league championship. They are also sport product partners: without a healthy, well-balanced competitive league, there is less consumer interest in this sport 'product.'³²

A second peculiarity is linked directly to the first one. Football clubs are continually grappling with a central, perennial problem, namely the need to balance financial sustainability (a CA 2006 s.172(1) 'stakeholder best interests' outcome), with relentless club supporter pressure to achieve playing success.³³ Clubs are powerfully incentivised to gamble with their available resources. They may seek to acquire specific high-quality players - seen as essential to immediate competitive success - by paying them higher wages to outbid rival clubs. Where clubs spend more money than they can afford to (using any conventional corporate governance and financial management standards) they become fundamentally unprofitable. So long as the pressure to win is present, the

²⁹ Michie and Oughton, n 19, 518.

³⁰ Premier League (EPL), 'Rules of the Premier League' (2020) [Online] Available: <<http://mobile.premierleague.com/staticFiles/85/d/0,,12306~134533,00.pdf>> [25 August 2020].

³¹ Michie and Oughton, n 19, 518, 519.

³² See: (i) Paul Craig and Grainne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015), 1001, 1051, citing Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/01, Articles 101, 102; (ii) Frank Hendrickx, 'Twenty years Bosman case' (2015) 6(3) *E.L.L.J.* 188, 189.

³³ Michie and Oughton, n 19, 519.

incentive to invest any possible operational profits in player salaries will arise - even when these profits have not yet appeared on the club balance sheet.³⁴ A club might continually be ‘mortgaging its future’ (spending revenues that it hopes to generate by winning games), risking financial stability in the process.

It is also important to note an aspect of football club governance that does not often affect other corporate entities and the way in which they operate: club supporters’ interests. In a traditional corporate governance model (pre-CA 2006 Part 10) the only interests that company directors were often obliged to satisfy were those of the owners (shareholders).³⁵ A successful, well-run company was one that maximised its ownership’s return on their corporate investment, with directors’ decision-making utilising all lawful means to achieve these resolutely profit-seeking objectives.³⁶ CA 2006 Part 10 introduced a revised governance concept however, with new emphasis placed on stakeholders’ interests, which were less aligned with profit maximisation, and more attuned to longer term company stability, and sustainability.³⁷ However, this stakeholder interests orientation is not equated with directors ignoring company profitability objectives. Instead, a fair CA 2006 Part 10 reading suggests that profit is part of the larger, more complex governance picture.

By any sensible measure, football club stakeholders must include their supporters – no club can exist without them. The unique position of supporters in a football club governance dynamic is

³⁴ Ibid; see also John Woodhouse ‘Soccer and solvency: The Football Creditors Rule’ (2014) House of Commons Library [Online] Available: < <https://commonslibrary.parliament.uk/insights/soccer-and-solvency-the-football-creditors-rule/#:~:text=The%20rule%20requires%20that%20an%20insolvent%20football%20club%E2%80%99s,irrespective%20of%20the%20position%20of%20any%20other%20creditors> > [25 August 2020], 2-4.

³⁵ See: (i) A point taken from reading Andrew Keay, ‘The Duty to Promote the Success of the Company: Is it Fit for Purpose?’ (2010) University of Leeds School of Law, Centre for Business Law and Practice Working Paper, [Online] Available: < <http://dx.doi.org/10.2139/ssrn.1662411> > [25 August 2020], 4-6; (ii) Christian Ajibo, C ‘A critique of enlightened shareholders value: revisiting the shareholders' primacy theory’ (2014) 3 *Manchester Review of Law, Crime and Ethics* 115, 117.

³⁶ Keay, 2010, 4-6.

³⁷ Ibid.

clear. On one hand, supporters might welcome Boards of Directors seeking to maximise club profits. This strategy could readily translate into a strengthened club ability to attract the best possible players; club profitability is thus converted into competitive successes. Conversely, club supporters might not care whether the club was losing money, if one of two circumstances existed: (1) the club was able to mortgage its future in the ways Michie and Oughton outlined³⁸ and enjoy competitive success; or (2), its ownership was prepared to absorb all necessary financial losses in the pursuit of competitive success. In either event, the ‘supporter as stakeholder’ has their primary interest advanced by the club leadership – their team is a winner on the pitch, and in the league standings.

It might appear that neither of these ‘supporter as stakeholder’ is objectionable. If competitive leagues’ long-term appeal depends upon clubs being competitive, how individual clubs are able to acquire the best available players is a secondary consideration. Further, if a wealthy owner is prepared to bear losses, and club supporters are satisfied with the competitive results, it seems offensive to fundamental individual autonomy, and freedom of choice, to deny this owner their apparent right to spend money as they may lawfully choose.³⁹ The following FFP rules and rationales provide an effective counterpoint to these two seemingly reasonable football governance interpretations.

3. Financial fair play: Rules and rationales

The FA requires each of its member clubs and leagues operating below its elite professional leagues (particularly the Premier League) to ensure corporate adherence to the following

³⁸ Michie and Oughton, 520.

³⁹ Ariela Caglio, Sébastien Laffitte, Donato Masciandaro, and Gianmarco Ottaviano, ‘Does Financial Fair Play Matter? The Real Effects of UEFA Regulation for European Football Clubs’ (2019) BAFFI CAREFIN Centre Research Paper No. 2019-119 [Online] Available: <<http://dx.doi.org/10.2139/ssrn.3459935>> [26 August 2020], 3, 5, 6.

governance principles: ⁴⁰(1) all club governance practices will contribute to the club being managed effectively, with demonstrated ‘accountability and transparency’; (2) good governance depends upon values that are ‘brought to life by leadership, direction and supervision’, as led by people with appropriate skills and experience; (3) robust, thorough, and continually reviewed club policies will be devised; (4) the FA club Good Governance Model will place values at its core.⁴¹ Importantly, the FA mentions ‘finance’, and related governance obligations 22 times in its governance requirements, thus cementing the corporate – financial governance interrelationship outlined in the project Introduction.⁴²

The most notable of the FA club financial governance responsibilities call into question two otherwise logical ‘supporter as stakeholder’ contentions (made above). The FA unequivocally states that all club operating procedures must include ‘... good internal financial and management controls’.⁴³ Further, clubs must ensure that executives (including corporate directors) act in furtherance of their ‘Duty of Prudence’ whereby parties will operate ‘... reasonably and honestly to make sure the club *is and will* remain financially solvent’.⁴⁴ It is obvious that an FA member club cannot ‘mortgage its future’ and still remain compliant with FA governance principles. The Premier League FFP rules do not refer to longstanding English FA competitive traditions, nor to any express desire to ensure that smaller clubs can compete with larger, better resourced ones on an equal financial footing. It is apparent that this implicit FFP rationale has been endorsed by various commentators over the period that FFP rules have been operative.⁴⁵ There is a romantic

⁴⁰ Football Association ‘Governance: A Guide for Clubs in the National League’ (2020) [Online] Available: <<https://www.thefa.com/-/media/files/thefaportal/governance-docs/>> [26 August 2020], 2.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid, 7.

⁴⁴ Ibid, 8.

⁴⁵ See e.g. Nick De Marco, ‘The 2018 report to the EC on the football transfer market: fascinating data but flawed conclusions’ (2018) 16(4) *W.S.A.* 4, 6.

notion underlying this competitive balance consideration. A small, more regionally-centred club that lacks global reach, marketing power, or the ownership wealth of the Premier League ‘Big Six’ can still have legitimate dreams of on-field success.⁴⁶ All that these smaller clubs must do, if one follows the FFP position to a logical conclusion, is take the following football governance steps. The club executive leadership must carefully manage its annual budgets, build up its ‘home grown’ football academy talent, make a judicious transfer player signing or two, secure an able, lower-cost manager, train hard, avoid any serious injuries, fill its stadium with spectators and ... win enough games to reach the UEFA sanctioned championships.⁴⁷

This reasoning is akin to an FFP fantasy, to the extent that such outcomes are not impossible – but the ability of virtually any Premier League smaller market clubs to have these factors align in a single season is highly unlikely. In 2019, Arsenal, Chelsea, Liverpool, Manchester City, Manchester United and Tottenham Hotspur accounted for almost 58 percent of the collective annual Premier League revenues generated by all 20 of its clubs.⁴⁸ These are the same clubs that have generally dominated the League table in recent seasons.⁴⁹ Further, these ‘Big Six’ may have set in motion a potentially irreversible process whereby financial power and on-field dominance are not merely synonymous, but become inextricably linked outcomes that are antithetical to fair competition. It is predicted that the other 14 Premier League clubs (irrespective of what specific clubs qualify to remain in the League during a given season), will fall further behind these Big Six clubs when ‘revenue, profitability and on-the-pitch performance’ are collectively assessed.⁵⁰ A

⁴⁶ Robert Kidd, ‘The Big 6 Clubs Are ‘Destroying the Premier League’ (June 2019) *Forbes* [Online] Available: <<https://www.forbes.com/sites/robertkidd/2019/06/18/the-big-6-clubs-are>> [26 August 2020].

⁴⁷ *Ibid.*

⁴⁸ Robert Kidd, ‘Powerhouse Premier League Helps European Soccer Reach Record Revenues’ *Forbes* [Online] Available: <<https://www.forbes.com/sites/robertkidd/2019/05/30/powerhouse-premier-league-helps-european-soccer-reach-record-revenues/#5187c8af23ef>> [27 August 2020].

⁴⁹ *Ibid.*

⁵⁰ Kidd, *op cit* n 46 (June 2019).

detailed 2019 economic study explained a clear, cause and effect relationship that exists between the Big Six clubs' seemingly ever-increasing economic profit performance, and their growing share of total Premier League points – the ultimate measure of competitive English professional football success.⁵¹ Each of these factors is a clear indication that no matter how closely the Premier League, or its UEFA overseers enforce the FFP framework, Big Six dominance will continue unabated. So long as Premier League is dominated year after year by big market clubs, FFP might be characterised as achieving fairness for these particular clubs, alone.

Consistent with an overall EW 'comply, or explain' philosophical attitude adopted regarding corporate governance,⁵² an FA club is not *legally* mandated to follow every stated FA governance policy. However, where a club has not adopted the FA guidance, they are still 'strongly encouraged' to publish reports that confirm the extent to which the guidance has been built into club operations. In this way, the club can demonstrate good governance 'accountability and transparency to stakeholders.'⁵³ When these FA statements are collectively assessed, club leadership that decides to deliberately run deficits is not following good governance.

4. Current FFP Rules

The initial (2009) UEFA FFP regulatory framework was introduced at a time when many European football clubs faced dire financial futures. Devised and implemented in the immediate post-2007

⁵¹ Vysyble, 'We're So Rich It's Unbelievable! – The Illusion of Wealth Within Football' (5th Edition, 2019) [Online] Available: < <https://vysyble.com/reports>> [28 August 2020].

⁵² See: (i) Andrew Keay, 'Assessing accountability of boards under the UK Corporate Governance Code' (2015) 7 *J.B.L.* 551, 572; (ii) Financial Reporting Council (FRC), *Corporate Governance Code 2018* [Online] Available: <<https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>> [21 August 2020].

⁵³ FA 'Governance' 2020, 22.

global financial crisis aftermath,⁵⁴ it was apparent that (glamour and player-star-power aside) elite level European football was properly characterised as an unprofitable business enterprise. At least 50 per cent of all UEFA member clubs were losing money, with the combined annual net losses generated by top tier division clubs (such as the Premier League members) had increased from €600 million in 2007, to exceed than €1.5 billion by 2010.⁵⁵ Caglio et al noted that the UEFA leadership described the problem as one where the ‘living within your means’ mantra was a sound basis for all corporate accounting, but the football world had not employed it for many years.⁵⁶ A significant financial reckoning was plainly at hand; the FFP was the UEFAs (and its member leagues) response to this crisis.

FFP is aligned with the FA governance philosophies outlined above. The Premier League rules are mandated by UEFA, given that the Premiership is a UEFA member; Premier League club eligibility for UEFA championships (most notably its prestigious, annual Champions League, and Europa League competitions) is predicated on full Premier League – FFP compliance.⁵⁷ The *Manchester City v UEFA* dispute - and the initial UEFA ruling disqualifying Manchester City from the Champions League - provide compelling evidence of the overall FFP importance to football club governance compliance generally.⁵⁸

This article’s opening FA - Premier League comment on what FFP means, is instructive, especially when placed in the CA 2006 Part 10 governance provisions identified and explained above. The FFP definition is framed as follows: ‘in addition to Company Law, the Premier League has its own

⁵⁴ Ian McNeil, ‘The trajectory of regulatory reform in the UK in the wake of the financial crisis’ (2011) 11(4) *E.B.L.R.* 483, 488.

⁵⁵ Gaglio et al, 2.

⁵⁶ Ibid.

⁵⁷ Football Association, ‘What is Financial Fair Play?’ (2020) [Online] Available: <<https://www.premierleague.com/news/102374>> [27 August 2020].

⁵⁸ *Manchester City v UEFA*, [333].

Rules relating to club finances, accounting and good governance.’⁵⁹ As EW corporate enterprises, Premier League clubs are bound by both CA 2006 and League governance rules. The specific Premier League FFP requirements include provisions defining transfer fees, salaries, and national tax payment compliance.⁶⁰ Clubs are also mandated to submit accounts annually to the League administration, where this provision also requires Clubs to disclose all payments made to player agents.⁶¹ This particular agent information requirement is telling, given past problems attributed to the dubious role some agents played in some player transfers.⁶² A general decline of sportsmanship (as a value in modern football administration) is often cited – an ironic comment, given that football is a sport.⁶³ The rise of player agent influence has been described as symptomatic of how football club management is ‘increasingly dominated by businessmen at the expense of sportspeople.’⁶⁴ It might also be said that such criticisms are more rooted in nostalgia than practicality: the sentiment that ‘sport is business’ is now so entrenched as to be a truism.

The following selected FFP requirements were central to the *Manchester City v UEFA* proceedings. The Premier League Handbook (‘Section E: Club Finances’) clarifies how League clubs must set up and monitor all financial operations.⁶⁵ It is noted that the League administration (‘the Board’) reserves to itself the power to inspect the financial records of any League club that is reasonably suspected of having breached its Rules.⁶⁶ Further, every club is mandated to providing advance ‘projected profit and loss accounts, cash flow, balance sheets and relevant

⁵⁹ Football Association, ‘What is Financial Fair Play?’ (2020).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Daniel Lowen, ‘A guide for young footballers on how on to choose an agent’ (2020) [Online] Available: <<https://www.lawinsport.com/topics/item/a-guide-for-young-footballers>> [26 August 2020].

⁶³ Gill, Adelus and Duarte, 1054.

⁶⁴ Ibid.

⁶⁵ Football Association ‘Premier League Handbook’ (2020) [Online] Available: <<https://resources.premierleague.com/premierleague/document/2020/08/11/1256c4b9-23bb-4247-93c0-028f042b010d/2020-21-PL-Handbook-110820.pdf>> [26 August 2020], ‘Section E’.

⁶⁶ Ibid, 113, E1.

explanatory notes’, concerning every upcoming Premier League season (‘Future Financial information’).⁶⁷

Arguably the most important Board FFP review power is defined at Handbook Section E.14. The Board will undertake its club Future Financial Information review, as based on a ‘reasonable opinion’ test. Negative club consequences arise where the Board reaches any of the following opinions concerning the club’s financial projections: (1) the club will not be able to satisfy its creditor liabilities, and those related to club employees, *as these fall due*; (2) any inability to play specific League Matches; (3) fulfil its Rules obligations to ‘provide such rights, facilities and services’ enabling the League to fulfil its ‘Commercial Contracts, UK Broadcast Contracts, International Broadcast Contracts and Radio Contracts.’⁶⁸

The highlighted Handbook reference to (1) debt obligations being payable as they fall due is important in a broader FFP context. English company law (such as the Insolvency Act 1986) prohibits any limited company and its directors from trading whilst insolvent, or where a pending insolvency appears imminent.⁶⁹ In the same way that FA governance guidance discourages clubs from living beyond their immediate financial means, it is evident that this Premier League Section E language specifically prohibits its clubs from engaging in such conduct. When the specific Handbook rules are further analysed, the Board can permissibly exercise seemingly sweeping remedial powers to address any FFP violations. These include: (1) requiring the subject Club to ‘submit, agree and adhere’ to a new annual budget that shall include (amongst any other provisions that the Board deems necessary), how the Club will handle ‘Compensation Fees, Contingent Sums

⁶⁷ Ibid, 114, E11.

⁶⁸ Ibid, 116, E14.7.

⁶⁹ Insolvency Act 1986, ss.213, 214; Crispin Daly, ‘Jetivia SA v Bilta (UK) Ltd: the illegality defence of *ex turpi causa non oritur actio* and the extra-territorial effect of section 213 Insolvency Act 1986’ (2016) 13(2) *Int. C.R.* 134, 139.

or Loan Fees’, player remuneration, and any ‘payments to or for the benefit of Intermediaries’ (especially player agents); (2) the Board requiring the Club to provide it with any other additional information that the Board seeks in connection with (1); and (3), the Board may refuse any Club application ‘... to register any Player or any new contract of an existing Player’, where the Board ‘reasonably deems’ such action as necessary to ensure that the Club complies with its Rule 14.7 financial obligations.⁷⁰

This final extract is one that goes directly to the concepts of ‘mortgaging the future’ and ‘supporters as stakeholders.’ If the Board refuses to permit a player registration on the basis that their salary exceeds what the Club can afford, the Board is directly influencing the present and future ability of the Club to compete on a level footing with rivals. This Board power impacts the provision of a competitive product upon which all professional sport league competition is premised.⁷¹ The Board requires assurances that the submitted Club budget means that the Club will not run deficits to acquire players.

Club supporters might take a different view. Say for example a mid level Premier League club ownership group decides that it will privately fund efforts to acquire 2019 FIFA Footballer of the Year Lionel Messi from Barcelona FC.⁷² The group commits to this irrespective of the fact that this acquisition might cost millions of pounds beyond what the Club could afford. Under the Rules, such a transaction would be disallowed by the Board. Club supporters would doubtless be enraged, perhaps arguing that any owners committed to making the club the best it can be should be celebrated, not prohibited from doing what the key stakeholders would applaud. From this

⁷⁰ Football Association ‘Premier League Handbook’ (2020), 116, E14.7.

⁷¹ Hendrickx, 189.

⁷² FIFA, ‘The Best FIFA Men’s Player’ (2020) [Online] Available: <<https://www.fifa.com/the-best-fifa-football-awards/best-fifa-mens-player/>> [27 August 2020].

perspective, the fact that wealthy owners are prepared to commit private funds (that may never be recouped from Club revenues) is neither offensive nor illogical. The owners will generate potentially boundless goodwill, and much money that they should be permitted to spend as they deem best. As such, the *Manchester City v UEFA* outcome is central to the present and future of FFP, and to determining what effective football club governance actually means in 2020.

5. *Manchester City v UEFA* – a compelling financial fair play cautionary tale

UEFA football clubs are required to live within their present, not future, nor speculative, financial means.⁷³ For several years however, various Premier League and other leading UEFA member clubs had been suspected of breaching the FFP rules. In particular, Chelsea and Manchester City had posted successive seasons where their net annual losses approached £140 million, yet the clubs insisted that they had remained FFP – compliant.⁷⁴ The 2019 Chelsea financial statements confirmed overall losses of almost £100 million, attributable, in the Club’s official statement language, to ‘... a number of player acquisitions and related costs, as well as a lack of Champions League football together with costs associated with the change of first team management...’⁷⁵ One could reasonably conclude that Chelsea had conducted itself in exact conflict with the FFP philosophy of living within ones means, and not using projected future revenues to support present football operations expenses. Chelsea acquired expensive player-talent knowing that it would not

⁷³ Gaglio et al, 2.

⁷⁴ Of numerous examples, see RT, ‘Chelsea post \$130 million loss – but insist they WILL stay in the Premier League’ (2019) [Online] Available: <<https://www.rt.com/sport/477262-chelsea-post-financial-loss-2019>> [26 August 2020].

⁷⁵ Ibid.

have Champions League revenues coming in 2019, but spent these sums based on the expectation that future additional revenues would result.⁷⁶

These pre-*Manchester City v UEFA* developments underscored two contrasting sentiments that roughly align with ‘supporters as stakeholders’ propositions. Chelsea supporters suspect that they are being unduly and unfairly targeted for Premier League investigative attention given that many clubs engage in similar behaviour. English club rivals who do not have the Chelsea ownership wealth to fund financing shortfalls may adopt a contrary, FFP-positive opinion – even where one suspects that if their clubs were able to make the same moves, these supporters would have different ideas.⁷⁷

In 2009 Manchester City (MC) was acquired by a wealthy Abu Dhabi-based businessman and politician Sheikh Mansour (Mansour). In a series of corporate restructuring moves orchestrated by Mansour, MC was linked to a series of companies controlled by him, where various monies - characterised as sponsorship funds - were directed into MC bank accounts. If these sponsorships were validly created within FFP definitions, the MC annual accounts would satisfy the core FFP requirement that football club operations must at least break even, annually.⁷⁸ However, a series of leaked 2012 emails suggested that the MC leadership had fraudulently described these purported arms-length sponsorships as monies that had originated with, or were controlled by, Mansour.⁷⁹ These emails provided UEFA with grounds to convene an internal disciplinary hearing, where UEFA concluded that: (1) MC had breached the FFP, and it had fraudulently disguised the

⁷⁶ See also Football London, ‘UEFA chief confirms Financial Fair Play rule change that affects Arsenal, Chelsea and Tottenham’ (May 2020) [Online] Available: <<https://www.football.london/premier-league/uefa-chief-announce-new-ffp-18266583>> [26 August 2020].

⁷⁷ Ibid.

⁷⁸ *Manchester City v UEFA*, [30].

⁷⁹ Ibid.

sponsorship payments to create the impression they were legitimate; (2) that MC had actively obstructed the UEFA investigation by (amongst other wrongdoing) refusing to actively assist UEFA investigators (especially with respect to turning over all relevant documents).⁸⁰ The UEFA ruling, and its penalty – a two year MC ban from all UEFA competition, and a €30 million fine – reflected the seriousness of the MC FFP violations that the UEFA panel concluded had occurred.⁸¹

FFP rules read as a dispassionate financial blueprint for UEFA clubs to use as their primary financial governance guidance; MC based a significant part of its CAS appeal however on technical legal arguments bearing little connection to FFP objectives.⁸² The most forceful of these was the following MC contention. The Club urged the CAS panel to find that the emails inadmissible on the basis that they were ‘hacked’ (under the Swiss procedural laws governing CAS hearings and appeals).⁸³ Without admitting the truth of the emails, or other UEFA evidence that was derived from them, MC also argued that (1) many of the alleged fraudulent sponsorship claims were not established, or (2) they were time-barred (limitation period of five years must apply).⁸⁴ Objective reading of the 350 paragraph CAS judgment suggests that the best MC defences to the dishonest concealment (of Mansour and related corporate equity funding) were procedural, not substantive. The attention that the CAS panel directed to the MC arguments (an ‘inference-based case’) supports this view.⁸⁵

The relevant CAS appeal standard of review is also important. The CAS requirement that the Court must be ‘comfortably satisfied’ concerning MC’s alleged FFP violations is one that does neatly fit

⁸⁰ Ibid.

⁸¹ Bobby McMahon, ‘UEFA Bans Manchester City for 2 Years: Separating Facts from Fiction’ (February 2020) [Online] Available: <<https://www.forbes.com/sites/bobbymcmahon/2020/02/16/uefa-ban-manchester-city-for-2-years-separating-the-facts-from-fiction/#606cfa65204f>> [26 August 2020].

⁸² *Manchester City v UEFA*, [61].

⁸³ Ibid, citing the Swiss Civil Procedure Code 2001, Article 152.2.

⁸⁴ Ibid.

⁸⁵ Ibid, [63]-[72].

within EW proof concepts.⁸⁶ The criminal ‘proof beyond a reasonable doubt’ standard, and corresponding civil ‘balance of probabilities (more likely than not)’ test do not immediately align with ‘comfortably satisfied’ language.⁸⁷ The applicable CAS standard fell somewhere between the two EW tests. The way in which the CAS panel resolved the MC email issue was also significant: the panel was not prepared to reject email admissibility (a key component in the UEFA findings), on the logically sound basis that even illegally obtained evidence could be outweighed by public interest. MC should be held publicly accountable for its alleged large scale FFP deceit.⁸⁸

The CAS also concluded that no matter what apparent procedural violations may have occurred in earlier proceedings the CAS panel was resolutely independent. Previous procedural problems were ‘cured’ accordingly.⁸⁹ In particular, CAS relied upon its *de novo* hearing power to provide assurance that its ruling was appropriately detached from all prior UEFA involvement.⁹⁰ CAS emphasised its commitment to procedural fairness lending credence to the view that the CAS took all reasonable steps to ensure its ruling would be accepted as credible, balanced, and consistent with the evidence and arguments tendered by both sides.

In sum, the FFP payments made, or caused to be made by Mansour and his companies were illegally claimed as innocent ‘sponsorship obligations’ to disguise the true purpose of providing MC with sufficient equity funding to satisfy the FFP ‘break even’ rules.⁹¹ The ways in which the CAS panel refined its applicable ‘comfortable satisfaction’ standard of proof is particularly instructive. The CAS rightly directed itself on a point that resonates: by its nature, the corruption

⁸⁶ Ibid, [200].

⁸⁷ Jonathan Taylor ‘Case comment: Lawson v IAAF, CAS 2019/A/6313 (Case Comment)’ (2020) 3 *I.S.L.R.* 47, 56.

⁸⁸ *Manchester City v UEFA*, [105].

⁸⁹ Ibid, [145].

⁹⁰ Ibid, [163].

⁹¹ Ibid, [198]-[203].

implicit in the efforts made to disguise equity injections into MC must be treated very seriously.⁹² On this basis, the CAS must correspondingly be ‘comfortably satisfied’ that the evidence is ‘particularly cogent’, before making an FFP breach finding. It is on this precise point that the *Manchester City v UEFA* ruling is crystallised. No matter how one reads the CAS ruling, the panel was not persuaded to a ‘comfortably satisfied’ standard that MC had committed the alleged acts.⁹³ High levels of suspicion were raised by emails that referenced sponsorships relationships: these were dubious at best, in terms of their arms length, transparency requirement.⁹⁴ Unlike the EW civil or criminal proceeding approaches referenced above, the CAS was not prepared to find that because MC obstructed the UEFA investigation, such actions weighed against them in terms of overall credibility.⁹⁵ Although the CAS found that MC was ‘rightly sanctioned’ for its non-cooperation with the UEFA investigation, the CAS was only prepared to impose a penalty limited to that discrete MC transgression.⁹⁶

If the CAS analysis is accepted as authoritative, it follows that FFP violations will likely now be judged at a standard that may favour alleged UEFA club member interests over FFP compliance, unless the violation evidence is clear cut. If proving such violations is this difficult for UEFA, or any other football governing body, it must be asked whether the FFP rule enforcement procedures are still fit for purpose.⁹⁷

⁹² Ibid, [207].

⁹³ Ibid, [272].

⁹⁴ See e.g. Zak Garner-Purkis, ‘Manchester City V. UEFA Judgment Reveals New Depths of Paranoia’ (July 2020) [Online] Available: <<https://www.forbes.com/sites/zakgarnerpurkis/2020/07/29/manchester>> [27 August 2020].

⁹⁵ *Manchester City v UEFA*, [278]-[279].

⁹⁶ Ibid.

⁹⁷ Tony Evans, ‘Uefa only has itself to blame as full judgement on Man City CAS appeal reveals a body not fit for purpose’ (July 2020) *The Independent* [Online] Available: <<https://www.independent.co.uk/sport/football/european/man-city-uefa-ban-appeal-cas-verdict-reasons-a9643511.html>> [27 August 2020].

6. Longer term football governance consequences?

The 2019 Caglio et al study highlighted above offers extensive UEFA FFP data-gathering and review, and poses a fundamental question that bears directly on the CAS decision: does the FFP regime really matter, in terms of whether FFP rules actually achieve what UEFA states as the FFP fundamental purpose, namely, fair football competition?⁹⁸ The Caglio research describes itself as the first ever academic study to analyse actual FFP implications, as opposed to merely documenting the fierce challenges faced by European football ‘business.’⁹⁹ Caglio et al narrowed their focus to consider the FFP ‘Break-Even Requirements’ (BER), the lynchpin element whereby any clubs seeking to participate in any UEFA tournament must operate as a self-sustaining, conventionally profit-seeking business.¹⁰⁰ Two Caglio conclusions merit more attention here. The first is the observation that ‘... these [study] results suggest that [FFP] has not translated (yet) into an improvement in the financial sustainability of football clubs...’¹⁰¹ The ‘yet’ is a significant qualifier: FFP has produced ‘real effects’ in terms of how European football club management seek to achieve better balance between revenue generation and operating expenses.¹⁰² This hopeful tone suggests that perhaps, over time, the FFP – BER objectives will continue to exert positive influence over football club governance.

⁹⁸ Caglio et al, 3, 4.

⁹⁹ Ibid.

¹⁰⁰ Ibid, 2.

¹⁰¹ Ibid, 14.

¹⁰² Ibid, 16.

The second Caglio conclusion is a natural extension of the first. Whilst clubs are now more successful in securing higher sponsor and commercial revenues, television rights, transfer monies, and merchandising rights, there is no persuasive evidence linking BER-related improvements to ‘better overall financial sustainability of the European football industry’.¹⁰³ If these two points are collectively weighed, the entire FFP philosophy might be reconsidered in conventional cost-benefit terms – whether the football governing body efforts to impose FFP rules (a significant cost) are justified when viewed in terms of the benefits. Further, remembering the FFP tensions noted above, it is important to particularise what these benefits are. Would football suffer, and, if so, to what extent, if the FFP framework was removed altogether?

The earlier (2018) *AC Milan v UEFA* FFP proceedings are relevant here.¹⁰⁴ In prior UEFA BER investigations, UEFA had resolved matters by entering into ‘Settlement Agreements’ with clubs alleged to have violated FFP rules (Paris Saint-Germain Football Club (2014), FC Internazionale Milano (2015), and Manchester City Football Club Limited (2014)).¹⁰⁵ The AC Milan position before the CAS can be reduced to a single question: *Why is UEFA proceeding against us when it was previously prepared to settle similar claims by agreement?*¹⁰⁶ AC Milan supplemented this position with actuarial evidence, whereby the club appeared to have never been at actual risk of becoming insolvent or of ‘losing business continuity’ given its overall financing arrangements.¹⁰⁷ In its final analysis, the CAS determined that there were significant differences between earlier UEFA investigations involving BER, and the AC Milan FFP violations. The Court underscored a third party expert opinion: ‘shocking reservations’ were conveyed regarding AC Milan’s ability to

¹⁰³ Ibid, 26.

¹⁰⁴ *AC Milan v Union des Associations Europeennes de Football (UEFA)* unreported 20 July 2018 (Arbitration).

¹⁰⁵ Ibid, 61.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, [77].

even ‘continue as a going concern.’¹⁰⁸ The CAS ruling was based on the factual finding that AC Milan had breached its FFP obligations by €121 million. The CAS opted to exercise its discretion, and the dispute was referred back to the UEFA adjudicative panel to make an FFP ruling based on its analysis.¹⁰⁹

It is not suggested that the CAS decision concerning its BER assessment, or final ruling were necessarily wrong. What the *AC Milan v UEFA* proceedings confirm is the element of uncertainty that appears to surround the entire FFP enforcement dynamic.¹¹⁰ Some UEFA investigations are resolved by agreement; the most serious UEFA FFP allegations (as set out in *Manchester City v UEFA*) were not however sufficiently substantiated. *AC Milan* was a UEFA FFP enforcement success. The cost – benefit FFP justification is doubtful in terms of common-sense logic. If FFP was devised to encourage fairness at the highest levels of professional football, but UEFA investigative results are uneven – for whatever reason – then UEFA and other international football governance policy-makers should look carefully at other options that might achieve better governance, such as salary cap alternatives.

7. FFP alternatives? Salary cap models

There are inherent philosophical conflicts - and pragmatic enforcement issues - surrounding FFP rules. Obvious tensions exist in respect of what club supporters expect of their ownership (securing the best available players to field the best possible teams) versus how governing sports bodies perceive clubs as competition partners that must abide by similar financial governance rules to

¹⁰⁸ Ibid, [79].

¹⁰⁹ Ibid, [158].

¹¹⁰ Juan De Dios Crespo Perez and Paolo Torchetti ‘UEFA's financial fair play case against AC Milan: special considerations after the CAS press release’ (2018) 16(8) *W.S.A.* 3, 5.

ensure greater competitive balance – and drive public (consumer) interest.¹¹¹ BER benefits for consumers remain unclear; ¹¹² the club supporter position is valid, given human nature, and the much documented ‘tribalism’ that may characterise some club supporters’ devotion to their team.¹¹³ Supporters will likely care less about whether their club adheres to FFP requirements than they will over the issue of winning matches and trophies.

Notwithstanding FFP rules having been in place - and enforceable - for the past 10 years, the fact that a ‘Big Six’ Premier League cohort dominates both revenue generation and on-field competition casts further doubt on whether FFP achieves its essential ‘fair play’ goals.¹¹⁴ Large clubs attract the most UEFA regulatory attention; the *AC Milan* settlement agreements that UEFA negotiated with alleged FFP offenders all involved such enterprises. Further, the *Manchester City* CAS ruling notes that several Premier League clubs sought intervenor status in the proceedings, for the express purpose of preventing Manchester City from potentially seeking a stay of proceedings (thereby preserving the Club’s ability to advance to the UEFA Champions League).¹¹⁵ Of the nine Premier League clubs seeking to limit Manchester City’s procedural manoeuvrability, five are City’s ‘Big Six’ League companion clubs.¹¹⁶ There is a double irony here, and a strong argument to be made that FFP, as currently formulated, only promotes financial, and associated competitive fairness amongst the ‘Big Six’ cohort. Secondly, the clubs most interested in the CAS outcome (given their intervenor status) were those most impacted by a successful City appeal.

¹¹¹ See e.g. Johan Lindholm ‘End of cash-for-player transfers in football?’ (2018) 18 *I.S.L.J.* 1, 2.; Thomas Peeters and Stefan Szymanski, ‘Financial Fair Play in European Football’ (2014) 29(78) *Economic Policy* 343, 390.

¹¹² Peeters and Szymanski, *Ibid.*

¹¹³ Matthew Syed, ‘Tribalism is football’s most distinctive aspect - segregating fans enhances it’ (November 2017) *The Times* [Online] Available: <<https://www.thetimes.co.uk/article/tribalism-is-football-s-most-distinctive-aspect-segregating-fans-enhances-it-clzvm2jg2>> [27 August 2020].

¹¹⁴ Kidd (May 2019), (June 2019).

¹¹⁵ *Manchester City v UEFA*, [32].

¹¹⁶ *Ibid.*

These points raise further questions concerning FFP utility, in terms of football governance and competitive fairness.

Any alternatives proposed to the current FFP model must logically address competition partner, and stakeholder objectives, whilst still providing greater certainty and predictability. The salary cap concept is universally understood as the agreed ceiling imposed on a professional sport club's spending devoted to player salaries, and associated benefits.¹¹⁷ The cap can be defined in terms of the maximum permitted spending on an individual player, the entire team roster, or both.¹¹⁸ In North American major professional sports leagues, a salary cap has been negotiated between club owners (through the particular league), and the league players association in their respective collective bargaining agreements (CBA) in three of the four most prominent leagues – the National Football League (NFL), the National Hockey League (NHL), and National Basketball Association (NBA).¹¹⁹ Other leagues (notably English professional rugby),¹²⁰ have instituted different salary cap regimes. The North American professional sport examples are useful, given their greater, longer-term experience with caps.¹²¹

As 'hard' salary limits, they may lack inherent flexibility, with no leeway for clubs to exceed the pre-determined salary maximum.¹²² The most frequently cited rationales for favouring salary caps are readily understood in terms of corporate – financial governance language, and by using more subjective, 'supporter as stakeholder' terms. Unlike the Premier League and UEFA FFP models,

¹¹⁷ Daniel Pannett 'Collective bargaining in sport: challenges and benefits' (2015) 4(1) *UCL J.L. and J.* 189, 217.

¹¹⁸ *Ibid.*

¹¹⁹ James Hill and Nicholas Jolly, 'Salary Distribution and Collective Bargaining Agreements: A Case Study of the NBA' (2013) 51(2) *Industrial Relations: A Journal of Economy and Society* 342, 363.

¹²⁰ Ben Cisneros, 'Saracens and the Salary Cap – Part II: Grounds for Review?' (November 2019) [Online] Available: <<http://rugbyandthelaw.com/>> [27 August 2020], citing the Premiership Rugby Salary Cap Regulations (2019) [Online] Available: <<https://d2cx26qpfwuhvu.cloudfront.net/premier/wp-content/uploads/2016/05/03161651/Salary-Cap-Regulations-2018-19.pdf>> [27 August 2020].

¹²¹ Hill and Jolly, 342, 345.

¹²² *Ibid.*

a properly instituted salary cap should reduce opportunities for well-resourced clubs to bypass its effect, keeping all clubs to the same spending limit. In theory, whilst some clubs may have extremely wealthy ownership, this resource advantage does not impact competitive outcomes. Each club must abide by the same budgetary limits; the club that puts the best team on the pitch, ice, field, or floor, will win. Club owners' wealth, or their corresponding ability to make up any club financing shortfalls should be largely removed from the club financing equation.¹²³ Club owners also gain obvious salary cost certainty; their executive leadership will know from year to year what its players will cost, and how much money the club has available to pursue free agents, or acquire players with higher salaries through trades.¹²⁴

The supporters – as stakeholders - can take some comfort in the fact that their club is at least potentially able to offer the same money to gain top players as any other league member. Just as a leading international footballer player might choose to play for a club offering opportunity to win a championship (and perhaps effectively take a salary discount, accordingly) a club having available salary cap 'space' with which to offer a specific player the most lucrative contract is no guarantee that the club will sign them.¹²⁵ A player might conclude that, all things considered, they would like to play in glamorous, 'big market' New York, Chicago, or Los Angeles, over a 'small market' club based in Portland, Memphis, or Charlotte, North Carolina – even if the offered small market club contract was more lucrative.¹²⁶ Likewise, the salary cap is not necessarily punitive in terms of how players' interests are impacted. One might reasonably assume that players would automatically reject salary caps as being particularly blunt restraints of trade, a well-entrenched

¹²³ Ibid.

¹²⁴ Michael Beloff, Tim Kerr, Marie Demetriou, and Rupert Beloff, *Sports Law* (3rd edn OUP), 4, 12.

¹²⁵ K.D. Drummond 'Details of Andy Dalton's hometown discount, buyer's market Cowboys contract emerge' (April 2020) [Online] Available: < <https://www.msn.com/en-us/sports/nfl/details-of-andy-daltons-hometown-discount-buyers-market-cowboys-contract-emerge/ar-BB13ASX7>> [27 August 2020].

¹²⁶ Ibid.

English, and wider global contract -and employment - law doctrine.¹²⁷ However, a salary cap is a potentially attractive form of compromise for players and clubs alike. Owners cannot simply ‘spend their way to a championship’, and players tend to appreciate that they are not able to pursue what might be their maximum value.¹²⁸ Instead (depending upon the precise salary cap model), talented players can negotiate with clubs using the defined salary cap structure to obtain longer term contracts, thus giving the club financial governance – cost predictability, and their individual combined contractual security – a potential ‘win, win’ situation for owners and players alike.¹²⁹

The following hypothetical example illustrates this cost certainty – player income security proposition. In a fully free market, a talented 28-year-old, but not world class, footballer X could conceivably negotiate an annual £4 million contract with a Premier League Club. The Club will not likely agree that X will have a contract term of longer than two years, making allowances for injury, declining skills, annual FFP rules compliance (including the Club annual budget, and BER requirements) combined with the fact that other players of similar ability are regularly available on the transfer market. By contrast, in a fixed salary cap circumstance, a £3 million annual contract guaranteed for four years provide X with more total income (security), and the Club now has cost certainty regarding X. There are many variables that might impact how X and the Club actually settle the contract, which are beyond this scenario’s scope, but the core player – club balancing of interests’ proposition remains intact. The strengths and weaknesses of this primary salary cap rationale merit examination, however.

¹²⁷ *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535 (HL), 565.

¹²⁸ Chris Davies, ‘The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine’ (2006) *Journal of Contract Law* 246, 259.

¹²⁹ *Ibid.*

Salary caps can take several forms, not least those that represent ‘soft cap’ variations on the hard, fixed player spending limits explained above. Using North American league examples, the NHL has a hard cap (in 2019-2020, a ceiling of USD 81.5 million, and a prescribed team salary USD 50 million floor for its 20 player rosters).¹³⁰ The NFL has a similar hard cap system, with each of its 32 clubs permitted to spend approximately USD 198.5 million (53 player rosters).¹³¹ The MLB does not have a salary cap per se. Under the current CBA, MLB clubs can spend essentially unlimited monies, where the limits are dictated by the types of contracts that clubs can typically offer available players. Many large market clubs have their own (lucrative) television broadcast agreements, making the financial divide between large and small market clubs especially wide.¹³² If financial fairness and robust sport competition are companion concepts, the MLB model is remarkably flawed. It does not take MLB club owner wealth out of the corporate governance equation. The MLB approach instead reinforces that owners must have access to significant financial resources, or their clubs may never meaningfully compete for the best available players.

The NBA soft cap model has more features that lend themselves to a thorough football FFP comparison. Under the current NBA CBA, a club may spend an annual maximum of USD 109.14 million on player salaries. This figure was agreed upon within the NBA CBA structure, as based upon the total NBA net revenues divided between the league and its players (roughly a 50 – 50 percent revenue division); a clear refinement of the sport partnership approach above. In addition, club may exceed this maximum upper salary limit up to a prescribed ‘luxury tax’ maximum of

¹³⁰ Spotrac ‘NHL Team Salary Cap Tracker’ (2020) [Online] Available: < <https://www.spotrac.com/nhl/cap/>> [28 August 2020].

¹³¹ Spotrac ‘2020 NFL Team Salary Cap Space Tracker’ (2020) [Online] Available: <www.spotrac.com/nfl/cap/2020/> [27 August 2020].

¹³² Mike DeCourcy, ‘If MLB loses the 2020 season, a salary cap should be part of its vision for the future’ (March 2020) *Sporting News* [Online] Available: <<https://www.sportingnews.com/us/mlb/news/mlb-salary-cap-2020-season/1c6trusvpkbml1jen8ojxiqmwy>> [27 August 2020].

USD 132.62 million (15 player rosters).¹³³ There are numerous exemptions for certain designated player circumstances, giving the NBA system a significant degree of complexity. The most notable exemptions are those triggered where a player was originally acquired by their club through the annual NBA player draft (new prospective players who have left the US university system, or the increasingly number of European players who are draft eligible).¹³⁴ When these players' contracts expire, and they can pursue free agency, their current club has the right to offer more money than any other NBA club can pay them. On its surface, the NBA cap system appears to achieve financial certainty and provide players with opportunities to earn significant income.

The luxury tax option is an NBA feature that might seemingly detract from otherwise clear financial fairness in this model. A club can exceed the defined cap maximum on the following terms. Where the club payroll exceeds the \$119 million threshold, the club must pay an additional tax calculated in accordance with how much the cap is exceeded. For example, if a Club payroll is \$5 million over the cap maximum, the Club must pay a tax of \$1.50 for every dollar over the limit – in this case, \$7.5 million. At different excess cap thresholds, the corresponding tax increases – a \$1.75 tax applies to the next \$5 million limit excess. If a club exceeded the 2019-2020 limit by \$20 million, its luxury tax would total over \$16 million.¹³⁵

One might conclude that wealthy NBA clubs might dispassionately regard the luxury tax as the cost of doing business in this market, and simply treat the tax as another expense. The NBA have also implemented a 'repeat offender' luxury tax rule, whereby any team that has paid the luxury tax three times in the previous four seasons must pay 'dollar for dollar' on all monies that exceed

¹³³ Spotrac 'NBA 2019-2020 Cap Tracker' (2020) [Online] Available: <<https://www.spotrac.com/nba/cap>> [28 August 2020].

¹³⁴ Ibid.

¹³⁵ Ibid.

the cap, in addition to the incremental tax tiers outlined above.¹³⁶ It is suggested that whilst no system can fully prevent a wealthy, motivated owner from declaring that they will simply accept the luxury tax, and proceed to acquire players, an ultimate practical check on such power is plainly available to the NBA league administration. There are no legal limits imposed on NBA members to prevent salary cap abuse; the NBA can simply refuse to ratify contracts that undermine the fundamental salary cap purpose – offering competitive league balance on a par with FFP justifications.

The NBA soft cap has another attractive feature. The luxury tax is punitive in its effects upon repeat offender clubs. There is clear financial deterrent effect via its structure and the tiered taxes imposed. However, when viewed from the ‘supporter as stakeholder’ vantage point, the tax has a potentially positive symbolic effect. A Club that sees itself as close to an NBA championship, but still needing one more player as a key ‘piece’ to success, might gamble on a player who takes the overall club payroll over the limit. The Club will pay a certain financial price, but promote greater loyalty amongst its fan base (who purchase NBA merchandise that supplements total Club incomes) – so that supporters will appreciate that their Club is trying to win now.¹³⁷ Further, when compared to the machinations revealed by the various UEFA FFP investigations, the NBA cap system is simple and understandable (subject to the exemptions defined within it). Unlike the UEFA model (and the obvious opportunities to avoid FFP through creative accounting and complex corporate structures such as those utilised by Manchester City to direct equity into club finances that might have otherwise been unavailable) the NBA cap is precisely defined in discrete dollar values. There are no apparent mechanisms available to NBA clubs that can support deviation

¹³⁶ Ibid.

¹³⁷ Spotrac ‘NBA 2019-2020 Cap Tracker’ (2020).

from cap limits – unless the Club is prepared to pay its mandatory luxury tax. Put briefly, the FFP is premised on a more subjective Premier League Board, or UEFA investigative assessments of what a football club’s ‘balanced budget’ or BER might mean in any given season, for a particular Club. The NBA model is based on an all or nothing compliance ethos.

A useful way of assessing the NBA salary model is to ask the ‘*what if*’ question and imagine what Premier League football might look like if an NBA-model was implemented here. Two clear impressions are encouraged. The first looks to the unsettling, and inconclusive *Manchester City v UEFA* proceedings, and the uncertainty regarding whether rich Club ownership groups can, or will, create corporate structures to direct monies into Club coffers that are not transparent. Such corporate maneuverings are irrelevant to NBA salary cap compliance. Secondly, if all clubs were bound by the same salary cap rules, how much money individual clubs might generate in revenue is less important than league competitiveness. Individual players might always be encouraged to play in big market centres where their personal endorsement income opportunities are greater. However, in the one key area that the league can control – salary, and related player benefits like insurance coverage - NBA clubs are placed on a much more even footing than is possible under the current football FFP.

8. Conclusion

As North American professional sports salary cap financial controls illustrate, sport is a business. The different reasons why FFP rules are generally desirable overlap with the wider need to ensure that proper corporate governance principles are not only followed by professional football clubs but enforced by their governing bodies. The often-complex interrelationships that contribute to modern day professional sport appeal are on prominent display in the Premier League. At its top end, Premier League and other elite international football competitions are potentially very

lucrative. Football is an industry that is tied, indeed contracted, into - and still largely dependent upon - club supporter passion. The ‘supporter as stakeholder’ model, when placed within the English CA 2006 Part 10 corporate governance legal framework, offers strong justification for some form of FFP system. The notion that professional football and its desired competitive balance will generate benefits for club owners, players, supporters, and all other stakeholders is left unchallenged in this article. It is the particular FFP system shortcomings however that prompt the call for a salary cap system modelled on the current NBA approach; arguably, it might prove better at delivering real financial fairness to football.

It is not suggested that the NBA, or any other salary cap system is perfect, when assessed in terms of how effectively (or otherwise) financial governance, competitive balance, and owners versus players’ interests are reflected or protected. The fact that a luxury tax can be used to significantly exceed the upper team salary limit is an obvious opportunity to avoid what the cap is intended to resolve – equal Club opportunities to bid upon, and secure the services of the best available sporting talents. It is when the NBA cap model’s strengths and weaknesses are compared with the current football FFP that the Premier League – UEFA approaches appear dangerously flawed. The cited UEFA examples (notably the *Manchester City*, and *AC Milan* cases) are compelling illustrations that – at best – FFP works mainly to serve the interests of wealthy clubs and their owners who seem determined to exploit any potential FFP vulnerabilities. Within the Premier League, the ‘Big Six’ have clearly profited financially, and in sport competition terms, throughout the FFP rules era.

If a movement towards an NBA-styled soft cap system achieved only one tangible benefit (as compared to those encouraged by the current FFP system) that would likely be conceptual precision and financial rules transparency. NHL, NFL, and NBA data confirm how accurately

player salaries can be calculated for cap space analysis. No NBA club is ever left in any doubt over its current and projected salary cap, or its present and future ability to seek new talent. It is suggested that NBA club supporters also benefit from this system – they are left with no uncertainty over the financial capability of their Club at any given moment. The Premier League, and UEFA would be wise to adopt a similar system, modified for football, to break away from the serious problems of FFP rules practical enforcement. FFP as presently conceived does not deliver on its promised fairness, and competitive balance promises – all stakeholders, including its passionate football followers, are compromised by these FFP shortcomings.

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