

THIRD PARTY OWNERSHIP AND MULTI-CLUB OWNERSHIP: WHERE FOOTBALL IS HEADING FOR

by *Luca Pastore**

ABSTRACT: The present contribution analyses third party ownership and multi-club ownership. These two practices have been developing in the last few decades, together with the increasing globalisation and commercialization of the football industry.

Third party ownership and multi-club ownership have been constant subjects of debate among the stakeholders, because of the possible risk that they might constitute for the integrity of the competitions.

This paper investigates the origins of these practices, the arising issues and the relevant regulatory framework in order to shed light on the rationale behind them and on possible future developments of the matter.

Keywords: Third party ownership – Multi-club ownership – Clubs financing – Integrity – FIFA Regulations – UEFA Regulations – EU law – Court of Arbitration for Sport – European Commission – FIFA, UEFA and CAS case law

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* Italian qualified lawyer, *of Counsel* at Lombardi Associates, Edinburgh (UK).
E-mail: luca@lombardi-football.com.

1. Introduction

The football industry has been constantly growing in the last 30 years. Football clubs' revenues derive mainly from match-day income, commercial sources and broadcasting rights, and have been increasing year by year as a result of the ever more globalised sport industry, the boom of broadcasting rights' value (related to domestic leagues, cups and European club competitions), the multiplying of commercial sources, and clubs' investment in privately-owned facilities.

According to Deloitte's report *Football Money League*,¹ with a combined value of EUR 29.9 billion, the aggregate value of Europe's 32 leading clubs grew by 14% in comparison to last season: Manchester United, which tops the list, in the 2015/2016 football season generated EUR 689 million in revenue, which is over six times the revenue it generated in the 1996/1997 football season.

However, the increasing value of European football goes along with a polarisation of the wealth, as the continent's elite clubs leave the rest behind.

As a matter of fact, the Deloitte report shows that clubs belonging to Europe's "big five" leagues – Italy, Spain, England, Germany and France – are pulling away from the rest. This is clearly proven by the fact that even the biggest clubs in Europe outside the 'big five' leagues struggle to reach the top 20 positions.

After the *Bosman* ruling,² competition for hiring the top players is wholly transnational, whereas most of clubs' revenues – broadcasting rights, game and season tickets, merchandising, advertising and sponsorship – still depend on the national and local markets. Therefore, although the cost of creating a team that will potentially be successful in international competitions tends nowadays to be comparable all over Europe, clubs' revenues are quite different from country to country, even among clubs with similar successful sporting results. Revenues for football clubs are much higher in the countries of the "big five leagues", and this explains why the best and costliest players always end up in those few countries, whose richest clubs currently dominate continental competitions.

In addition, also within the same league, the financial gap between top clubs and the rest is rapidly widening. For instance, during the 2015/2016 football season the Italian Serie A league included among its participating clubs Juventus FC, which generated EUR 397.9 million in revenue, and Frosinone Calcio, with a turnover of EUR 31 million.³

Such financial imbalance has been recently investigated by UEFA, in order to evaluate its consequences on the competitiveness of national and continental competitions.

¹ Available at: www2.deloitte.com/uk/en/pages/sports-business-group/articles/deloitte-football-money-league.html (February 2018).

² Court of Justice, Judgement of 15 December 1995, case C-415/93, in E.C.R. 1995, I-4921.

³ Cf. www.calcioefinanza.it/2017/03/20/bilanci-serie-a-2016-fatturato-costi/ (February 2018).

According to UEFA's *Club Licensing Benchmarking Report*⁴ (regarding the financial year 2015) the growing financial gap among clubs represents one of the biggest challenges to football.

Clearly, financial capacity does not win competitions by itself, but it does enable clubs to spend more on player transfers and wages, enhancing their sporting competitiveness.

This is proved by the fact that in the last six years, the leading European leagues, England, Spain, Italy and Germany, have taken every Champions League semi-finals place, with the only exception being Monaco in the last edition: Real Madrid has been there every year and Bayern Munich five times, Barcelona and Atletico Madrid three times each, Chelsea and Juventus twice each, with one appearance each from Manchester City and Borussia Dortmund.

An emblematic figure provided by UEFA's *Club Licensing Benchmarking Report* is the overall amount of sponsorship and commercial revenue since 2009: the top 15 clubs in Europe collect EUR 1.5 billion, whereas the remaining 700 clubs considered by the report have made less than EUR 500 million.

The disparity among clubs is still more evident if we compare European clubs and the other clubs around the world. According to the *Soccerex Football Finance 100* report 2018 edition,⁵ aimed at evaluating the financial strength of football clubs, among the top twenty richest clubs in the world only two of them are not European (*Guangzhou Evergrande* ranked third and *Los Angeles Galaxy* ranked fourteenth). The first South American club is the Mexican *Club de Fútbol América*, which is ranked 40th; the first Brazilian club is *Clube Atlético Paranaense*, ranked 63th, whereas the first Argentinian club is *Club Atlético Boca Juniors*, ranked 76th.

Paradoxically, the 2012 UEFA Financial Fair Play regulations' implementation, aiming to help clubs to keep a sound financial balance have aggravated this situation. The clubs are strictly forbidden from spending considerably more than they earn over certain periods of time. Club owners cannot use resources without control and exceed certain debt limits or accept funds outside the customary market practices.

Similar rules had also been implemented at a national level: in the United States for instance, wage caps and transfer regulations prevent MLS club owners – many of whom are wealthy tycoons – from making large investments that might create an uncompetitive environment. England's Premier League implemented a rule limiting wage bill rises: clubs will be able to increase their wage spend by GBP 7 million each season from 2016/17 to 2018/19. Considering that in the 2016/2017 football season, of the FA league's 20 clubs 14 spent less than GBP 80

⁴ Available at: www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Finance/02/42/27/91/2422791_DOWNLOAD.pdf (February 2018).

⁵ Available at: www.soccerex.com/insight/articles/2017/manchester-city-pack-most-financial-punch-on-planet/download-soccerex-football-finance-100-report (February 2018).

million each, while the “big six” spent more than GBP 120 million (with Manchester City, Manchester United, Chelsea and Arsenal exceeding GBP 200 million each), it appears clear that the smaller clubs will never be able to reduce the gap and upgrade their sporting competitiveness.

Within this framework, which ultimately makes it more difficult for small/medium size clubs to ascend to the top tier clubs’ competitive level, the ability of clubs and leagues to generate revenue and to find alternative ways of financing are key differentiators nowadays and in the years to come.

During the last thirty years, clubs have been developing different strategies aimed at financing their activities, and in the last few years the chase of new sources of financing has further spread, especially in medium-size clubs in an effort to keep pace with the irreversibly growing revenue of the top clubs.

In particular, two specific practises have been increasingly used by football clubs around the world in order to increase their financial competitiveness: third-parties’ ownership and multi-club ownership.

The purpose of this paper is to analyse these two practices, the current regulatory framework, and the relevant jurisprudence in order to shed light on possible future developments.

2. *Third party ownership*

The expression “third-party ownership” (“TPO”) indicates the practice whereby a player is registered with a club, but a third party – either a company or an individual – has a direct financial interest in his “economic rights”: as a result the third party, together with or instead of a football club, benefits from transfer fees every time the player is transferred.

The basis of this practice relies on the conceptual separation of a player’s federative rights from the economic rights.

The so called “federative rights” of players are the rights binding a professional player to a club by virtue of an employment contract duly registered before the respective national association. Such rights can be held only by clubs and cannot be fractioned or shared with any third party. However, it is commonly accepted that players’ federative rights also have substantial economic value, which is normally referred to as the “economic rights derived from the federative right”.

The economic rights could be defined as any financial rights arising from a negotiation/transfer of the player’s federative rights. Clubs normally held their player’s economic rights (those under an employment contract). However, economic rights can also be potentially held by third parties, other than the club.

TPO involves the “economic rights” of a player being owned, wholly or partially, by a physical or legal person who is not a football club (normally they are investment funds), whereby in return for a financial investment, investors are entitled to a percentage of a specific player’s future transfer fee.

Clearly the third-party does not “own the player”, being only entitled to receive economic benefits from the player’s transfers. Such entitlement derives

from a private law contract usually concluded between the “third-party” and a football club in order to finance the club or externalise the costs of player recruitment or obtain an influx of cash when needed. In general, TPO is used by football clubs in order to diversify their funding sources and increase their competitive edge.

TPO is implemented through a number of different ways and means.

Investors may purchase a stake in players’ economic value at an early stage in their careers: this often involves covering the costs associated with the training and housing of players at a club’s academy. This format is a very speculative model, contingent on a player developing to a level where they could command a transfer fee substantial enough for the TPO investor to realise a profit on their share of the players’ economic rights.

Alternatively, investors may finance a club that wishes to sign a player registered with another club, but does not have the necessary financial resources to pay the transfer fee: this is the most commonly used TPO model. The investor pays part or all of the transfer fee in order to acquire a percentage of the player’s economic rights. The standard percentage of economic rights transferred to the third party ranges between 30% and 70%. This TPO model is the result of a joint venture between the club and the investor, in which parties share the costs of the investment as well as the future revenues deriving from the future transfer of the player: the risk/reward is therefore shared by investors and clubs based on the percentage of ownership of the transferred player’s economic rights. However, in many cases that have taken place in recent years, the investors tend to minimise the risks through a guaranteed minimum return, which in general terms is similar to the amount invested.

To be less speculative, investors can also look for a club in need of an immediate influx of cash, but does not wish to weaken their playing squad through sales. TPO investors could purchase a percentage of ownership in an established player and the club receives cash which it could reinvest into its playing squad or infrastructure, realising equity in their assets without diminishing the quality of their squad.

In addition to the standard TPO models described above, there are other legal/contractual solutions, which cannot strictly be considered TPO, but under which a club owning 100% of a player’s federative rights would not be the sole beneficiary of the economic rights arising from that player’s future transfer.

An interesting example of these alternative models was the so called “*Accordi di partecipazione*” (commonly known as “*comproprietà*”) in Italy, which allowed two clubs to share the profits arising from a player’s future transfer.

Such joint-ownership was permitted by article 102-bis of the FIGC internal organisational rules, according to which a club could transfer one of its players to another club in exchange for an interest in the player’s economic value.⁶

⁶ The original version of art. 102-bis, par. 1 of Italian NOIF (now repealed) reads: “*Una società, che ha acquisito il diritto alle prestazioni sportive di un calciatore professionista per effetto di cessione*

This model represented a club/club co-ownership scenario, and it had the peculiarity of being governed by the Italian FIGC rules: since the parties entering into this kind of agreement were clubs and not third parties unrelated to football, this practice was considered acceptable to the football governing bodies.

However, following the debate regarding the well-known Tevez and Mascherano transfers to the English club West Ham United FC, which led the English FA first and then FIFA to ban TPO (see para. 2.2. below), on May 2014 the Italian FIGC abolished the “*Accordi di partecipazione*”.

TPO models offer a number of benefits especially to smaller football clubs, who might want to share the financial risks associated with the purchase of a player: with the increasing economic dominance of a relatively small number of clubs, TPO becomes a source of financial support for clubs to compete in the transfer market. And this is true not only for small clubs, but also for major clubs that struggle to keep their place in the elite of football. An emblematic example of this was FC Porto: the club’s annual accounts for the period ending 22/7/2013 showed that the club only owned the complete economic rights of seven players out of twenty-nine registered in their squad.⁷

The central role played by TPO as financial instruments has however been challenged by the increasing number of issues related to the compatibility of such instruments with the protection of the sporting values and, in particular the integrity of football.

2.1 *Third-party ownership of players: financial instruments or threats?*

The first shadow on TPO derives from the identity of the investors and the origin of the money involved.

As said above, third parties include investment funds, companies, agents and private investors. However, very often the identity of the real beneficiaries is not known, as the investment is made through secretive offshore entities.

This circumstance by itself raises doubts about the compatibility of this practice with the integrity of competitions, given that the same investor might own several players in different clubs participating in the same competition and exercise some kind of influence on players or clubs.

Moreover, TPO contracts could be sold to other entities or other secretive funds, without any control from the national or international football bodies: companies may therefore effectively own or control various players at different clubs and could move them around in a way that might potentially influence the result of a competition. Ultimately, this lack of transparency over the “ownership

definitiva di contratto, può contemporaneamente stipulare un accordo con la società cedente, che preveda un diritto di partecipazione di quest’ultima, in misura paritaria, agli effetti patrimoniali conseguenti alla titolarità del contratto”.

⁷ Available at: www.just-football.com/2013/08/porto-third-party-ownership/ (February 2018).

of players” might entail risks for the integrity of the competitions or, at least, it might jeopardize the public perception of the fairness of competitions.

Such issue leads to another major matter related to TPO: the control enforceable by investors on clubs, which could be a potential intrusion of a third-party in the decisions of football clubs and players, *i.e.* third-parties could have an undue influence on the management of the teams and the players’ careers.

This influence may be provided by specific provisions contained in the TPO agreement (such as free agency provisions – which prevent the club from releasing the player as a free agent in exchange for no compensation – or compulsory sale provisions – which oblige the club to accept a transfer offer above a certain value) or by an active interference in the transfer policies of the club.

Third-parties might also take illegitimate upper hand on clubs in financial difficulty, in order to take control of their players and influence their transfer policies.

In light of the above, it might also be argued that far from being a mere financial means for clubs, the use of TPO is an opaque, financing technique used to circumvent the UEFA Financial Fair Play regulations and to prop up clubs that are persistently in financial troubles.

In addition to the above, TPO also undermines the contractual stability and training of players: as a matter of fact, TPO can only create revenues by the sale of the clubs’ federative rights of a player to another club through a transfer. Thus, by its very nature, TPO depends on the club prematurely ending its employment contract with the player (usually after the 2nd or 3rd season). Third parties’ ownership have therefore an inherent interest in moving players as often as possible before the end of the employment contracts, in order to give value to their investment. Unsurprisingly, a lot of third party investors or investment companies are linked to player agents or companies owned by agents.

By means of TPO, player transfers could be driven by third-party investors purely interested in profit unlikely to enhance training, and this might determine serious consequences on the professional development of players: in fact, clubs might rely upon short-term financing strategy rather than investing in long-term training programmes. Moreover, players’ careers could be determined by mere commercial decisions, without taking into account the professional sporting and personal development of players.

Finally, ethics are concerned: can it be morally tolerable for someone to own a share of an economic right personally attached to a player? UEFA former president Michel Platini defined TPO as a type of modern “slavery”,⁸ whereas FIFA President Gianni Infantino declared that it is simply unacceptable for companies to “trade” economic rights to people.⁹

For all these reasons, FIFA deemed the practice to be a threat to the integrity of football and in December 2014 banned TPO, subject to a transitional

⁸ Available at: www.bbc.co.uk/sport/football/31905811 (February 2018).

⁹ Available at: www.soccerex.com/insight/articles/2013/third-party-ownership-has-no-place-in-football-infantino (February 2018).

period.¹⁰ This ban came into force just few months later, on 1st May 2015; however, the path that led to this ban was much longer.

2.2 *The FIFA ban on third party ownership*

Although common practice in South America for a long time, the issue of third-party ownership was brought under the spotlight in Europe by the transfers of Carlos Tevez and Javier Mascherano to West Ham United from the Brazilian club Corinthians in 2006.

The economic rights of the two players were owned by a number of parties, with Tevez's rights owned by Media Sports Investments ("MSI") and Just Sports Inc, while Mascherano's rights were jointly owned by Global Soccer Agencies and Mystere Services Ltd.¹¹

At that time, there was no outright ban on TPO, but West Ham was found culpable of breaching rules U6 and U18 of the Premier League regulations,¹² which forbade third-party from having material influence over the decision making of clubs. In fact, according to the TPO contract signed in the Tevez deal, the third-party investor had the exclusive power to move the player on to another club and to decide the fee involved, in clear breach of the Premier League rules.

West Ham were ultimately fined £5.5m (for not disclosing all of the documents relating to the transfers): however, the relevance of the issue went beyond this specific case.

The revelation that players' "economic rights" could be "owned" by investors, shocked English football, where the transfer system was regarded as a valuable means of distributing money from rich to small clubs, and raised a debate about the legitimacy of TPO, which ultimately led the Premier League's clubs to prohibit third-party ownership of their own players in 2008.

As a Premier League spokesman explained¹³ *"The clubs decided that third-party ownership was something they did not want to see. It raises too many issues over the integrity of competition, the development of young players and the potential impact on the football pyramid. It was felt the Premier League was in a position to take a stand on this. No one wants to see what has happened to club football in South America repeated over here"*.

Because of the Tevez and Mascherano transfers' widespread clamour, the English Football Association banned TPO at the beginning of the 2008/2009 football season.

¹⁰ Available at: www.fifa.com/governance/news/y=2014/m=12/news=ethics-executive-committee-unanimously-supports-recommendation-to-publ-2494723.html (February 2018).

¹¹ Available at: www.theguardian.com/sport/david-conn-inside-sport-blog/2009/jul/14/manchestercity-carlos-tevez (February 2018).

¹² Regulation U6 stated: "No person may either directly or indirectly be involved in or have any power to determine or influence the management or administration of more than one club." Regulation U18 read: "No club shall enter into a contract which enables any other party to that contract to require the ability materially to influence its policies or the performance of its teams in league matches".

Following the fallout from these cases, FIFA also investigated TPO: in 2007, it set up a working group under FIFA's Players' Status Committee with a mandate to consult all relevant stakeholders and to analyse possible regulatory options.

As a result, in 2008 FIFA introduced article 18bis of the Regulations on the Status and Transfer of Players (FIFA RSTP),¹⁴ titled *Third-party influence on clubs*, which read: “No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article”.

However, this first attempt of FIFA to regulate TPO was not successful given that this provision, which was the result of a compromise among the stakeholders, was too general to be effective.

As a matter of fact, during the years following its introduction, art. 18bis FIFA RSTP was easily deceived by investors. This called for the necessity of a total ban, which was decided by FIFA's Executive Committee on September 2014 and implemented by means of the Circular Letter 1464 of 22nd December 2014.¹⁵

In particular, FIFA first provided a definition of “third party”, described as “a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered”.

Moreover, it provided a new version of article 18bis, para. 1 FIFA RSTP, stating that “No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams”.

In addition, FIFA introduced art. 18ter FIFA RSTP titled *Third-party ownership of players' economic rights*,¹⁶ which prevents players and clubs from

¹³ Available at: www.theguardian.com/football/2008/dec/10/premierleague (February 2018).

¹⁴ Available at: http://resources.fifa.com/mm/document/affederation/administration/02/92/54/37/regulationsonthestatusandtransferofplayersdez2017webeng_neutral.pdf (February 2018).

¹⁵ Available at: www.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf (February 2018).

¹⁶ Art. 18ter FIFA RSTP reads: “No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation. The interdiction as per paragraph 1 comes into force on 1 May 2015. Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended. The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the

concluding agreements whereby a third party is entitled to receive financial benefits or any other right in relation to a player's transfer or a transfer compensation. By means of this provision, FIFA definitively banned TPO. In addition, it established the obligation to record in the FIFA Transfer Matching System (TMS) all of the TPO agreements existing at the time of the ban being imposed, and includes art. 18ter FIFA RSTP among the provisions binding at national level, to be included in each national association's regulations.

The rationale behind Articles 18bis and 18ter is that no pressure whatsoever should be exerted by third parties upon clubs and players to make a transfer.

It must be noted that prior to the FIFA ban, the TPO contracts passed the scrutiny of the Court of Arbitration for Sport (hereinafter "CAS"), in a landmark award rendered at the end of a dispute between Doyen Sport Investments - a Maltese private equity fund specialised in financial operations and among the main global investors in TPO- and Sporting Clube de Portugal.¹⁷

In particular, in 2014 the Portuguese club had unilaterally terminated the TPO contract concluded with Doyen Sport Investments, in order not to pay the amount resulting from the transfer of the player Marcos Rojo to Manchester United in 2014.

Sporting Clube de Portugal had argued before CAS that the contract was immoral and that it constrained its sporting policy as the club had been forced to transfer the player. Nevertheless, CAS rejected these "moral" arguments and privileged the contractual freedom of the parties: as a result Sporting Clube de Portugal was condemned to pay Doyen Sport Investments the amounts due in compliance with the TPO contract.¹⁸

The validity of TPO contracts from the perspective of Swiss law was finally marked by the Federal Supreme Court of Switzerland, which in December 2016 ended the Rojo case by confirming the CAS award.¹⁹

2.3 Challenges to the FIFA TPO ban

The imposition of the TPO ban determined different reactions among the stakeholders: the general public welcomed such a decision as a necessary step to protect the authenticity of football from ruthless investors.

However, the ban has also been strongly opposed, especially in countries where TPO was an important financing mechanism for clubs.

agreement. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article".

¹⁷ CAS 2014/O/3781 & 3782, *Sporting Clube de Portugal Futebol SAD v. Doyen Sports Investment Limited*, Award of 21 December 2015.

¹⁸ More details about this case on G. MARINO and L. SMACCHIA, *Il caso Rojo e la validità degli accordi di TPO*, in *Riv. Dir. Ec. Sport*, vol. 3/2016.

¹⁹ Judgment 4a_116 / 2016 of 13 December 2016.

In particular, the central role of TPO for the sustainability of the football industry in Spain and Portugal led the *Liga de Fútbol Profesional* (LFP) and *Liga Portuguesa de Futebol Profissional* (LPFP), the Spanish and Portuguese football leagues, to file in February 2015 a complaint before the European Commission, challenging the compatibility of the TPO ban with EU competition law.²⁰

The leagues argued that the ban infringed Article 101 of the Treaty on the Functioning of the European Union²¹ concerning the prohibition of anti-competitive agreements, and Article 102,²² which prevents abuse of a dominant position, claiming that FIFA was abusing its dominant position by introducing such a ban.

According to the applicants, the ban also contravened the fundamental freedom of establishment, the freedom to provide services, the free movement of workers, and the free movement of capital.

In April 2015, a similar complaint was filed by Doyen Sport Investments.

In turn, UEFA and FIFPro launched a joint legal action with the European Commission, asking it to endorse FIFA's decision to outlaw TPO.²³

²⁰ Available at www.laliga.es/noticias/las-ligas-espanola-y-portuguesa-denuncian-ante-la-comision-europea-la-prohibicion-de-los-tpo-de-la-fifa (February 2018).

²¹ Article 101 TFEU: "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings; - any decision or category of decisions by associations of undertakings; - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

²² Article 102 TFEU: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

²³ Available at: www.uefa.com/insideuefa/stakeholders/players-unions/news/newsid=2230203.html?redirectFromOrg=true#/ (February 2018).

A few months later, in June 2015, Doyen Sports and the Belgian club RFC Seraing –which entered a TPO agreement on 30th January 2015 stipulating that the club transferred the economic rights of three players to Doyen Sports against a sum of EUR300'000- challenged the TPO ban before Brussels' First Instance Court.

In particular, the claimants requested provisional measures preventing FIFA from putting into force the ban. They also demanded reference to the European Court of Justice on whether the TPO ban was lawful.

The judge noted that TPO endangered the integrity of competitions, and that the previous attempt made by FIFA to limit TPO through art. 18-bis of the FIFA RSTP was proven to be ineffective. Therefore, the Court concluded that the likelihood that FIFA's TPO ban would fail the tests of proportionality and necessity had not been proven with the force necessary to justify the application of provisional measures (i.e. the essential condition of *fumus boni iuris* had not been met).

As a result, the Brussels Court of First Instance rejected the demand for provisional measures to prevent the TPO ban from entering into force in its order dated 24 July 2015: for the first time a judicial authority adopted a legally binding (though provisional) opinion on the potential compatibility of the TPO ban with EU competition law.

On September 2015, the Belgium club RFC Seraing was also sanctioned by the FIFA Disciplinary Committee for having breached Art. 18bis and 18ter of the FIFA RSTP on TPO: FIFA condemned RFC Seraing to a transfer ban for 4 transfer windows and a fine of CHF150'000.

The club challenged the decision with FIFA's Appeal Committee, which however rejected the appeal and confirmed the original decision. Eventually, Seraing appealed this decision to CAS, which decided to uphold the sanctions imposed by FIFA.²⁴

In particular, CAS observed that TPO “[...] gives rise to a number of risks notably: risks linked to the opacity of investors who are uncontrolled and escape all form of regulation from football governing bodies; risks to players' rights and professional activities due to the speculative interests on their transfer; risks of conflicts of interest from the fact that the same TPO provider may hold interests in a number of clubs in the same competition that could result in the manipulation or fixing of matches [...]”.²⁵

Thus, CAS deemed legitimate the objectives pursued by the FIFA ban (i.e. the preservation of contractual stability; the preservation of the independence and autonomy of clubs in the management of their recruitment policy; the securing of the integrity of football and preservation of the loyalty and equity of competitions; the prevention of conflicts of interests and the securing of transparency in the transfer market)²⁶ and decided that the ban was proportionate to these objectives.

²⁴ CAS 2016/A/4490 *RFC Seraing v. FIFA*, award available at www.tas-cas.org/fileadmin/user_upload/Sentence_4490__FINALE__internet.pdf (February 2018).

²⁵ CAS 2016/A/4490 *RFC Seraing v. FIFA*, para. 108.

²⁶ CAS 2016/A/4490 *RFC Seraing v. FIFA*, para. 101.

Also, the CAS Panel clarified that the TPO ban has limited effects on the freedom to invest in football, excluding only certain types or modalities of investing.²⁷

In light of the above, CAS considered the sanctions imposed by FIFA upon Seraing to be justified, given that the TPO contract concluded with Doyen had clearly deprived the club of its independence, in particular where the club committed itself to accept any transfer offer equal or above a certain amount and to inform Doyen Sports of any negotiations relating to the relevant players.

The Belgian club Seraing then brought the matter to the Swiss Federal Supreme Court, which however confirmed the findings of the CAS award, in the decision issued on 20th February 2018 (4A_260/2017).²⁸

In November 2017, the European Commission rejected the complaint lodged by Doyen on April 2015, with similar arguments used by CAS in CAS 2016/A/4490 RFC Seraing v. FIFA, whereas the complaint lodged by the Spanish and Portuguese leagues is still under assessment.

Other complaints have been lodged before national courts in Spain and Belgium: however, the consistent jurisprudence of CAS, the European Commission and the Belgium Court, together with the growing legal and political consensus for the TPO ban, suggests that the ban legitimacy path has been drawn for future decisions.

2.4 TPO: conclusion

The FIFA decision to put a definitive end to the use of TPO in football raised several controversial arguments upon its application, and still raises doubts about its convenience and effectiveness in some stakeholders.

As a matter of fact, the use of TPO has enabled several clubs to finance their activities, and made it possible for small/medium-sized clubs to maintain/enhance their competitiveness against their “bigger” rivals.

Such practice has been largely used in South America and in several different countries around the world for a long time; however, only in 2006 did it focus the attention of stakeholders, after the transfers of Tevez and Mascherano to West Ham United.

FIFA reacted to this possible threat to the integrity of competitions initially implementing a generic and somewhat ineffective provision – Art. 18bis FIFA RSTP – and afterwards imposing a total ban of TPO. In my opinion, the leap between these two extremities has been hasty and weakly justified.

As a matter of fact, in light of the current socio-economic context of the football industry, and considering the financial difficulties that clubs all over the

²⁷ CAS 2016/A/4490 RFC Seraing v. FIFA, paras. 109-112.

²⁸ The decision 4A_260 / 2017 is available at: www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://20-02-2018-4A_260-2017&lang=de&zoom=&type=show_document (March 2018).

world are experiencing together with the increasing gap between a few rich clubs and the rest, the total ban of TPO imposed by FIFA appears to be inconvenient at least, since it cancels an important source of external funding to clubs which are sometime in desperate need.

In my view, FIFA could have taken a more positive approach in regulating the matter in order to suppress the unethical aspects while fostering the competitive balance of clubs and therefore create a more attractive and legitimate product.

There are a number of reasons why the “regulatory-solution” would have been preferable: first and foremost, an appropriate regulation of TPO would have been a more holistic approach to the issue, which would have ultimately attenuated the disparity of effects produced within the member associations.

In fact, FIFA gathers together 211 football associations worldwide: each of them has different clubs’ financing models and regulations in place and the absolute ban imposed by FIFA had a devastating impact on a large number of clubs that had legitimately based their business model on TPO. As said above, South American clubs tend to resort to the sale of players as a key income source: prior to the implementation of the TPO ban they commonly sold a percentage of players’ economic rights to obtain quicker alternative finance mechanisms for their daily operations. On the contrary, the TPO ban did not affect in any way clubs that at that time run different financial models.

Moreover, the absolute global ban imposed by FIFA appears still more unreasonable in a system whereby the huge disparity among clubs is not attenuated by structural measures aimed at contrasting the clubs’ need for ever-increasing investments in order to be competitive.

As a matter of fact, on one side the spending on transfer fees grows each year with an exponential trend, following the increasing income of the top clubs (according to the TMS 2018 Global Transfer Market Report,²⁹ in 2017 the number of international transfers increased by 6.8% compared to 2016, whereas the total spending increased by 32.7% compared to the previous year); however, on the other side the TPO ban imposed by FIFA reduces the financing sources for small-medium size clubs, and for all those clubs that do not have direct access to the beneficial effects of the football industry’s internationalisation.

In light of the above, the TPO ban deepens the economic inequality among clubs, with the top tier clubs benefitting from a privileged bargaining position. As a matter of example, a South American club cannot rely anymore on an investor buying 50% of a talented player’s economic rights to hold on to the player a few more years, waiting for the player’s development. Even if the club knows that the player’s value will double or triple in a very short period, in case of an offer from a European club it won’t be in the position to refuse such an offer without taking a huge gamble.

²⁹ TMS 2018 Global Transfer Market Report is available at: www.fifatms.com/data-reports/reports/ (February 2018).

For all these reasons, although the rationale that led FIFA to enact the TPO ban is totally legitimate and embraceable, regulating TPO through the introduction of clear and strict boundaries together with the imposition of transparency and disclosure obligations would have been a better alternative than an outright ban.

3. *Multi-club ownership*

In times of advanced internationalisation and commercialisation of sports, football clubs are developing new business models and adopting strategies borrowed from other industries in order to expand their network and maximise their income.

Within this framework, a particular model that has become more and more common is the so called “multi-club ownership” (hereinafter, MCO), defined as the situation where two or more football clubs are owned by the same entity.

There are a number of reasons that make MCO attractive: it brings broader network and results in profitable synergies from both a sporting (e.g. improve scouting networks) and business perspective (e.g. sharing staff, mutualise sponsorship efforts, cost efficiencies, sharing expertise and best practices, brand awareness).

What is more, in a market where football players are more valuable than ever, MCO allows clubs to recruit talented players at low cost, facilitating their development in smaller clubs.

The practice of a larger company acquiring or merging with smaller companies in order to benefit from broader networks and expertise is very common in every market in which synergies play an important role in companies’ growth. As far as football is concerned, the MCO practice has become increasingly common over the last twenty years, with a dramatic increase in the last five years.

3.1 *The evolution of MCO*

MCO is not a recent phenomenon. From 1992 to 2000, Mr Calisto Tanzi’s Parmalat controlled the Italian club Parma AC and the Brazilian club *Palmeiras*. Both clubs experienced a successful decade under the control of the Italian multinational company, but afterwards both club were dragged into the throes of the financial scandal that run over Parmalat in 2002. Another major example of MCO in the nineties concerns the English company ENIC plc.

ENIC purchased large amounts of shares in several football clubs including Glasgow Rangers FC, SK Slavia Prague, AEK Athens FC, Vicenza Calcio, FC Basel and Tottenham Hotspur. However ENIC was not interested in the football side of the business, given that it only invested in the shares hoping for a rise, and it did not control the day-to-day management of the clubs owned.

ENIC ownership on such clubs arose the first issues in relation to MCO, and eventually prompted a football institution – UEFA – to consider for the first

time the impact of MCO on competitions (see below para. 3.3); however, the ENIC case did not have a real impact on the working of the football industry. The circumstance that changed everything in this respect was the entry by the Pozzo family into the football industry.

In the mid-eighties, the Italian businessman Giampaolo Pozzo purchased Udinese Calcio.³⁰ After an initial difficult period between Serie A and Serie B, Mr Pozzo and his son Gino developed a peculiar practice, which ultimately resulted in a successful way to stabilise the club in the top Italian league. They set up a huge worldwide scouting network, the first of its kind, to find young talented footballers before other clubs. They focused on scouting undervalued markets such as Africa, Eastern Europe and South American countries such as Colombia and Chile. Through this system, Udinese Calcio discovered many talented players (among others, Balbo, Sensini, Bierhoff, Amoroso, Appiah, Muntari, Handanovic, Sanchez, Isla, Inler, Asamoah, Benatia) that helped the club to reach remarkable success, not only on the field, but also off the field: in fact, the policy of the club was to sell these players at the most profitable moment, and then invest part of the money gained into more unknown players.

However, Udinese Calcio was recruiting too many players and not all of them could play in the first team in order to display their potential: thus, the Pozzo family decided to buy another club in a different country, in order to develop more players and maximise the effectiveness of their successful system. Hence, in 2009 the Pozzo family purchased Granada CF (recently sold to Chinese firm Desport) at that time a third tier Spanish club in financial difficulty.

During the first season, ten players were temporarily transferred from Udinese to Granada, with the latter being promoted to the second division at the end of the season. In the second season, six more players joined from Udinese and Granada got promoted to the Spanish top division.

The success of the model experimented with Granada led the Pozzo family to expand it by buying in 2012 the English club Watford FC.

At that time, the club competed in the Championship, the English second division: adopting a system similar to the one used with Granada (in the first season under the new owners, 12 players arrived on loan from Udinese and two from Granada), Watford got promoted to the Premier League after just three seasons.

However, the transfer on loan of 14 players from Udinese and Granada to Watford had been met with considerable opposition and prompted a change to the Football League's rules in order to prevent a mass influx of foreign players on loan to a single team.

Ultimately, by means of this network of clubs, players were first acquired at low cost, then loaned between 'sister clubs' and later sold at a premium price.

Also, the clubs' sporting results profited from this network, with both Granada and Watford achieving promotion respectively to La Liga and the Premier

³⁰ Cf. www.bymarthebestteam.com/posts/definitive-guide-multi-club-ownership-episode-1-introduction-pozzos (February 2018).

League, and with Udinese Calcio consistently in the middle of the Serie A table (reaching 3rd place in the 2011/2012 football season).

Following the Pozzo family's successful business model, several other clubs have adopted similar strategies and today MCO has become a common practice in football.

The Belgian millionaire businessman Roland Duchâtelet is the main shareholder of five clubs: Charlton Athletic (England), Carl Zeiss Jena (Germany), AD Alcorcón (Spain), Sint-Truiden (Belgium) and Újpest FC (Hungary).

Also the Malaysian businessman Vincent Tan invested in football and now he owns the Welsh club Cardiff City FC, the Bosnian Fudbalski klub Sarajevo, the Belgian Koninklijke Voetbalclub Kortrijk and he is also co-owner and director of the American Los Angeles FC.

Last summer, the leading travel retail group based in Bangkok "Thai King Power International Group" made a new acquisition, purchasing the Belgian club Oud-Heverlee Leuven, which became the second club of the group after the English club Leicester City.

Another relevant group is the Chinese "Suning Holdings Group", owned by Mr Zhang Jindong, which in June 2016 purchased the majority of the shares of Inter Milan (Italy) for an estimated EUR270 million, after the acquisition of another club, Jiangsu Suning (China).

A peculiar model of MCO has been developed by the Austrian company Red Bull, which uses football clubs as part of its innovative marketing strategy to promote its brand (see below, para. 3.4). To date, Red Bull owns RB Leipzig (Germany), Red Bull Salzburg (Austria), Red Bull Brazil (Brazil) and New York Red Bulls (USA).

Also in South America, MCO took root and, in particular, in Mexico: the "Salinas Group" of the billionaire businessman Ricardo Salinas, owns the Atlas of Guadalajara and the Monarcas de Morelia, while "Grupo Pachuca", one of the most important business groups in Mexico, owns the Mexican Club de Fútbol Pachuca, Club Deportivo Mineros de Zacatecas, Club León, Tlaxcala Fútbol Club, and the Chilean club Everton de Viña del Mar. Also the Mexican businessman and film producer Jorge Vergara acquired football clubs and now he owns the Costa Rican club Deportivo Saprissa and the Mexican Club Deportivo Guadalajara. He also founded the Chivas USA, a club based in California that was a subsidiary of the Club Deportivo Guadalajara, sharing common ownership and branding. However, in 2014 the Major League Soccer purchased Chivas USA from Vergara and rebranded the club.

There are also clubs that have acquired stakes in other clubs: Atlético Madrid (Spain) invested in RC Lens (France) and Club Atlético de San Luis (Mexico); ACF Fiorentina (Italy) in Pune City (India); AS Monaco (France) in Cercle Brugge (Belgium); Ajax (The Netherlands) in Ajax Cape Town (South Africa).

However, today the ultimate example of MCO is represented by the City Football Group, which has been taking MCO to a global scale.

The City Football Group is a holding company under the ownership of Abu Dhabi United Group that administers several football clubs around the world: Manchester City FC (England), New York City FC (USA), Melbourne City FC (Australia), Yokohama F. Marinos (Japan) and Club Atlético Torque (Uruguay). However, the origin of the City Football Group does not lie in Abu Dhabi nor any other city hosting a club belonging to the group, but in Barcelona.

Mr Ferran Soriano, the current Chief Executive Officer at the City Group, in 2003 was elected Finance Director at FC Barcelona. During his time at the Catalan club, he was influenced by the work of sports academic Stefan Szymanski,³¹ which showed that the best predictor of a club's success was the wage bill of its playing squad.

As a result, Mr Soriano embraced a new business model for the development of the club: *"If you want a champion team, a team with a chance of regularly winning championships, then you need to work consistently to have a big club that generates enough revenues to be able to sign the best football talent available"*.³²

To do so, Mr Soriano followed the commercial model first adopted by Manchester United and decided to increase the club's revenues by the internationalisation of the brand. In particular, he sought sponsorship deals outside its home market and went on the road for pre-season exhibition tours around North America and Asia. As a result, between 2003 and 2008 FC Barcelona almost trebled its revenues, from EUR123 million to EUR309 million, cutting the gap with the top clubs Manchester United and Real Madrid. But he wanted to go further.

Mr Soriano pointed the franchise model of the American multinational mass media and entertainment conglomerate "The Walt Disney Company" and suggested a similar formula could be applied to sport: *"At Disney you can franchise out across the world, make films in different languages, build theme parks. Multi-club ownership is the realisation of this Walt Disney view of football; where clubs are entertainment franchises, where football is a form of content"*.³³

However, FC Barcelona rejected such business model and Mr Soriano left the club in 2008. Four years later he joined Manchester City FC as chief executive, where he immediately started implementing his new strategy, with the results that we see today.

The commercial opportunities offered by the application of this business model to football are countless: it is therefore not surprising that similar models

³¹ Cf. S. SZYMANSKI AND T. KUYPERS, *"Winners and Losers: the business strategy of football"*, Viking, 1999.

³² F. SORIANO, *"Goal: The Ball Doesn't Go In By Chance: Management Ideas from the World of Football"*, Palgrave Macmillan, 2011, 4.

³³ *"Disneyfication of clubs like Manchester City keeps showing benefits"*, The Guardian, 31 August 2017.

have been increasingly adopted in the last few years, and in light of the clubs' need to generate revenue and find alternative strategies of financing, it is plausible that MCO will increase further on a drastic scale over the next few years.

However, beneath the surface there are a number of challenges that need to be addressed by the football governing bodies, such as the protection of each club's autonomy when the club's interest comes at the expense of a broader corporate body, the protection of integrity and credibility of competitions, and the delimitation of a legitimate cooperation among related clubs.

3.2 *The current regulatory framework*

To date there are no specific regulations on MCO at FIFA level. The reason why FIFA does not regulate such models lies in the fact that clubs are not direct members of FIFA, being only affiliated to member associations. In fact, article 20, para. 1 of the FIFA Statutes³⁴ reads "*Clubs, leagues or any other groups affiliated to a member association shall be subordinate to and recognised by that member association [...]*".

The same article, however, under paragraph 2 explicitly provides an obligation for the member associations aimed at ensuring the integrity of the competitions by exercising a strict control over clubs' ownership:

"Every member association shall ensure that its affiliated clubs can take all decisions on any matters regarding membership independently of any external body. This obligation applies regardless of an affiliated club's corporate structure. In any case, the member association shall ensure that neither a natural nor a legal person (including holding companies and subsidiaries) exercises control in any manner whatsoever (in particular through a majority shareholding, a majority of voting rights, a majority of seats on the board of directors or any other form of economic dependence or control, etc.) over more than one club whenever the integrity of any match or competition could be jeopardised".

Thus, by means of this article, FIFA explicitly recognises the fundamental importance of clubs' independence for the purposes of ensuring the integrity of the competitions, and requires the member associations to ensure that no-one exercises a control over more than one club that might endanger the integrity of the competition.

As a way of example, in Italy such provision has been implemented by the Italian FA ("FIGC") in Article 16-bis of the internal organizational rules,³⁵ according to which:

³⁴ Available at: http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen_neutral.pdf. (February 2018).

³⁵ Available at: [www.figc.it/Assets/contentresources_2/ContenutoGenerico/86.\\$split/C_2_ContentenutoGenerico_3817_Sezioni_1stSezioni_0_1stCapitoli_1_upfFileUpload_it.pdf](http://www.figc.it/Assets/contentresources_2/ContenutoGenerico/86.$split/C_2_ContentenutoGenerico_3817_Sezioni_1stSezioni_0_1stCapitoli_1_upfFileUpload_it.pdf) (February 2018).

“1. Shareholdings or management that determine a direct or indirect control in companies belonging to the professional sphere or to the championship organized by the Interregional Committee are not admitted.

2. For the purposes referred to in paragraph 1, a subject has a controlling position of a company or sports association when he – or his relatives or similar within the fourth degree – is able to control, even indirectly, the majority of the votes in a decision-making body or to exercise a dominant influence due to particularly qualified share or to particular contractual terms”.³⁶

The FIGC has therefore specified defined what a “controlling position” is, in order to protect clubs’ independence.

However, the first governing body that enshrined the essential role of clubs’ independence in its regulation was UEFA, following a major case concerning the English company ENIC Plc.

3.3 *A landmark case: the ENIC plc saga*

In the landscape of multi-club ownership, the English company ENIC, an investment company listed on the London Stock Exchange made a landmark case.³⁷

ENIC acquired during the 1990s controlling interests in several European football clubs by means of subsidiaries: Glasgow Rangers FC, SK Slavia Prague, AEK Athens FC, Vicenza Calcio, FC Basel and Tottenham Hotspur.³⁸ Its Media arm was also involved in sports, through the delivery of betting services.

During the 1997/1998 football season, SK Slavia Prague, AEK Athens and Vicenza Calcio all reached the quarter-final of the UEFA Cup Winners’ Cup: therefore, three of the eight clubs involved in the quarter-final had ownership-links among them.

The clubs were not drawn to play against each other³⁹ and only Vicenza advanced to the semi-final of the competition, where it lost against Chelsea FC.

However, the possibility that clubs with ownership-links could have played against each other in the quarter-final of a UEFA competition lead UEFA to adopt a new rule aimed at ensuring the integrity of its competitions.

³⁶ Original version of Art. 16- bis NOIF: “1. *Non sono ammesse partecipazioni o gestioni che determinino in capo al medesimo soggetto controlli diretti o indiretti in società appartenenti alla sfera professionistica o al campionato organizzato dal Comitato Interregionale.* 2. *Ai fini di cui al comma 1, un soggetto ha una posizione di controllo di una società o associazione sportiva quando allo stesso, ai suoi parenti o affini entro il quarto grado sono riconducibili, anche indirettamente, la maggioranza dei voti di organi decisionali ovvero un’influenza dominante in ragione di partecipazioni particolarmente qualificate o di particolari vincoli contrattuali [...]*”.

³⁷ See *Multi-Club Ownership in European Football – Part I: General Introduction and the ENIC Saga* by Tomáš Grell, available at www.asser.nl/SportsLaw/Blog/post/multi-club-ownership-in-european-football-part-i-general-introduction-and-the-enic-saga-by-tomas-grell (February 2018).

³⁸ Available at: www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=875712 (February 2018).

³⁹ AEK Athens lost to the Russian club Lokomotiv Moscow, SK Slavia Prague lost to the German club VfB Stuttgart, whereas Vicenza Calcio defeated the Dutch club Roda JC.

3.3.1 *The UEFA rule “Integrity of the UEFA Club Competitions: Independence of the Clubs”*

After an internal consultation, on 19th May 1998, UEFA finally addressed the issue of multi-club ownership and enacted a new rule, entitled “*Integrity of the UEFA Club Competitions: Independence of the Clubs*” (hereinafter, the “Integrity Rule”), that prevented clubs under common control to play in the same competition.

According to this rule, an entity (company or individual) cannot control, either directly or indirectly, more than one club participating in the same UEFA club competition.⁴⁰

The Integrity Rule also defined when an individual or legal entity exercises control over a club, providing a thorough list:

“[...] an individual or legal entity has control of a club where he/she/it: a) holds a majority of the shareholders’ voting rights, or, b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or, c) is a shareholder and alone controls a majority of the shareholders’ voting rights pursuant to an agreement entered into with other shareholders of the club in question”.

On 26th May 1998, UEFA communicated the Integrity Rule to its member associations through Circular Letter no. 37. UEFA also sent a copy to ENIC,

⁴⁰ Integrity of the UEFA Club Competitions: Independence of the Clubs: “A. *General Principle* It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.

B. Criteria:

1) *no club participating in a UEFA club competition may, either directly or indirectly:*

a) *hold or deal in the securities or shares of any other club, or*

b) *be a member of any other club, or*

c) *be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or*

d) *have any power whatsoever in the management, administration and/or sporting performance of any other club.*

2) *no person may at the same time, either directly or indirectly be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA competition. And*

3) *In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:*

a) *holds a majority of the shareholders’ voting rights, or*

b) *has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or*

c) *is a shareholder and alone controls a majority of the shareholders’ voting rights pursuant to an agreement entered into with other shareholders of the club in question”.*

4) *The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs to these competitions. It furthermore reserves the right to act vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition”.*

informing them that the new provision would be effective as of the start of the new season.

As regards the criteria to be used in order to determine which club should be admitted to a UEFA club competition in case of two or more club under common control, UEFA considered the following elements: first, the highest “club coefficient” (based on the club’s results of the previous five years) and then the highest “national association coefficient” (based on the previous results of all the teams of a national association). Lastly lots would be drawn.

As a result of the application of these criteria, on 25th June 1998, UEFA excluded AEK Athens from the UEFA Cup, while authorising SK Slavia Prague to compete.

On 15th June 1998, SK Slavia Prague and AEK Athens filed a request for arbitration with CAS, following the execution of the arbitration agreement concluded two days before with UEFA.

3.3.2 *The proceedings before the Court of Arbitration for Sport*

AEK Athens and SK Slavia Prague specifically contested paragraph B.3) of the Integrity Rule, which was deemed unlawful under a number of aspects. The main disputed grounds were:

- i. *violation of the UEFA Statutes*: the Integrity Rule created different categories of members between clubs which are under common control and clubs which are not and therefore breached the principle of equal treatment;
- ii. *infringement of EC competition law*: violation of Article 81 of the Treaty Establishing the European Community (hereinafter, the “EC Treaty”),⁴¹ because the Integrity Rule restricted, distorted and prevented competition, limiting investment within the common market; violation of Article 82 of the EC Treaty,⁴² because of an abuse by UEFA of its dominant position;
- iii. *infringement of Swiss competition law*: violation of Article 5 and 7 of the Swiss Federal Act on cartels, because of an agreement between undertakings significantly affecting competition; and because of an abuse of UEFA of its dominant position;
- iv. *infringement of EC law on freedom of movement*: violation of the EC Treaty, because of restrictions on freedom of establishment and on free movement of capitals;
- v. *infringement of general principles of law*: abuse by UEFA of its regulatory power with the purpose of preserving its position as the dominant organiser of European football competitions.

⁴¹ Article 101 TFEU (ex Article 81 EC Treaty): see above, footnote no. 21.

⁴² Article 102 TFEU (ex Article 82 EC Treaty): see above, footnote no. 22.

At the same time, the claimants also filed a request for interim relief which was eventually granted on 16th July 1998:⁴³ as a result, AEK Athens and SK Slavia Prague were allowed to participate in the 1998/99 UEFA Cup.⁴⁴

On the other side, the respondent requested CAS to dismiss all the petitions submitted by the claimants, arguing that the Integrity Rule was a balanced and proportionate way of addressing the common control issue arisen in UEFA competitions.

On conclusion of the proceedings, on 20th August 1999, CAS issued a comprehensive award, whereby the Panel found that when commonly controlled clubs participate in the same competition, the public's perception is that there is a conflict of interest potentially affecting the authenticity of results. Therefore, the Panel concluded that "*ownership of multiple clubs competing in the same competition represents a justified concern for a sports regulator and organizer*".⁴⁵

As regards the principal allegations purported by the claimants (see above), the Panel observed the following:

- i. *as to the alleged violation of the UEFA Statutes*: the Panel concluded that the Integrity Rule did not create different categories of member clubs but rather it established new conditions of participation in UEFA competitions;
- ii. *as to the alleged infringement of EC competition law*: preliminarily the Panel noted that the European Commission had recently issued a statement whereby it affirmed that sport is subject to EC competition law only in so far as it constitutes an economic activity.⁴⁶ In this case, the Panel noted that the Integrity Rules concerned not only sporting interests but also economic activities and

⁴³ In particular CAS based its decision on the circumstance that on a *prima facie* basis, UEFA appeared to have violated the duties of good faith and procedural fairness, having enacted the Integrity Rule after the adoption of the Cup Regulations for the 1998/99 season, which did not provide any restriction for multiple ownership. Thus, at the time of the Integrity Rule being issued, ENIC, AEK Athens and SK Slavia Prague could legitimately expect that no restriction was going to be adopted for the said season (cf. CAS 98/200, AEK Athens and SK Slavia Prague / UEFA, award of 20 August 1999).

⁴⁴ Both club failed to progress from the first round: AEK Athens lost to the Dutch club Vitesse, and SK Slavia Prague lost to the Spanish club Real Sociedad.

⁴⁵ CAS 98/200, *AEK Athens and SK Slavia Prague / UEFA*, award of 20 August 1999, para. 48.

⁴⁶ EC Commission, Press Release no. IP/99/133, 24 February 1999 "*Sport comprises two levels of activity: on the one hand the sporting activity strictly speaking, which fulfils a social, integrating and cultural role that must be preserved and to which in theory the competition rules of the EC Treaty do not apply. On the other hand, a series of economic activities generated by the sporting activity, to which the competition rules of the EC Treaty apply, albeit taking into account the specific requirements of this sector. The interdependence and indeed the overlap between these two levels render the application of competition rules more complex. Sport also has features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could justify that sporting organizations implement a specific framework, in particular on the markets for the production and the sale of sports events. However, these specific features do not warrant an automatic exemption from the EU competition rules of any economic activities generated by sport, due in particular to the increasing economic weight of such activities*".

therefore it decided to proceed with the analysis of the alleged violation of Articles 81 and 82 of the EC Treaty.

- a) Article 81 prohibits “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which [...] have as their object or effect the prevention, restriction or distortion of competition within the internal market*”.

On this point, the Panel found that the Integrity Rule undoubtedly discouraged owners of football clubs capable of qualifying for UEFA competitions from buying ownership interests in different football clubs with the same capability; however, such effect is pro-competitive given that it enables more undertakings to enter the relevant market, and hence it fosters new investments in professional football.

Finally, the Panel concluded that the Integrity Rule “... is *not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and thus the uncertainty, of results in UEFA competitions. The Panel finds the [Integrity] Rule to be proportionate to such legitimate objective and finds that no viable and realistic less restrictive alternatives exist*”.⁴⁷ Article 81 of the EC Treaty had therefore not been violated.

- b) The claimants sustained that the adoption of the Integrity Rule constituted an abuse of UEFA’s dominant position, contrary to Article 82 of the EC Treaty.

In order to find an abuse of dominant position, the Panel deemed it necessary to find that UEFA was seeking to overcome rival competitors through its dominant market power. However, UEFA was not going to enter into the market for ownership interests in football clubs and, according to the findings of the Panel, it acted only as a mere regulator. As a result, the Panel decided that the Integrity Rule did not violate Article 82 of the EC Treaty.

iii. *as to the alleged infringement of Swiss competition law*: the Claimants contested the violation of Article 5⁴⁸ and 7⁴⁹ of the Swiss Federal Act on Cartels

⁴⁷ CAS 98/200, *ibidem*, para. 136.

⁴⁸ Article 5.1 of the *Loi fédérale sur les cartels et autres restrictions à la concurrence* reads: “*Les accords qui affectent de manière notable la concurrence sur le marché de certains biens ou services et qui ne sont pas justifiés par des motifs d’efficacité économique, ainsi que tous ceux qui conduisent à la suppression d’une concurrence efficace, sont illicites*» (“*All agreements which significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful*”).

⁴⁹ Article 7.1 of the *Loi fédérale sur les cartels et autres restrictions à la concurrence* reads “*Les pratiques d’entreprises ayant une position dominante sont réputées illicites lorsque celles-ci abusent de leur position et entravent ainsi l’accès d’autres entreprises à la concurrence ou son exercice, ou désavantagent les partenaires commerciaux*» (“*Practices of undertakings having a dominant position*”).

- (“*Loi fédérale sur les cartels et autres restrictions à la concurrence*» of 6 October 1995), which essentially correspond to Article 81 and 81 of the EC Treaty respectively. Therefore, the conclusions reached under the previous point applied – *mutatis mutandis* – to Articles 5 and 7 of the Swiss Cartel Act.
- iv. *as to the alleged infringement of EC law on freedom of movement*: on this point, the Panel decided that even assuming that the Integrity Rule somewhat restricts the right of establishment or the free movement of capital, the need for preserving the authenticity and uncertainty of sporting results constitutes a justified ground for such restriction, as explicitly admitted in the Bosman case.⁵⁰
- v. *as to the alleged infringement of general principles of law*: the Panel observed that as already explained above, UEFA did not seek to overcome rival competitors through its dominant market power, having acted only as a mere regulator.

However, despite having ascertained the general admissibility of the Integrity Rule, the Panel found that UEFA violated its duty of procedural fairness because it adopted such rule too late. Therefore, the violation of the unwritten principle of procedural fairness led the Panel to decide that the Integrity Rule could have been implemented by UEFA starting from the 2000/2001 football season.

3.3.3 *The proceedings before the European Commission*

On 18th February 2000, ENIC lodged a complaint with the European Commission ex art. 3, n. 2 of the Regulations 17/62⁵¹ claiming again that the Integrity Rule adopted by UEFA infringed Articles 81 and 82 the EC Treaty.

According to ENIC, the Integrity Rule could not be qualified as a sporting rule and it restricted investment in European football clubs’ stocks, producing restrictions and distortions of competition in both the market for the supply of capital to football clubs and its ancillary markets, such as the market for players, the sponsorship market, the football merchandising market, and the media rights market.

are deemed unlawful when such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or when they injure trading partners”).

⁵⁰ EC Court of Justice, Judgement of 15 December 1995, case C-415/93, in E.C.R. 1995, I-4921, para. 106 “*in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results ... must be accepted as legitimate*”.

⁵¹ Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty: Article 3 “*Termination of infringements: 1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end. 2. Those entitled to make application are: (a) Member States; (b) natural or legal persons who claim a legitimate interest. 3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement*”. [Regulation (EEC) No 17/62 was replaced by Regulation (EC) No 1/2003 as of 1 January 2004].

In the decision,⁵² the Commission found out that the object of the contested rule was not to distort competition but to protect the integrity of the competition and to avoid conflicts of interest. Such rule was therefore motivated by the need to protect integrity of sporting UEFA competitions.⁵³

With regard to the effect of the Integrity Rule, the Commission held that *“the limitation on the freedom to act therefore merely constitutes the effect of the application of a rule which is deemed necessary and proportionate to the need to maintain the public’s confidence in the fairness and authenticity of the game, the absence of which would have the effect of rendering, in the long term, any competition impossible”*.⁵⁴

Therefore, the Commission declared that the Integrity Rule fell outside Article 81 of the EC Treaty, provided it is applied in an objective and non-discriminatory manner.

Finally, the Commission turned to the analysis of Article 82 of the EC Treaty and rejected ENIC’s complaint on the basis that *“If one were to assume that UEFA enjoys a dominant position in whatever market, the fact that UEFA has adopted such a rule does not appear to constitute in itself an abuse of dominant position”*.⁵⁵

3.3.4 Conclusion: the ENIC legacy

The events that lead to the ENIC saga put in the spotlight for the first time the presence of a multi-club ownership practice that jeopardised the integrity of European football competitions and led UEFA to start regulating the matter in order to protect the credibility of such competitions.

The Integrity Rule enacted by UEFA introduced some restrictions aimed at preventing owners of European clubs from acquiring controlling interests in other clubs participating in the same competition.

Such rule stood up to the scrutiny of CAS first – which considered the restrictions proportionate to the legitimate purpose of preserving the integrity of the competitions – and of the European Commission later – which confirmed the Integrity Rule’s compliance with EU competition law.

The outcomes of both proceedings firmly confirmed that the protection of integrity plays an essential part in the competitions, which justifies the limitations imposed by UEFA.

⁵² Available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37806/37806_7_3.pdf (February 2018).

⁵³ European Commission decision case COMP/37 806: ENIC/ UEFA, para. 28.

⁵⁴ European Commission decision case COMP/37 806: ENIC/ UEFA, para. 38.

⁵⁵ European Commission decision case COMP/37 806: ENIC/ UEFA, para. 45.

3.4 The Red Bull case and the concept of “decisive influence”

As we explained above, UEFA enacted the Integrity Rule in order to protect football from corporate structures that could have affected the integrity and credibility of the competitions.

However, the development of new forms of cooperation and influence among clubs and third parties led UEFA to make the Integrity Rule more stringent, since it realised that even if a club, an individual or a legal entity does not have *de jure* control over a club, it may still be able to exercise *de facto* control over such club.

In order to also prevent indirect forms of control, UEFA introduced the concept of “decisive influence”, which has been analysed by a recent decision issued by the UEFA Club Financial Control Body (“CFCB”) in a major case involving the Austrian company Red Bull GmbH.⁵⁶

3.4.1 Red Bull’s entry into football

Founded in the mid 1980’s by Mr Dietrich Mateschitz, Red Bull GmbH (hereinafter, “Red Bull”) has its core business in the production and commercialisation of its namesake famous energy drink.

Red Bull has also been an innovator in marketing: instead of following traditional approaches to mass marketing, it has associated its brand with a range of sporting events and teams. Since the beginning, Red Bull has been focusing on organising or sponsoring extreme sport events whereas more recently it has extended its presence into the purchase and re-branding of a number of sports teams, including football clubs.

In particular, the presence of Red Bull in football dates back to 2005, when it bought the Austrian club SV Austria Salzburg and renamed it to FC Red Bull Salzburg.

Afterwards, Red Bull bought the New York MetroStars and renamed the franchise Red Bull New York; in 2007, it established in São Paulo the lower-division Red Bull Brasil team and in 2008 founded a professional football team and academy located in Ghana, which was eventually abolished in 2014.

Finally, in 2009, Red Bull founded the RasenBallSport Leipzig e.V. and acquired the playing rights of SSV Markranstädt, a German fifth division club based near Leipzig. Under Red Bull’s ownership, the club got repeatedly promoted and in seven seasons it reached the top of the German football league system, the Bundesliga.

⁵⁶ See *Multi-Club Ownership in European Football – Part II: The Concept of Decisive Influence in the Red Bull Case*, by Tomáš Grell, available at www.asser.nl/SportsLaw/Blog/post/multi-club-ownership-in-european-football-part-ii-the-concept-of-decisive-influence-in-the-red-bull-case-by-tomas-grell (February 2018).

Red Bull's takeovers of football clubs implicated not only a change of ownership, but a complete revolution of the clubs' identity.

In fact, after the takeover of SV Austria Salzburg, Red Bull changed the club's name, management and staff; it also changed the club's colours and logo, according to Red Bull's commercial brand.

What is more, Red Bull also claimed on the club's website that the club was founded in 2005 (whereas the original club was formed in 1933), but the Austrian Football Association ordered them to remove it.

The same process happened with the New York MetroStars, although in this case Red Bull decided to recognise the club history.

As regard to the German club RasenBallsport Leipzig e.V., the logo and colours chosen by Red Bull for the club emphasised the connection with the corporate identity. However, the statutes of the German Football Association did not permit the corporate name to be included in the club's name: this is why the club adopted the unusual name "RasenBallsport" – which literally means "*Lawn Ball Sports*" – in order to keep in the name the initials "RB", which corresponds to the initials of the company.

As a result of this marketing strategy, the connection among the clubs and Red Bull could not be more blatant and manifest: all the football clubs in Red Bull's portfolio have similar outfits to fit the colours of Red Bull's branding: white and red at home while a combination of navy blue and yellow for away kits, each with a prominent Red Bull logo across the chest.

Moreover, each team plays in a stadium named "Red Bull Arena" and, what is more, the clubs' logos explicitly display the company's brand (two red bulls charging against each other in front of a yellowish gold circle) and name (apart from the German club, for the reasons explained above).

Therefore, it appears clear that by means of these takeovers, Red Bull not only decided to invest in football, but it chose to exploit its ownerships of football clubs for advertising purposes, manifestly promoting its brand.

This new model arose strong criticism in the football industry and in particular among football fans. On several occasions, opponents' fans protested against the business model promoted by Red Bull, perceived as a threat to football,⁵⁷ but also Red Bull clubs' fans protested against the loss of identity of the clubs they supported.⁵⁸ However, fans were not the only ones to be worried about the Red Bull clubs' rise.

Since Red Bull's takeover of RB Leipzig in 2009, it appeared clear that the common ownership was not only aimed at promoting Red Bull brand through an innovating marketing strategy: in fact, RB Leipzig and FC Red Bull Salzburg

⁵⁷ E.g. see www.dailymail.co.uk/sport/football/article-3753194/Holy-cow-Dynamo-Dresden-fans-red-throw-severed-bull-s-head-RB-Leipzig-clash.html, www.bbc.co.uk/sport/football/37467692, and www.theguardian.com/football/2016/sep/08/why-rb-leipzig-has-become-the-most-hated-club-in-german-football (February 2018).

⁵⁸ E.g. see www.violett-weiss.at/index.en.php (February 2018), <https://in.reuters.com/article/idINIndia-57287120110526> (February 2018).

had a close cooperation involving an increased transfer activity, which has seen players moving from one club to the other on a regular basis. Just during the 2015/2016 and 2016/2017 summer transfer windows, eight of the best FC Red Bull Salzburg's players departed for the German club RB Leipzig.⁵⁹ These transfers provoked anger among the fans of FC Red Bull Salzburg and put the focus back on the practices related with multi-club ownership, arising a number of questions in relation to the legitimacy of such practice.

Eventually, RB Leipzig reached the second position of the 2016/17 Bundesliga season behind FC Bayern Munich, and qualified for the 2017/18 UEFA Champions League group stage.

In May 2017, FC Red Bull Salzburg also qualified for 2017/18 UEFA Champions League, by winning the Austrian top division championship.

Both clubs were consequently granted the UEFA licences for the 2017/18 season by their respective football associations.⁶⁰

However, on 16th May 2017, the Chief Investigator of the UEFA Club Financial Control Body informed the clubs that an investigation had been opened in accordance with the Procedural rules governing the CFCB in order to assess whether both clubs were able to participate in the 2017/18 UEFA Champions League according to the “*Regulations of the UEFA Champions League 2015-18 Cycle*” (hereinafter, the “UCLR”).⁶¹

3.4.2 *Article 5 of the Regulations of the UEFA Champions League 2015-18 Cycle*

The principles provided by the Integrity Rule enacted by UEFA Executive Committee in 1998 have been inserted in the UCLR, under article 5 (hereinafter, the “Current Integrity Rule”).⁶²

⁵⁹ See www.espn.co.uk/football/fc-salzburg/story/2945474/salzburg-fans-hit-out-at-club-owner-red-bull-over-sales-of-big-name-players (February 2018).

⁶⁰ A similar situation happens nowadays, with both clubs qualified for the 2017–18 UEFA Europa League knockout phase.

⁶¹ Available at: www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/46/71/38/2467138_DOWNLOAD.pdf (February 2018).

⁶² Article 5 of the Regulations of the UEFA Champions League 2015-18 Cycle: “*To ensure the integrity of the UEFA club competitions, the following criteria apply:*

a. no club participating in a UEFA club competition may, either directly or indirectly:

i. hold or deal in the securities or shares of any other club participating in a UEFA club competition;
ii. be a member of any other club participating in a UEFA club competition;
iii. be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition; or
iv. have any power whatsoever in the management, administration and/or sporting performance of any other club participating in a UEFA club competition.

b. no one may simultaneously be involved, either directly or indirectly, in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in a UEFA club competition;

In fact, also the Current Integrity Rule makes admission to UEFA competitions conditional upon the fulfilment of specific criteria, aimed at ensuring integrity in the competitions.

However, the Current Integrity Rule differs from the Integrity Rule in three major aspects:

- I) the Integrity Rule considered relevant the ownership-link among clubs participating in the same UEFA club competition, whereas the Current Integrity Rule extends this prohibition to clubs participating both in the UEFA Champions League and the UEFA Europa League;
- II) in order to evaluate whether an individual or legal entity is supposed to have control over a club, in addition to the criteria established by the Integrity Rule, the Current Integrity Rule foresees the case whereby an individual or legal entity is able to exercise by any means a ‘decisive influence’ in the decision-making of the club;
- III) the Current Integrity Rule encapsulates the criteria that determine which club should be admitted to a UEFA club competition in case one or more clubs do not meet the conditions provided to ensure integrity in the competitions, and among them, the “club coefficient” no longer represents the principal criterion: clubs that qualify on sporting merit for the more prestigious UEFA club competition shall be preferred.

3.4.3 *The proceedings before the Adjudicatory Chamber of the UEFA Club Financial Control Body*

After both FC Red Bull Salzburg and RB Leipzig qualified in the 2017/18 UEFA Champions League, the Investigatory Chamber of the CFCB conducted an investigation in order to evaluate whether the clubs fulfilled the criteria enshrined in the Current Integrity Rule. As a result, on 24th May 2017, it decided to refer the

c. no individual or legal entity may have control or influence over more than one club participating in a UEFA club competition, such control or influence being defined in this context as:

- i. holding a majority of the shareholders’ voting rights;*
- ii. having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the club;*
- iii. being a shareholder and alone controlling a majority of the shareholders’ voting rights pursuant to an agreement entered into with other shareholders of the club; or*
- iv. being able to exercise by any means a decisive influence in the decision making of the club.*

If two or more clubs fail to meet the criteria aimed at ensuring the integrity of the competition, only one of them may be admitted to a UEFA club competition, in accordance with the following criteria (applicable in descending order):

- a. the club which qualifies on sporting merit for the more prestigious UEFA club competition (i.e., in descending order: UEFA Champions League and UEFA Europa League);*
- b. the club which was best-ranked in the domestic championship giving access to the relevant UEFA club competition;*
- c. the club whose association has the highest association coefficient ranking, drawn up in accordance with Annex D.*

Clubs that are not admitted are replaced in accordance with Paragraph 4.08”.

case to the CFCB Adjudicatory Chamber in accordance with Article 14, para. 1, lit. d) of the *“Procedural rules governing the UEFA Club Financial Control Body”*.⁶³

In particular, the CFCB Chief Investigator alleged that Red Bull had a “decisive influence” over FC Red Bull Salzburg and RB Leipzig, in contravention of para. 1, lit. c, no. iv of the Current Integrity Rule. Such conclusion was reached on the basis of the following circumstances:

1. Red Bull had the ability to control access to the ordinary membership of the General Assembly of both clubs;
2. both clubs concluded sponsorship agreements and loan financing with Red Bull on unusually favourable economic terms;
3. FC Red Bull Salzburg rented its stadium and offices from a subsidiary of Red Bull;
4. as regards the relationship between the two clubs, the CFCB Chief Investigator considered different aspects, such as the cooperation in place between the clubs, the involvement of certain individuals connected to Red Bull in the operation of both clubs, and the common visual identity/similar branding of the clubs.

In light of these findings, the CFCB Chief Investigator concluded that FC Red Bull Salzburg and RB Leipzig did not satisfy the criteria provided by the Current Integrity Rule: hence, in compliance with article 5 para. 2, lit. b of the Current Integrity Rule, only FC Red Bull Salzburg should have been admitted to the competition.

However, having analysed the arguments purported by the CFCB Chief Investigator and the stances and evidence submitted by the defendants, on 16th June 2017, the CFCB Adjudicatory Chamber issued a different decision,⁶⁴ stating that the Current Integrity Rule had not been breached in the case at stake.

3.4.4 *“Decisive interest” in the decision rendered by the Adjudicatory Chamber of the UEFA Club Financial Control Body*

The CFCB Adjudicatory Chamber focused the analysis to assess the Red Bull capacity to exercise decisive influence in the decision making of both clubs, or for

⁶³ Article 14, para. 1 of the Procedural rules governing the UEFA Club Financial Control Body reads: *“At the end of the investigation, the CFCB chief investigator, after having consulted with the other members of the investigatory chamber, may decide to: a) dismiss the case; or b) conclude, with the consent of the defendant, a settlement agreement; or c) apply, with the consent of the defendant, disciplinary measures limited to a warning, a reprimand or a fine up to a maximum amount of EUR100,000; or d) refer the case to the adjudicatory chamber”*. The document is available here: www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/28/72/46/2287246_DOWNLOAD.pdf (February 2018).

⁶⁴ UEFA Club Financial Control Body, decision in case AC-01/2017. The document is available at www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/ClubFinancialControl/02/48/50/34/2485034_DOWNLOAD.pdf (February 2018).

one of the clubs to have the ability to exercise decisive influence in the relevant decision making of both clubs.

Lacking a definition of “decisive influence” in the relevant regulations, the CFCB Adjudicatory Chamber deemed it appropriate to limit the nature of the decision making under scrutiny to decisions that might impact on the integrity of a competition: as a result, it considered only decisions related to matters that affect the performance of a club in a competition, keeping out of scrutiny every other generic decision related to corporate, commercial or financial activities.

The CFCB Adjudicatory Chamber then clarified the evaluation criterion of the analysis: starting from the wording of article 5, para. 1, lit. c, no. I, II and III, the CFCB Adjudicatory Chamber noted that “*nothing short of a legal power to control decision making is required under these provisions*”.⁶⁵ Therefore, applying the same yardstick to the last provision of article 5, para. 1, lit. c, it concluded that “*the benchmark for establishing decisive influence is a high one, requiring the ability to direct the decision making of both Clubs by any means*”.⁶⁶

Furthermore, it underlined that the subject of the analysis was the situation existing at the date when all of the evidence and facts in the case had been submitted, given that the issue was whether the clubs comply with the relevant regulations as at the date of admission to the UEFA Champions League.

Lastly, it specified that the CFCB Investigatory Chamber bore the burden to prove that Red Bull had decisive influence over both Clubs, and the standard of proof was to be to the Chamber’s “comfortable satisfaction”.

Finally, the CFCB Adjudicatory Chamber examined the arguments of the CFCB Chief Investigator within the above-mentioned framework, in order to determine whether Red Bull was able to exercise “decisive influence” in the decision-making of both clubs.

Starting from the analysis of the relationship between Red Bull and FC Red Bull Salzburg, the Chamber analysed the evidence submitted by the defendants and noted that the club had removed certain individuals allegedly linked to Red Bull from the club’s decision-making bodies and terminated certain loan agreements that were under scrutiny.

In addition, during the proceedings, FC Red Bull Salzburg provided documentary evidence to prove that it had made additional changes to address some of the issues raised by the CFCB Investigatory Chamber: in particular, the cooperation agreement concluded with RB Leipzig had been terminated, the sponsorship agreement had been amended (both the rights granted to Red Bull and the amounts paid by Red Bull), and Red Bull’s membership in the General Assembly of the club had been terminated.

Also, FC Red Bull Salzburg explicitly committed to address the situation regarding the stadium and the branding and visual identity of the club.

⁶⁵ UEFA Club Financial Control Body, decision in case AC-01/2017, para. 38.

⁶⁶ UEFA Club Financial Control Body, decision in case AC-01/2017, para. 41.

In light of these new circumstances and considering the basis and extent of the analysis at stake (as defined above), the Chamber concluded that Red Bull did not have decisive influence over the relevant decision-making bodies of FC Red Bull Salzburg, holding that at the time of its decision, Red Bull's relationship with RB Salzburg "*resembles only a standard sponsorship relationship*".⁶⁷

Consequently, the CFCB Adjudicatory Chamber deemed that there was no need to consider the relationship between RB Leipzig and Red Bull.

Finally, the CFCB Adjudicatory Chamber considered whether one of the clubs exercised "decisive influence" over the other. Despite the cooperation agreement and the significant transfer activity between the clubs, the Chamber eventually stated that there was insufficient evidence to corroborate such a thesis.

As a result, the CFCB Adjudicatory Chamber admitted both clubs to the 2017/18 edition of the UEFA Champions League.

3.4.5 Conclusion: the concept of "decisive influence"

By inserting the broad concept of "decisive influence" in the current regulations, UEFA has integrated the applicable regulatory framework with a rule aimed at protecting the integrity of the competitions from new and unpredictable forms of multi-club ownership. As a matter of fact, the presence of such a wide and undetermined concept in the regulations might allow UEFA to adopt in the future an extensive interpretation of the "influence" relevant to the rule, in order to strengthen the effectiveness of the provision.

In the Red Bull case, the CFCB Adjudicatory Chamber analysed the notion of "decisive influence" but it did not provide any element useful for specifying the extent of the concept.

External observers⁶⁸ have put forward that the Chamber had the opportunity to identify the boundaries of the relevant "influence" by defining such notion or, at least, by providing more details about the case at stake in order to identify specific elements that qualifies influence as "decisive". In particular, the Chamber could have explained why the amendments made by FC Red Bull Salzburg had been considered appropriate to guarantee that no "decisive influence" was exercised by Red Bull. They could have clarified the roles of the individuals removed from the club's decision-making bodies because of their links with Red Bull, or why the amendments made to the sponsorship deal satisfied the Chamber.

On the contrary, the Chamber did not clarify the extent of such concept, or provide concrete criteria that might have been useful for the stakeholders in order to regulate their conduct. The only new element provided by the decision of

⁶⁷ UEFA Club Financial Control Body, decision in case AC-01/2017, para. 55.

⁶⁸ See *Multi-Club Ownership in European Football – Part II: The Concept of Decisive Influence in the Red Bull Case*, by Tomáš Grell, available at www.asser.nl/SportsLaw/Blog/post/multi-club-ownership-in-european-football-part-ii-the-concept-of-decisive-influence-in-the-red-bull-case-by-tomas-grell (February 2018).

the CFCB Adjudicatory Chamber in the present case is that “*the benchmark for establishing decisive influence is a high one, requiring the ability to direct the decision making of both Clubs by any means*”.⁶⁹

Such approach of the CFCB Adjudicatory Chamber may have been dictated by the intention of preserving the wide extent of the provision, in a case whereby a clear stance on the extent of “decisive influence” was not required, because of the amendments made by Red Bull after the notification of the alleged violations of the Current Integrity Rule.

However, it is desirable that UEFA refine the concept of “decisive influence” in order to permit the UEFA members to regulate their conduct with certainty and to protect those subjects from an arbitrary application of the relevant regulations. For the time being, the scope of article 5, para. 1, lit. c, no. iv of the Regulations of the UEFA Champions League 2015-18 Cycle appears too broad and vague to correctly and effectively interpret it and to guarantee the minimum legal certainty recognised as an essential requirement for the rule of law.

3.5 MCO: conclusions

Clubs’ owners are developing global networks of clubs that could transform not only the structure of football clubs, but also football as we know it today.

So far, MCO models have been used to nurture young talent (like in the case of the Pozzo family) or to create a new way to increase the competitiveness of the club, optimising financial resources and improving existing structures (like the City Group) or as a branding exercise to advertise companies (like Red Bull).

New clubs will probably follow these MCO models and it is very likely that new MCO models will soon develop in the football landscape. Some clubs are already planning new alternative strategies: the Spanish club FC Barcelona, for instance, have confirmed the intention to create a women’s football franchise to join USA’s National Women’s Soccer League.⁷⁰

What is certain is that the number of clubs adopting MCO models is going to increase on a drastic scale over the next few years to grow their brands, diversify their business and optimize their operations, in parallel with the increasing internationalisation and commercialisation of football.

The rise of MCO is steered also by the increasing transfer fees, which lead football clubs to seek alternative models to scout and develop their own talents, and by the corporations’ investment that will rise, following Red Bull’s successful model.

The growth of MCO brings the raise of controversial issues that regulatory bodies and sporting courts are going to face.

⁶⁹ UEFA Club Financial Control Body, decision in case AC-01/2017, para. 41.

⁷⁰ Available at: www.usatoday.com/story/sports/soccer/2017/05/12/barcelona-to-have-womens-team-in-united-states/101586820/ (February 2018).

The current regulatory framework lies on a confederation/association level, as a result of the mandate given by FIFA to the single associations to ensure the integrity of the competitions by exercising a strict control over clubs' ownership (cf. Article 20, para. 2 of the FIFA Statutes).

However, in my view this regulatory structure determines a bare and fragmented legal framework, which is not appropriate anymore in light of the increasing number of clubs involved in MCO with an always more complex and transnational structure. The City Group, for example, owns clubs in England (Manchester City), USA (New York City), Australia (Melbourne City), Japan (Yokohama Marinos) and Uruguay (Club Atlético Torque): the issue has a global dimension and it should be regulated at a global level.

It is therefore time now for FIFA to provide a clear and dedicated regulatory framework for MCO, in order to regulate these business models consistently all over the world. If this should not be the case, it will be up to the sporting deciding bodies to face the new challenges brought by MCO and to tackle always more complex issues in order to protect the integrity of football, because one thing is for sure: MCO will definitely come under the spotlight again in the near future.

4. Final comments

Third party ownership and multi-club ownership have always been controversial topics among the football stakeholders.

Undoubtedly both practices can lead to abuses that might jeopardise the integrity of the competitions. However, this risk has been handled in different ways in relation to TPO and MCO.

In 2014, FIFA decided to ban TPO, thereby depriving clubs of an important financial source, especially in case of clubs playing in less lucrative leagues. Such outright ban imposed by FIFA represents in my opinion an unnecessary shutdown, which has had a severe and serious impact on a large number of clubs that adopted this practice to mitigate risks – sharing the financial burden of signing players –, or to 'release equity' from existing players, or to maintain a competitive balance.

In my view, FIFA had to hold a more reasonable approach, implementing a regulatory framework aimed at promoting transparency, by tackling conflicts of interest and material influence over clubs and by adopting a full disclosure-policy, maybe through the TMS system already in place.

In addition, FIFA could have limited third-party economic rights establishing a maximum admissible percentage, or limiting the number of players from the same club in which a third-party can have minority economic rights.

A well-reasoned regulation could have achieved the target of protecting the integrity of the competitions without depriving clubs of such an important financial instrument as TPO.

On the contrary, the approach adopted by UEFA about MCO has been, in my view, focused on the substance and balanced.

In fact, UEFA only prohibits the control of multiple clubs, but not the acquisition of minority stakes in them. What is more, by inserting the concept of “decisive influence” in the current regulations, UEFA has on one side integrated the applicable regulatory framework with a broad concept that does not help legal certainty, but on the other side it inserted a concept aimed at protecting the integrity of the competitions from new and unpredictable forms of multi-club ownership, leaving the door open for further development of this practice.

On a general note, I think that the football governing bodies cannot analyse and regulate these practices without considering the bigger picture in which these have been developing.

Football has changed dramatically over the last ten to twenty years and so have football clubs, which are turning from sporting entities with strong roots in the local socio-economic context, to global lucrative companies, aimed at exploiting their brand worldwide in order to maximise their profits.

Nowadays, the difference between big clubs and the rest is dramatically increasing and we are now facing a two-tier system: on one tier, there are the big clubs, able to exploit their brands on a global scale, which see their revenues increase like never before; on the other tier, there is the rest of the clubs, which struggle to maintain financial sustainability in the hope of gathering a few crumbs from the top clubs’ table.

The current trend will likely lead to a closed system, which attracts the biggest stars in order to create more potential for investments, replicating the model implemented in the United States. Ironically, the football governing bodies see the closed system as an anathema, but seem to be doing everything possible to ensure its adoption.

Without a strong governance bent on implementing effective financial regulations aimed at reducing inequality among clubs by means of rules for sharing revenues and limiting player wages, the growing commercialisation of the big clubs will lead to an even more drastic radicalisation of this gap, with few clubs competing for the trophies and the rest in the background, which cannot even aspire to compete with top clubs. However, this is not football’s tradition.

Commercialisation of football should not be about bad and cynical people stealing the game from fans, but an opportunity for the stakeholders to increase the competitiveness of the game in order to make the football grow as a whole, protecting the values and the romantic appeal that led football to be the most beloved of popular sports.

Every political or regulatory debate about football clubs’ financing cannot avoid a preliminary reflection about where football is heading for.