CAS 2018/A/5808 AC Milan v. UEFA

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Ulrich **Haas**, Professor in Zurich, Switzerland

Arbitrators: Judge Pierre **Muller**, former judge in Lausanne, Switzerland
Mr Mark **Hovell**, solicitor in Manchester, United Kingdom

in the arbitration between

ASSOCIAZIONE CALCIO Milan S.p.A. (AC Milan), Italy
Represented by Mr Roberto Cappelli and Mr Andrea Aiello from Gianni, Origoni, Grippo, Cappelli & Partners, Milan, Italy
and
Mr Sébastien Besson, Mr Antonio Rigozzi and Mr William McAuliffe from Lévy, Kaufmann-Kohler, Geneva, Switzerland

-Appellant-

and

UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL (UEFA), Switzerland
Represented by Mr Emilio Garcia, Managing Director Integrity and Ms Erika Montemor Ferreira, Legal Counsel

-Respondent-

I. THE PARTIES

1. Associazione Calcio Milan S.p.A. ("AC Milan" or the "Appellant") is an Italian football club competing in the Serie A, the premier football league in Italy. The Appellant was founded in 1899 and is affiliated to the Italian Football Federation that is in turn affiliated to the Union des Associations Européennes de Football.

2. The Union des Associations Européennes de Football ("UEFA" or "the Respondent") is the governing body for the sport of football in Europe.

II. FACTUAL BACKGROUND

3. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne, Switzerland, on 19 July 2018. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award.

A. AC Milan and European Club Championships

4. AC Milan has an impressive track record of European Club Championships, including 7 UEFA Champions League trophies, 5 UEFA Super Cup trophies and 2 UEFA Cup Winner's Cups.

5. On 15 June 2017, AC Milan was admitted to the 2017/18 UEFA Europa League as it had met all admission criteria listed in Article 4.01 of the Regulations of the UEFA Europa League 2017/18 Season (hereinafter the "UELR").

B. The sale of AC Milan

6. In 2016, Mr Silvio Berlusconi through the holding company Fininvest S.p.A. decided to sell his interests in AC Milan.

7. On 5 August 2016, a preliminary agreement was signed with the Chinese investment management company Sino-Europe Sports Investment Management Changxing Co. Ltd. The preliminary agreement provided that Sino-Europe Sports Investment Management Changxing Co. Ltd would acquire a 99.93% stake of AC Milan from Fininvest S.p.A. for about EUR 740 million.

8. On 13 April 2017, the deal was finalized whereby Fininvest S.p.A. sold 99.93% of the shares held in AC Milan to the purchase vehicle Rossoneri Sport Investment Lux (hereinafter "HoldCo"). HoldCo was at that time controlled by a Chinese investor, Mr Li.

9. In order to finance the purchase price, HoldCo concluded a loan agreement with the company Project Redblack S.à.r.l. (hereinafter "Redblack") in the amount of EUR 202 million at an interest rate of 11.5% p.a. and with a maturity date of 15 October 2018. Redblack is a private limited liability company founded according to the laws of Luxemburg. The company is advised by Elliott Advisors (UK) Limited (hereinafter "Elliott"), which is indirectly controlled by Elliott Management, an American fund manager. The loan provided by Redblack to HoldCo was secured against the shares of AC Milan and Holdco.

10. Soon after closing, AC Milan issued notes (bonds) in the Vienna Stock Exchange in the amount of EUR 73.7 million and EUR 54.3 million at 7.7% p.a. with a maturity date of 15 October 2018. The sole subscriber of these bonds was Redblack.

C. Shareholders' Meeting of AC Milan

11. On 18 May 2017, the Shareholders' Meeting approved the amendment of the financial year (with effect from 1 July 2017), from the calendar year (01/01 – 31/12) to the football season (01/07 – 30/06). Therefore, the accounts for the financial year were prepared for a period of 6 months only from 1 January 2017 until 30 June 2017.

12. Further on 18 May 2017, the Shareholders' Meeting resolved to increase the share capital of AC Milan up to EUR 49,920,000. During the months of June and July 2017, the shareholder's resolution was implemented through a series of payments.

D. Change of Control

13. In June 2018, HoldCo failed to make a EUR 32 million capital contribution demanded by AC Milan. Redblack injected the full amount in lieu of HoldCo. HoldCo then, however, failed to pay the relevant amount back to Redblack within the deadline provided for in the relevant agreement. This constituted an event of default that entitled Redblack to enforce the pledge over the shares in HoldCo. As a result of these events on 10 July 2018, Redblack – through HoldCo – became the new controlling shareholder of AC Milan.

14. On 10 July 2018, Elliott issued the following press release that reads – *inter alia* – as follows:

> *"Ownership and control of the holding company that owns AC Milan has today been transferred to funds advised by Elliott Advisors (UK) Limited ('Elliott'). This transfer has occurred as a result of steps taken to enforce Elliott's security interests after the previous owner of AC Milan defaulted on its debt obligation to Elliott.*
>
> *Having assumed control, Elliott's vision of AC Milan is straightforward: to create financial stability and establish sound management; to achieve long-term success for AC Milan by focusing on the fundamentals and ensuring that the club is well-capitalized; and to run a sustainable operating model that respects UEFA Financial Fair Play regulations. …*

As first measures, Elliott intends to inject € 50 million of equity capital to stabilize the club's finances, and plans to inject further capital over time to continue to fund AC Milan's transformation …

Elliott Management Corporation manages two multi-strategy funds which combined have approximately $35 billion of assets under management. …"

E. Overview of the UEFA Financial Fair Play System

15. Article 50(1) of the UEFA Statutes empowers the UEFA Executive Committee to draw up regulations governing the conditions of participation in, and the staging of UEFA competitions. Based on Article 50(1) of the UEFA Statutes, the UEFA Executive Committee has enacted the UEFA Club Licensing and Financial Fair Play Regulations ("CL&FFP Regulations") and the Procedural Rules Governing the UEFA Club Financial Control Body ("Procedural Rules"). The purpose of the CL&FFP Regulations is to promote financial fair play in UEFA club competitions by improving the economic and financial capability of the football clubs, introducing more discipline / rationality into football club finances, encouraging clubs to operate on the basis of their own revenues and encouraging responsible spending for the long term benefit of football, at all times with the aim of protecting the long term viability and sustainability of European club football.

16. The CL&FFP Regulations are enforced by the UEFA Club Financial Control Body ("CFCB"). The CFCB consists of an Investigatory Chamber responsible for the investigation phase of the proceedings (headed by the CFCB Chief Investigator) and the Adjudicatory Chamber responsible for deciding the cases brought before it by the Investigatory Chamber. Both chambers are competent to impose disciplinary measures in case of non-fulfilment of the requirements of the CL&FFP Regulations.

17. The CL&FFP Regulations provide for the monitoring of the clubs eligible to play in UEFA club competitions. One of the criteria to be examined in this monitoring process is the so-called "break-even requirement" (cf. Articles 58-64 CL&FFP Regulations). This criteria aims at preventing clubs from building up unacceptable levels of losses and, in doing so, to stabilise and rationalise spending by European football clubs in the long term. The break-even result is now calculated for a monitoring period comprising 3 years, individually referred to as "reporting periods". Thereby, each club's relevant expenses are deducted from its relevant income for the individual reporting period and then added together for the relevant monitoring period. The break-even requirement is, thus, the aggregate break-even result for three consecutive years. If any club's aggregate break-even result is negative, then the club has an aggregate break-even deficit for the monitoring period. The maximum aggregate break-even deficit possible for a club to be deemed to be in compliance with the break-even requirement is defined as the "acceptable deviation". The latter corresponds to an amount of EUR 5 million. Such amount can be increased up to a final maximum amount of EUR 30 million, provided that such increase is entirely covered by contributions from equity participants and/or related parties of the respective club.

F. The Proceedings before the CFCB

1. The Failed Attempts to conclude Voluntary Agreements

18. On 1 December 2016, AC Milan applied for a voluntary agreement according to Annex XII (A)(2)(i) of the CL& FFP Regulations ("the First Voluntary Agreement").

19. The relevant provisions of Annex XII of the CL&FFP Regulations provide as follows:

> *"**A. Principles***
>
> *1. A club may apply to the UEFA Club Financial Control Body investigatory chamber to enter into a voluntary agreement with the aim of complying with the break-even requirement.*
>
> *2. A club is eligible to apply to enter into a voluntary agreement if it:*
>
> *i) has been granted a valid licence to enter the UEFA club competitions by its national licensor but has not qualified for a UEFA club competition in the season that precedes the entry into force of the voluntary agreement; …*
>
> *iii) has been subject to a significant change in ownership and/or control within the 12 months preceding the application deadline.*
>
> *3. The club must not have been party to a voluntary agreement (as defined in this annex) or subject to a disciplinary measure or settlement agreement (as foreseen in the Procedural rules governing the UEFA Club Financial Control Body) within the last three reporting periods.*
>
> *4. A voluntary agreement can cover up to four reporting periods.*
>
> *5. A voluntary agreement includes a structured set of obligations which are individually tailored to the situation of the club, break-even targets defined as annual and aggregate break-even results for each reporting period covered by the agreement, and any other obligations as agreed with the UEFA Club Financial Control Body investigatory chamber.*
>
> ***B. Process***
>
> *1. The application deadline is the 31 December preceding the licence season in which the voluntary agreement would come into force.*
>
> *2. When applying for a voluntary agreement the club must:*
>
> *…*
>
> *c) submit an irrevocable commitment(s) by an equity participant(s) and/or related party(ies) to make contributions for an amount at least equal to the aggregate future break-even deficits for all the reporting periods covered by the voluntary agreement. This irrevocable commitment must be evidenced by way of a legally binding agreement between the licensee and the equity participant and/or related party and, if required by the UEFA Club Financial Control Body investigatory chamber, it must also be secured by means of either:*
>
> *i) payments into an escrow account, or*
>
> *ii) a guarantee from another company in the legal group structure outside the reporting perimeter; or*
>
> *iii) such other form of security as the UEFA Club Financial Control Body investigatory chamber considers satisfactory; …"*

20. Together with its application for a First Voluntary Agreement AC Milan – *inter alia* – provided information on the change of ownership from Fininvest S.p.A to HoldCo,

financial information on the reporting periods 2014, 2015 and 2016 and a business plan covering the reporting periods from 2017-2021 projecting significant income to be generated from new commercial activities in China.

21. On 11 May 2017, as part of this initial procedure, AC Milan had a first hearing with the CFCB Investigatory Chamber.

22. With its letter dated 9 June 2017, AC Milan withdrew its request for the First Voluntary Agreement. In the same letter, AC Milan submitted a new request for a voluntary agreement based on Annex XII (A)(2)(iii) of the C&FFP (hereinafter referred to as "the Second Voluntary Agreement"). The letter stated that this new request was made in order to allow AC Milan to present an updated business plan.

23. On the same day, the CFCB acknowledged AC Milan's withdrawal of its initial request for a voluntary agreement and agreed to assess the new request based on updated financial information and a new business plan to be provided by 15 October 2017.

24. AC Milan provided the updated financial information showing an aggregate break-even deficit for the reporting period 2015, 2016 and the first 6 months of 2017 of EUR 145,935 million.

25. On 31 August 2017, the CFCB Investigatory Chamber met to assess the financial documentation submitted by the Appellant and found that AC Milan was in breach of the CL&FFP Regulations.

26. A second hearing was held before the CFCB Investigatory Chamber on 9 November 2017, where AC Milan presented an updated business plan for its China Business for the reporting period ending in 2021. This second forecast showed a significant decrease of EUR 100 million compared to the first business plan (worst case scenario) presented in May 2017.

27. On 17 November 2017, the CFCB requested – *inter alia* – information from the Appellant according to Annex XII (B)(2)(c) of the CL&FFP Regulations, i.e. guarantees from the ultimate shareholder regarding capital injections projected over a period of 3 years equal to EUR 165 million in form of a payment into an escrow account of the entire sum or issuance of a bank guarantee.

28. On 9 December 2017, the CFCB Investigatory Chamber met in order to decide on AC Milan's request for a Second Voluntary Agreement.

29. Since AC Milan failed – *inter alia* – to provide the information according to Annex XII(B)(2)(c) of the CL&FFP Regulations, the CFCB Investigatory Chamber on 15 December 2017 notified its decision not to conclude a voluntary agreement with AC Milan. The letter reads in its relevant parts as follows (emphasis contained in the original):

"After having carefully analysed your application and corresponding additional information, the CFCB Investigatory Chamber decided not to conclude a voluntary agreement with AC Milan. In this respect, the Chamber considered that the two preliminary conditions described in our previous letter dated 17 November 2017 have not been fulfilled by your club:

1. Abilities to continue as a going concern for the whole duration of the envisaged voluntary agreement and to meet the targets and obligations of your business plan (Annex XII (B)(2)(b) and (d) of the CL&FFP Regulations)

…

2. Irrevocable commitment by an equity participant or related party (Annex XII (B)(2)(c) of the CL&FFP Regulations)

In this respect, the CFCB Investigatory Chamber requested your club to secure the irrevocable commitment received by your owner by way of payment(s) into an escrow account or any equivalent security which is satisfactory to the CFCB Investigatory Chamber, such as a bank guarantee issued by a reputable bank or another financial institution, for a total amount of EUR 165m (i.e. sum of the capital injections not already paid as per your business plan).

Your club responded on 6 December 2017 that an escrow arrangement as requested by the CFCB Investigatory Chamber "would clearly be an unreasonably burdensome solution". Instead, your club provided a corporate guarantee letter from the entity Guangdong Lion Asset Management Co Ltd, a company based in China, for a total amount of EUR 165m. The CFCB Investigatory Chamber however noted that the financial capacity and solvency of that company was not demonstrated with any supporting documents.

Considering that the irrevocable commitment of your club's owner was not secured in a way satisfactory to the CFCB Investigatory Chamber, the Chamber concluded that your club has failed to meet this second condition."

2. The non-offering of a Settlement Agreement

30. On 18-19 January 2018, the CFCB Investigatory Chamber met to discuss AC Milan's file in the context of the regular 2017/2018 monitoring process.

31. On 29 January 2018, the CFCB Chief Investigator wrote a letter to AC Milan that reads – *inter alia* – as follows:

"We refer to the recent decision of the CFCB Investigatory Chamber dated 15 December 2017 not to conclude a voluntary agreement with AC Milan. As a result, your club remains subject to the 'regular' 2017/18 club monitoring process.

As you are aware, your club's break-even information highlights an aggregate break-even deficit for the reporting periods 2017 (T), 2016 (T-1) and 2015 (T-2) above €30m, which is the maximum acceptable deviation to be applied over the monitoring period as per Article 61 (2) of the UEFA Club Licensing and Financial Fair Play Regulations – Edition 2015 (hereinafter: CL&FFP).

Due to this significant aggregate break-even deficit, an investigation is hereby formally opened in accordance with Article 12 (2) of the Procedural rules governing the UEFA Club Financial Control Body - Edition 2015 (hereinafter: Procedural rules).

As part of our investigation, you will be kindly requested to attend a meeting with the CFCB Investigatory Chamber (date to be confirmed) at the House of European Football in Nyon (Switzerland) in order to mainly discuss the following items:

- *Future financial information for the financial year 2018;*

- *Updated business plan for next years, i.e. financial years 2019-2021;*
- *Refinancing of the loans with Project Redblack; and*
- *Recent development in respect of the Chinese and Asian markets.*

At last, on the basis of Article 71 of the CL&FFP, the CFCB Investigatory Chamber requested a compliance audit to be performed on your club in relation to the break-even information submitted via the CL/FFP IT Solution. Independent auditors will be mandated to verify the completeness, validity and factual accuracy of specific elements of your club's submission. They will work under the supervision of the UEFA Administration and will maintain strict confidentiality on all information reviewed. The exact scope and dates of the compliance audit will be communicated shortly by the UEFA Administration."

32. With its letter dated 26 February 2018, the UEFA Head of Financial Monitoring and Compliance informed the Appellant – *inter alia* – as follows:

"UEFA will verify whether the break-even information submitted by your club as part of the 2017/18 monitoring process is complete and correct as well as in compliance with the UEFA Club Licensing and Financial Fair Play Regulations, Edition 2015 (CL&FFP). The key topics of your break-even information to be examined are as follows:
• Review of the 2017 annual financial statements and the reporting perimeter;
• Refinancing of the loans with Project Redblack;
• Review of the future financial information (reporting period 2018);
• Review of the income related to China.
…
As agreed, the compliance audit will take place in your club offices from 19 until 22 March 2018. Please note that you should ensure that club's employees involved in the preparation of the break-even information are on hand during those dates to answer any relevant question and provide any information necessary to perform the compliance audit.
…
In order to ensure an efficient assessment process you are required to submit to UEFA by e-mail on or before the 6th of March 2017 the following information/documentation:
• The detailed calculations (including underlying assumptions) for the amounts in the future financial information for the period 2018;
• The detailed breakdown of income related to China with corresponding supporting documents (e.g. sponsorship contracts, etc.);
• Documentation regarding the refinancing of the loans with Project Redblack. …"

33. On 5 March 2018, 28 March 2018 and 9 April 2018, AC Milan submitted the additional information requested, in particular the consolidated interim financial statements of AC Milan Group as of 31 December 2017 and the auditors' report from Ernst & Young (hereinafter referred to as "EY") dated 30 March 2018.

34. On 12 April 218, the compliance auditors appointed by the CFCB issued their final compliance report.

35. On 20 April 2018, a hearing took place before the CFCB Investigatory Chamber in which AC Milan updated on the status of the refinancing of the debt towards Redblack and presented a third business plan. The latter confirmed that the net results for the China Business for 2018 were EUR 0 and, thus, again significantly downgraded the previous forecast. Furthermore, the estimated net results from revenue streams in China until the reporting period ending 2021 were predicted to be EUR 42 million, which was a significant decrease (EUR 188 million) compared to the first business plan (worst case

scenario) presented in May 2017 and a decrease of EUR 77 million compared to the second business plan presented in November 2017.

36. On 27 April 2018, the CFCB Investigatory Chamber advised AC Milan as follows:

> *"... As already mentioned during the hearing with your club, this Chamber has serious concerns about the status of the refinancing of the loan/bonds provided/subscribed by the entity Project Redblack Sarl. Indeed, due to the existing default risk and the resulting enforced change of ownership, the CFCB Investigatory Chamber is of the opinion that the information presented by your club is not yet sufficient for this Chamber to potentially offer a settlement agreement.*
> *Therefore, the CFCB Investigatory Chamber requires the following additional information for the comprehensive assessment of your file:*
>
> ***Financing from Project Redblack:***
> *i) With regard to the financing from Project Redblack Sarl., including the 'Acquisition Financing' at the Holding level (i.e. Rossoneri Sport Investment Lux Sarl) and the 'Bond Issuance' at the Club level (i.e. AC Milan):*
> *a) Copy of the "Pledge Agreement" and "Supplemental Pledge Agreement" dated 13 April 2017 and 31 July 2017;*
> *b) Confirmation that the bonds at the Club level cannot be repaid/refinanced before the repayment/refinancing of the loans at the Holding level (i.e. priority of the loans at the Holding level);*
> *c) Indicate why the financing of the Club was structured through the issuance of bonds (on the Vienna Stock Exchange) and not as a straight loan as for the Holding;*
> *d) There is a commitment from Project Redblack to reschedule part of the financing (€15m) at the Club level from 15 October 2018 until 30 June 2019. Given existing financing through bonds on the Vienna Stock Exchange, indicate how and when the process will be completed and whether this extension will have an impact on the above-mentioned agreements with Project Redblack; and*
> *e) Latest status on the overall refinancing managed by Merrill Lynch.*
>
> *ii) Further information on potential scenarios regarding the repayments/refinancing of the financing from Project Redblack:*
> *a) In which scenarios the loans at the Holding level could be pushed down at the Club level; and*
> *b) In case the loans at the Holding level are not repaid/refinanced by October 2018, indicate potential scenarios for the bonds at the Club level.*
>
> ***AC Milan group - Interim financial statements:***
> *iii) Copy in English of the latest interim financial statements of AC Milan group as at 31 December 2017 and corresponding auditor report.*
>
> *Your club is kindly requested to provide the above-mentioned information to the attention of the CFCB Investigatory Chamber by 3 May 2018."*

37. On 3 May 2018, AC Milan provided the additional information requested.

38. On 11 May 2018, the CFCB Investigatory Chamber met to assess the documentation submitted by AC Milan and concluded that the club had an aggregate break-even deficit of EUR 146 million for the reporting periods ending in 2015, 2016 and 2017 corresponding to a deficit of EUR 121 million in excess of the acceptable deviation of EUR 25 million. As AC Milan had changed its statutory closing date of the reporting period 2017 from 31 December to 30 June, the reporting period 2017 only consisted of 6 months. Therefore, the acceptable deviation is only EUR 25 million (for a monitoring

period of 30 months) in the present case, instead of EUR 30 million (for a monitoring period of 36 months) in accordance with Article 61 of the UEFA CL&FFP Regulations.

39. On 22 May 2018, the CFCB Investigatory Chamber announced its decision to refer the case to the CFCB Adjudicatory Chamber (hereinafter referred to as the "Referral Decision") and, thus, not to enter into a settlement agreement with AC Milan. The Referral Decision reads in its pertinent parts as follows:

> *"**C. Regulatory breach committed by AC Milan***
> *As set out above, AC Milan declared an aggregate break-even deficit for the monitoring period assessed in 2017/18, i.e. reporting periods ending in 2015 (T-2), 2016 (T-1) and 2017 (T), of EUR 121m in excess of the acceptable deviation.*
> *Based on the above findings and gathered evidence, the CFCB Chief Investigator decides, after having consulted with the other members of the CFCB Investigatory Chamber, that AC Milan has not complied with the break-even requirement of the UEFA CL&FFP.*
> *- More particularly, AC Milan has breached Article 63 (3) of the UEFA CL&FFP as a result of having an aggregate break-even deficit for the reporting periods ending in 2017 (T), 2016 (T-1) and 2015 (T-2) that exceeds the maximum acceptable deviation in the amount of EUR 121m.*
>
> ***D. No settlement agreement with AC Milan***
> *The CFCB Chief Investigator, after having consulted with the other members of the CFCB Investigatory Chamber, considers that the circumstances of the present case do not allow the conclusion of a settlement agreement that is effective, equitable and dissuasive as required by Article 14 (1) (b) and Article 15 (1) of the Procedural rules) because:*
> *i. the size of the Club's break-even breach is so high, i.e. EUR 121m, that it is unrealistic to expect AC Milan to come into compliance with the UEFA CL&FFP in the near future based on the latest business plan provided by the Club;*
> *ii. the situation of the Club has not significantly changed compared to the one assessed by the CFCB Investigatory Chamber in December 2017 in the framework of the voluntary agreement. Indeed, the viability of the Club's latest business plan is dependent on the following two critical factors:*
> *- the successful implementation of the Club's strategy in China, and*
> *- the refinancing of the notes and loans provided by Project Redblack respectively to AC Milan and HoldCo.*
> *iii. in respect of the Club's China Business, in only one year (from May 2017 to April 2018), the Club significantly decreased by approximately EUR 190m the total net result it intended to achieve during the period 2018 until 2021 (as described in paragraph 27 iii above):*
> *The drastic downsizing of the plan within just one year questions the reliability of this plan and whether the results can be achieved by the Club. Without the projected income from its China Business as per its latest business plan (Annex 26), the Club will not be able to be break-even compliant during the monitoring period assessed in 2020/21 (which would include the reporting periods ending in 2019, 2020 and 2021). Indeed, according to its latest business plan, the Club is planning an aggregated break even deficit of EUR 29.4m in the monitoring period 2020/21. Therefore, based on the latest business plan, the club would fail to fulfil the break-even requirement in the monitoring period 2020/21 if the planned new revenues from the China Business further decrease or do not materialise;*
> *iv. in respect of the refinancing of the debt with Project Redblack, the Club stated in its letter dated 6 December 2017 that it can be 'reasonably' expected 'to close the global refinancing transaction by the end of April 2018' (Annex 15). As of today, the global refinancing transaction has still not taken place; the Compliance Auditors noted in their compliance audit report that 'the closing of the transaction is planned for June/early July 2018' (Annex 25.1), this deadline having been communicated by the Club on 28 March 2018 (Annex 20). Given that the Club has been negotiating*

for months with different financial institutions without being able to close the refinancing transaction, the CFCB Investigatory Chamber considers that the global refinancing may not take place or could take place at unfavourable conditions;

v. *the Club acknowledged, on 3 May 2018, "that a portion of the indebtedness of Rossoneri Sport Investment Luxembourg S.à.r.l towards Project Redblack S.à.r.l arising under the Acquisition Facility Agreement (such indebtedness, taken as a whole, the "HoldCo Debt") – which, in the context of the current refinancing transaction with Merrill Lynch International, has been quantified in an amount in the region of Euro 11,000,000 – could be pushed down to AC Milan in a scenario where Rossoneri Sport Investment Luxembourg S.à.r.l is not able to raise new funds sufficient to repay in full the HoldCo Debt. In this scenario, the residual portion of HoldCo Debt which cannot be refinanced at the level of Rossoneri Sport Investment Luxembourg S.à.r.l could be – subject to the approval of the board of directors of AC Milan – pushed down to AC Milan by virtue of a reverse merger under the Italian Civil Code" (Annex 28.1). This statement of AC Milan makes it clear that the possibility of a push down of part of the debt at HoldCo level to AC Milan cannot be excluded at this stage. The impact of such possible push down of part of the HoldCo debt on the Club's balance sheet, profit and loss is clearly negative and, as a consequence, would further worsen the projected break-even results. It furthermore has to be repeated that the failure to refinance the total HoldCo debt by 15 October 2018 would trigger the transfer of the pledged shares of AC Milan to Project Redblack and therefore the enforced change of ownership of AC Milan;*

vi. *the Club remains subject to an enforced change of ownership in the short term, i.e. in October 2018, thus creating great uncertainty in respect of what would happen to the Club should its ownership change. The Club acknowledges that it is in the best interest of Project Redblack, as current creditor and future potential main shareholder, to keep the club in operation. However, if Project Redblack were to become the main shareholder of the Club, there is no visibility on whether Project Redblack intends to operate the club themselves or to sell it to a new investor. In summary, provided potential refinancing scenarios, the identity of the main shareholder of AC Milan in October 2018 remains unclear. The CFCB Investigatory Chamber cannot obtain any assurance that a potential new main shareholder would follow the business plan as presented by AC Milan in April 2018;*

vii. *both auditors' reports (issued by EY) (Annexes 12 and 23) on the consolidated annual financial statements (as at 30 June 2017) and interim financial statements (as at 31 December 2017) include a key emphasis in respect of going concern. EY's review report on the interim consolidated financial statements even quotes the notes of the interim financial statements on the going concern issue (as prepared by the Board of Directors of AC Milan Group) : "a material uncertainty exists that may cast significant doubt on the Milan Group's ability to continue as a going concern" (Annex 23);*

viii. *when looking at the trend of the submitted annual break-even results (Annex 10), despite an improvement on historical years from FY 2015 (break-even deficit of EUR 74m), FY 2016 (break-even deficit of EUR 51m) until FY 2017 (break-even deficit of EUR 40m if the deficit of EUR 20m over 6 months is extrapolated to 12 months), the projected figures for FY 2018 (break-even deficit of EUR 70m) as validated by the Compliance Auditors are worse than in reporting period 2017. This negative movement is highly influenced by the investments in new players during the summer 2017 transfer window and the corresponding increase in amortisation of player registration rights.*

3. OPERATIVE PART

For the above reasons, the CFCB Chief Investigator, after having consulted with the other members of the CFCB Investigatory Chamber, decides in accordance with Article 54 (2) (g) of the UEFA CL&FFP and Article 14 (1) (d) of the Procedural rules, with the unanimous agreement of his fellow members of the CFCB Investigatory Chamber, to refer the present case of AC Milan to the CFCB Adjudicatory Chamber."

3. The Proceedings before the CFCB Adjudicatory Chamber

40. On 1 June 2018, AC Milan filed its written observations before the CFCB Adjudicatory Chamber.

41. On 19 June 2018, a hearing took place before the CFCB Adjudicatory Chamber.

42. On 27 June 2018, UEFA notified the decision passed by the CFCB Adjudicatory Chamber on 19 June 2018 (hereinafter referred to as "the Decision"). The operative part of the Decision provides as follows:

> *"1. AC Milan has failed to fulfill the break-even Requirement.*
> *2. To exclude AC Milan from participating in the next UEFA club competition for which it would otherwise qualify in the next two (2) seasons (i.e. the 2018/2019 and the 2019/2020 seasons).*
> *3. AC Milan is to pay three thousand Euros (€ 3,000) towards the costs of these proceedings.*
> *4. The costs of proceedings must be paid into the bank account indicated below within thirty (30) days of communication of this decision to AC Milan …"*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

43. On 4 July 2018, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS") directed against the Respondent with respect to the Decision (hereinafter the "Statement of Appeal"). The Appellant nominated Mr Pierre Muller as arbitrator. Furthermore, the Appellant in its Statement of Appeal mentioned ACF Fiorentina S.p.A. and Atalanta Bergamasca Calcio as interested parties. It also filed the following evidentiary request (while reserving its right to file further evidentiary requests) with the CAS:

- "*to order UEFA to provide a copy of the audio recording of the UEFA CFCB hearing of 19 June 2018*."

44. By its letter of 5 July 2018, the CAS Court Office acknowledged receipt of the Statement of Appeal and forwarded it to the Respondent. The CAS Court Office further took note of the expedited nature of the proceedings and the procedural calendar agreed by the Parties. It invited the Respondent to nominate an arbitrator in accordance with Article R53 of the Code of Sports-related Arbitration (the "CAS Code") on or before 9 July 2018. It also invited the Respondent to comment on the Appellant's evidentiary request filed on 4 July 2018 by 6 July 2018 at 15h.00.

45. With its letter dated the same day, the CAS Court Office informed ACF Fiorentina S.p.A. and Atalanta Bergamasca Calcio that Appellant had nominated them as interested parties. Furthermore the letter stated as follows:

> *"Pursuant to Article R41.3 of the Code of Sports-related Arbitration (2017 edition) (the "Code"), if you intend to participate as a party in the present arbitration, you shall file with*

the CAS an application to this effect, together with the reasons therefore, no later than Monday 9 July 2018 at 13h.00 (CET) in view of the expedited nature of the procedure."

46. With its letter dated 6 July 2018, the Respondent nominated Mr Mark Hovell as arbitrator. Furthermore, the Respondent opposed the Appellant's evidentiary request.

47. On 9 July 2018, the counsel for ACF Fiorentina S.p.A. informed the CAS Court Office that it "*hereby requests to (possibly) intervene pursuant to art. R41.3 of the CAS Code*".

48. With its letter dated 10 July 2018, the CAS Court Office acknowledged receipt of ACF Fiorentina S.p.A's application and advised that it will communicate the application for intervention to the parties so that they can express their position on the participation of ACF Fiorentina S.p.A.

49. In its letter dated the same day, the CAS Court Office set a time limit for AC Milan and UEFA until 11 July 2018 at 11h.00 to comment on ACF Fiorentina S.p.A.'s application.

50. On 10 July 2018, the CAS Court Office informed the Parties that the Panel was constituted as follows: Mr Ulrich Haas, president; Judge Pierre Muller and Mr Mark Hovell, arbitrators. Furthermore, the Parties were advised that the hearing will be held on 19 July 2018 at the premises of the CAS. The Parties were also invited to provide the CAS Court Office with the names of the persons attending the hearing on their behalf by 12 July 2018. Finally, the letter informed the Parties of the Panel's decision to grant the Appellant's request to be provided with the audio recording of the UEFA CFCB hearing held on 19 June 2018 by 15h.00.

51. With its letter dated 10 July 2018, the CAS Court Office acknowledged receipt of the audio recording of the UEFA CFCB hearing held on 19 June 2018 filed by the Respondent the same day.

52. On 11 July 2018, the Appellant informed the CAS Court Office that it opposed ACF Fiorentina S.p.A.'s application for intervention arguing that it was belated. The Respondent with email dated the same day did not oppose to the participation of ACF Fiorentina S.p.A.

53. With its letter dated 11 July 2018, the CAS Court Office extended the Appellant's deadline to file the Appeal Brief to 14h.30 (instead of 12h.00) following an agreement of both Parties.

54. With its letter dated 11 July 2018, the CAS Court Office informed the Parties that the Panel would decide on ACF Fiorentina S.p.A.'s request on intervention shortly.

55. Still on 11 July 2018, the Appellant filed its Appeal Brief. Therein, the Appellant also requested the production of the following documents / information from the Respondent:

- the unredacted version of the settlement agreements relating to the cases of Inter Milan (2015), Paris Saint-Germain Football Club (PSG) (2014) and Manchester City (2014);
- the determination by the Chief Investigator of the CFCB regarding the size of the above-mentioned clubs' failure to comply with the break-even requirement;
- any Business Plan(s) submitted by the above-mentioned clubs during the proceedings before UEFA; and
- documents establishing the assumptions on which the club's relevant business strategy was based.

56. With its letter dated 11 July 2018, the CAS Court Office invited the Respondent to file its Answer by 17 July 2018.

57. With its letter dated 12 July 2018, the Respondent opposed the Appellant's request for the production of documents / information based on confidentiality, lack of relevance and specificity.

58. With its letter of 12 July 2018, the CAS Court Office informed ACF Fiorentina S.p.A. that its request for intervention had been dismissed and that the reasons for the Panel's decision will be provided in the final award.

59. With its email dated 12 July 2018, the Respondent informed the CAS Court Office of the names of all persons who will be attending the hearing on its behalf.

60. In its unsolicited letter dated 13 July 2018, the Appellant objected to the Respondent's explanation for not providing the requested information.

61. With its letter dated the same day, the Panel decided on the outstanding evidentiary requests of the Appellant as follows:

> *"(i) Respondent is ordered to provide the unredacted versions of the settlement agreements for the cases Paris Saint-Germain Football Club (2014), FC Internazionale Milano (2015), Manchester City Football Club Limited (2014) by 16 July 2018 at 11h.00 (CET).*
> *(ii) In case the determination by the Chief Investigator of the CFCB regarding the size of the respective club's failure to comply with the break-even requirement cannot be derived from the unredacted versions of the settlement agreement, the Respondent is invited to provide that information within the same deadline.*
> *(iii) All other or further reaching …. requests for document production are rejected.*
> *(iv) Appellant and Counsel for the Appellant are reminded that the documents provided by the respondent in these proceedings must be treated confidentially and can only be used in these proceedings. Should the Appellant and/or Counsel of the Appellant wish to draw on the advice on experts in relation to these documents, the Appellant must ensure that these experts are bound to the same confidentiality standards as the parties by signing a respective confidentiality agreement.*
>
> *UEFA is invited to summarise the Settlement Agreement process it undertook with each of the above referenced clubs in its Answer and confirm if it saw business plans, forecasts etc. and to explain what income/expenditure they disallowed (was it commercial income that was above the market norm, an assignment of IPR, etc.)."*

62. Still on 13 July 2018, UEFA requested that its deadline to provide the documents / information referred to in the Panel's procedural decision quoted hereabove be extended to 17 July 2018. Such request was granted by the Panel with the CAS Court Office's letter of the same day.

63. With its email dated 13 July 2018, the counsel for ACF Fiorentina S.p.A. invited the Panel to reconsider its decision to reject the request for intervention or to allow ACF Fiorentina S.p.A. to participate in these proceedings as an interested party.

64. With its letter dated the same day, the CAS Court Office informed ACF Fiorentina S.p.A. on behalf of the Panel that the latter had dismissed the request for reconsideration and ACF Fiorentina S.p.A.'s request to participate as an interested party. It also informed that the reasons for this decision will be provided in the final award.

65. On 17 July 2018, the Respondent submitted its Answer and the unredacted versions of the settlement agreements for the cases Paris Saint-Germain Football Club (2014), FC Internazionale Milano (2015) and Manchester City Football Club Limited (2014).

66. On 17 July 2018, the CAS Court Office acknowledged receipt of the Respondent's Answer and enclosed the Order of Procedure for the Parties' attention. Furthermore, it requested the Parties to return a signed copy thereof by 18 July 2018.

67. Still on the same day, the CAS Court Office submitted a draft schedule for the hearing to the Parties.

68. By its letter dated 18 July 2018, the Appellant objected to the witness presented by the Respondent, Mr. Yves Wehrli.

69. By CAS office letter dated 18 July 2018, the Panel rejected the Appellant's objections against the testimony of Mr Wehrli. The Panel invited the Respondent to prepare a short list of topics on which Mr. Wehrli is supposed to testify by 18 July 2018 15h.00.

70. With its email dated 18 July 2018, the Respondent submitted the list of topics requested by the Panel.

71. With their letters dated 18 July 2018, both the Appellant and the Respondent returned a signed copy of the Order of Procedure.

72. On 18 July 2018, the Appellant and the Respondent commented on the draft hearing schedule.

73. With its letter dated the same day, the CAS Court Office circulated the final hearing schedule on behalf of the Panel.

74. On 19 July 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Panel was assisted by Mr Antonio de Quesada (Counsel to the CAS). In addition, the following persons attended the hearing:

i. for the Appellant: Mr Marco Fassone (Appellant's CEO); Mr Roberto Cappelli (counsel); Mr Andrea Aiello (counsel); Mr Antonio Rigozzi (counsel); Mr Sébastien Besson (counsel); Mr William McAuliffe (counsel) and Mr Ian Lynam (counsel).

ii. for the Respondent: Dr Emilio Garcia (UEFA Managing Director of Integrity); Ms Erika Montemor Ferreira (UEFA Counsel); Mr Pablo Rodrigues (UEFA Head of Financial Monitoring & Compliance).

iii. testimonies: Mr Marco Fassone (CEO of AC Milan) and Mr Franck Tuil (Elliott) gave testimony on behalf of the Appellant. Furthermore, Dr Ben von Rompuy was heard as an expert on EU law on behalf of the Appellant.

Mr Yves Wehrli (member of the Investigatory Chamber of the CFCB) gave testimony on behalf of the Respondent. Prof. Denis Waelbroeck was called as an expert by the Respondent, but did not appear at the hearing.

In its Appeal Brief the Appellant also requested that testimony be heard from Ms Valentina Montanari (CFO of AC Milan). At the hearing the Appellant waived its request with the consent of the Respondent.

75. At the opening of the hearing, both Parties confirmed that they had no objections to the composition of the Panel. During the hearing, the Parties made submissions in support of their respective cases. At the closing of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and that they had been given the opportunity to fully present their cases.

IV. THE POSITIONS OF THE PARTIES

76. The following is a summary of the Parties' written and oral submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Appellant: AC Milan

77. The Appellant has submitted, in essence, the following:

(a) CAS has jurisdiction to decide the dispute. In addition, the CAS Panel has full power to review the facts and the law. This follows from Article 34(2) of the Procedural Rules and Articles 62 and 63 of the UEFA Statutes. Consequently, the CAS Panel has the power to "*re-hear the matter afresh, as if it had not been previously heard or decided*."

(b) Article 16(1) and 16(3) of the Procedural Rules restrict the power of the CFCB Adjudicatory Chamber to review decisions taken by the CFCB Chief Investigator. According thereto, the CFCB Adjudicatory Chamber is deprived from reviewing the decision of the CFCB Chief Investigator not to conclude a settlement agreement. However, such restriction does not apply at the CAS stage, because:

- of the explicit wording in Article 16 of the Procedural Rules, since the provision only governs the review by the CFCB Adjudicatory Chamber;
- any other interpretation would amount to a denial of justice that "*would be highly questionable from both a right to be heard … and procedural public policy …*";
- in the case at hand Swiss law is subsidiarily applicable. The dispute is, thus, also covered by "*the mandatory provision of Swiss law, including Article 75 of the Swiss Civil Code*". According thereto, the principle of judicial review is mandatory. Granting judicial immunity to an internal decision of the Respondent is contrary to Swiss mandatory law.

(c) Furthermore, the Panel shall not exercise "self-restraint" when reviewing the facts and the law of the case. It is true that some CAS Panels have advocated some restraint when reviewing the discretion exercised by internal sporting bodies. However, according to the Appellant, such deference does not prevent the CAS Panel

- from examining whether or not such discretion has been exercised in violation of a provision of the applicable regulations or a fundamental principle of law, such as the principle of equal treatment or fairness, or to ensure the correct application of the law (proportionality, personality rights);
- in addition, deference can only be granted, if the Panel is convinced that such discretion was properly exercised. This, however, is not the case where a decision is taken in "*total lack of transparency with respect to how the discretion has been exercised*."

(d) According to the Appellant, the Decision is not proportionate. Instead of imposing a sanction on the Appellant the CFCB should have concluded a settlement agreement with the Appellant. The proportionality test is warranted under EU competition law and under Swiss personality rights. A decision is not proportionate if there was a less severe measure available. In the case at hand a settlement agreement would have been – "obviously" – less severe.

(e) The Appellant submits that the Decision is based on wrong facts or that the facts were not correctly assessed:

- At the hearing before the CFCB Adjudicatory Chamber, *"AC Milan presented two witnesses who corroborated its observations and one document that should Elliott gain control, it would support the Club in seeking to comply with the requirements imposed by UEFA. ... the Decision ... simply ignores AC Milan's points.*"
- At the hearing before the CFCB Adjudicatory Chamber, AC Milan submitted a new business plan for the fiscal year 2018. This business plan "*shows an improved net result notwithstanding the reduction to nil of the results coming from the Chinese Business for such year*." Consequently, the rubber stamping by the CFCB Adjudicatory Chamber of the Referral Decision that found that "*the situation of the Club has not significantly changed compared to the one assessed by the CFCB Investigatory Chamber in December 2017 in the framework of the voluntary agreement*" is simply wrong in light of the new facts. This is all the more true, considering that "*the actual results for the year to date show some further improvement; such result was achieved by the Club both through the substitution of China revenues with other revenues and through the implementation of cost efficiency policies*."
- The CFCB Adjudicatory Chamber also wrongly assessed the revised business plan for the so called Chinese revenues. It is true that the original projections were overly-optimistic. For various reasons "*the actual operations in China started with a significant delay*." The CFCB Adjudicatory Chamber overlooked – according to the Appellant – that AC Milan neither ignored nor concealed these facts, but instead took account of these (new) realities by downsizing the projected revenues from the China business. Such downwards adjustment of the estimates responsibly made by the management of AC Milan was held – without valid justification – against AC Milan in the Decision. The Adjudicatory Chamber failed to assess and examine the new business plan that provided a figure of EUR 42 million in the aggregate for the 4 years period. Instead, the CFCB Adjudicatory Chamber – by simply referring to the Referral Decision – concluded, solely based on the fact that the initial estimates were much higher, that also the figures in the new business plan were neither sustainable nor achievable. This conclusion is untenable and

ignores the sensitivity analysis included (only) in the latest business plan, which shows that even "*with a 50% decrease – and even a 75% decrease – of the China Business Net Result, the Club would in any case be able to meet the break-even target set out by the business plan*." The sensitivity analysis also simulated the financial effects in case AC Milan would not qualify for the European competitions in the near future.

(f) The refinancing of the loans provided by Redblack to HoldCo and of the notes issues by AC Milan to Redblack was deemed by the CFCB Investigatory Chamber as one of the critical factors that led to the Referral Decision. The Adjudicatory Chamber endorsed the findings of the CFCB Investigatory Chamber noting that "*there are many questions regarding the refinancing still unanswered"* and that *"only a permanent and sustainable refinancing for the entire period of the settlement agreement could be taken into account as enough guarantee that the settlement agreement is appropriate.*" This finding ignores – according to the Appellant – the following facts:

- There were still several months available before the maturity date of the financing;
- AC Milan at no time ran any actual risk of becoming insolvent or losing business continuity thanks to the provisions of the financing made available by Redblack;
- Redblack had undertaken in writing that in case of a change of ownership it would continue to finance the operations of AC Milan;
- AC Milan before the CFCB Adjudicatory Chamber filed a confirmation letter by Elliott that in case of a change of control "*the Club would immediately be in a materially improved financial position and the concerns raised in the decision about the viability of the Club as going concern would immediately fall away …*";
- The scenario envisaged by AC Milan and Elliott in the proceedings before the CFCB Adjudicatory Chamber have materialized in the meantime. Elliott – through Redblack and HoldCo – has become the new controlling shareholder of AC Milan. Elliott has already publicly expressed its commitment to operate the Club in accordance with the CL&FFP Regulations.

(g) Another reason identified by the CFCB Investigatory Chamber (and endorsed by the CFCB Adjudicatory Chamber) for not offering a settlement agreement related to an alleged risk that AC Milan would not continue as a going concern. This (incorrect) assumption was based on a quote taken from the EY report on the consolidated annual financial statements of the AC Milan Group as of 30 June 2017 and as of 31 December 2017. However, these statements were misinterpreted by the CFCB. It follows from these statements that "*after having provided the information required by Italian law, the existence of the going concern had been*

expressly confirmed both by the Board of Directors and by the auditors (EY)". Under Italian law "*it is mandatory for the Board of Directors to explicitly mention the most significant risk of going concern when a significant loss results frm the approved financial statements. Similarly, auditors – to the extent they are comfortable, as they clearly were in the case at issue – are entitled to express a clean opinion, but they are bound to mention in their report the statement made by the Board of Directors*." Thus, by repeating the statement of the Board of Directors, EY "*confirmed the validity of the statement rendered by the Board of Directors*" and did not intend to strengthen their emphasis of matter on going concern.

(h) The last reason identified by the CFCB Investigatory Chamber (and endorsed by the CFCB Adjudicatory Chamber) for not offering a settlement agreement related to the alleged negative trend of the financial results of AC Milan in the current fiscal year. This assumption, however, is inaccurate:

- Because in order to obtain a complete and fair view of the actual trend of AC Milan's financials one must take into account of all key factors (and not only the break-even result) on a long term perspective;
- There is a constantly improving trend of the EBITDA starting from the financial year 2015 to the financial year 2018;
- The losses of the current financial year were generated by the amortization of the players which represent the most significant asset of the club;
- The transitional worsening of the results highlighted by the CFCB Investigatory Chamber was due to the important investment campaign that was implemented by the new owners in April 2017 upon their acquisition of AC Milan.

(i) The Appellant submitted that the regulatory framework for offering a settlement agreement is incompatible with EU competition law, because the requirements for obtaining a settlement agreement are unclear. There is no clear basis in the applicable regulations.

(j) The Appellant is of the view that – in any event – it fulfils the requirements to be granted a settlement agreement. Such settlement agreements are referred to in Article 15(1) of the Procedural Rules. According thereto settlement agreements shall take into account certain financial factors and may be deemed appropriate as long as they are "effective, equitable and dissuasive". The Appellant further explained that:

- It is undisputed that the quantum and trend of the break-even result must be taken into account when deciding whether or not to offer a settlement agreement. AC Milan does not contest that it was in breach of the break-even requirement in the amount of EUR 121 million. However, this by

itself is no reason not to grant a settlement agreement. This is evidenced by other cases, such as the cases of Paris Saint-Germain, Inter Milan and Manchester City. It is uncontested that these other clubs had been offered settlement agreements while being in a worse break-even situation than AC Milan;

- Other criteria to be taken into account in the context of Article 15(1) of the Procedural Rules are – amongst others – the long-term business plan, the refinancing, the change of ownership or the business continuity. These other factors, however, were not correctly assessed by UEFA.

(k) The Respondent's Decision was also in breach of Article 53(2) CL&FFP Regulations. The latter provides that the CFCB must ensure equal treatment of all licensees. The decision not to offer to AC Milan a settlement agreement constitutes – in the view of the Appellant – an unfair and unequal treatment in respect of all other clubs that were in the same conditions in the past. The CFCB Investigatory Chamber's authority to grant, or not to grant a settlement agreement to a club in breach of the break-even requirement must be exercised in accordance with the fundamental principle of equal treatment. "*Since the introduction of the CL&FFP Regulations all clubs found in breach of such requirements (27 clubs) have been offered a Settlement Agreement, with the only exception of Dynamo Moscow. This implies that the offering of a Settlement Agreement is a customary procedure for the Investigatory Chamber … and the decision to deviate from such procedure must be based on very exceptional circumstances.*" The Appellant submitted that the clubs that were offered a settlement agreement were either in a similar or even worse situation with respect to the break-even requirement.

(l) The Decision also breached Swiss mandatory law. The Appellant referred to Article 28 of the Swiss Civil Code (hereinafter "CC") and submitted that:

- The regulations of a sports organisation must comply with Article 28 CC;
- Article 28 CC is not only applicable to natural, but also to legal persons;
- Preventing AC Milan from participating in European club competitions constitutes a severe infringement of its personality rights;
- There was no justification for such infringement, in particular in light of other cases decided by the CFCB;
- The burden to prove an overriding private or public interest in excluding AC Milan from European championships rests with UEFA and taking "*into account the above mentioned lack of motivation of the Decision … as well as the factual inaccuracies on which it is based, UEFA is not in a position to discharge this burden*";
- The goal to encourage clubs to operate on the basis of their own revenues and, thus, the protection of the long-term viability of football is worth protecting. However, the "*conclusion of a settlement agreement would allow to pursue the interest put forward in the Decision … in the same way*

if not in a more effective way than the sanction imposed by the Decision …".

(m) Finally, the Appellant submitted that the Decision also breached the principle of legal security under Swiss law as well as EU and Swiss competition law.

78. In light of the above, the Appellant submitted the following prayers for relief in its Appeal Brief:

"(i) Setting aside the Decision of the CFCB Adjudicatory Chamber.

(ii) Ordering UEFA to enter into a settlement agreement with AC Milan.

(iii) Ordering UEFA to take into account the reasons (considérants) of the Award, and notably the requirement of equal treatment, when entering into a settlement agreement with AC Milan.

(iv) Ordering any other relief the Panel deems necessary and/or appropriate.

(v) Ordering UEFA to pay the arbitration costs and a substantial contribution towards the AC Milan's costs."

B. The Respondent: UEFA

79. The Respondent in its Answer submitted, in essence, the following:

(a) CAS is competent to decide the present dispute in an expedited procedure.

(b) The appeal lodged by the Appellant is inadmissible. The appeal – in essence – is directed against the Referral Decision, i.e. the decision of the CFCB Investigatory Chamber not to conclude a settlement agreement with AC Milan and to refer the case to the CFCB Adjudicatory Chamber. Such decision was rendered on 22 May 2018 and is final and binding. There are no internal appeal remedies against the Referral Decision. Consequently, the Appellant should have lodged its appeal against the Referral Decision. However, the deadline to file such an appeal (10 days) had expired well before the Appellant filed its Statement of Appeal on 4 July 2018.

(c) The Appellant cannot circumvent the above conclusion by submitting that the Decision of the CFCB Adjudicatory Chamber "confirmed" the Referral Decision and that, therefore, AC Milan can direct its appeal against the Decision. It is simply not true that the CFCB Adjudicatory Chamber "confirmed" the Referral Decision. Instead, the CFCB Adjudicatory Chamber clearly stated "*that it was not competent to do that under the existing UEFA legal framework*". The Decision states that "[a] *decision of the Chief investigator not to conclude a settlement agreement does not fall within the scope of any of these categories and cannot therefore be submitted for review to the Adjudicatory Chamber. For these reasons, the Adjudicatory Chamber concludes that it has no competence to examine the requests made by AC Milan concerning the conclusion of a settlement agreement.*"

(d) On a subsidiary basis the Respondent submitted that the basis of the settlement regime provided for in the Procedural Rules contains the following characteristics:

- The purpose of a settlement agreement is to establish a roadmap for a club's future compliance with the CL&FFP Regulations;
- The initiative to conclude a settlement agreement rests with the CFCB Chief Investigator. The latter may decide to conclude a settlement agreement or refer the case to the CFCB Adjudicatory Chamber. The conclusion of the settlement agreement is the exception to the rule;
- The budget and projections of the club are one of the key factors to be taken into account when assessing the feasibility of a club effectively coming into compliance with the CL&FFP Regulations in the near future. The club has the burden to demonstrate that its business plan will result in the club complying with the CL&FFP Regulations and that it has already taken concrete steps that will lead the club towards this objective;
- The settlement agreement must be concluded with the consent of the defendant;
- The settlement agreement is not a material right of a club. It is a mere possibility. Accordingly, the CFCB Chief Investigator has a large margin of discretion when deciding whether or not to conclude a settlement agreement;
- The decision of the CFCB Chief Investigator not to conclude a settlement agreement is final.

(e) In order to consider the possibility of a settlement agreement, the latter must be "effective, equitable and dissuasive" (Article 15(1) Procedural Rules):

- A settlement agreement is effective within the above meaning if compliance with its terms will contribute to the club being break-even compliant in the near future. Compliance must be possible and realistic;
- The settlement agreement is equitable if it puts the club concerned at a disadvantage vis-à-vis the clubs that participate in the UEFA club competitions in line with the break-even requirement;
- A settlement agreement is dissuasive if it requires the club concerned to adapt its behaviour in a significant and meaningful way and if it deters the club from breaching the CL&FFP Regulations in the near future;
- The CFCB Chief Investigator must analyse all the circumstances of each case in order to determine whether or not to conclude a settlement agreement. He must be comfortably satisfied that the club is capable of becoming break-even compliant within the period provided for in the settlement agreement.

(f) The clubs are perfectly aware of the above system. The rules clear. In addition, further information is provided via the national federations to the clubs through the Club Licensing and Financial Fair Play Bulletins. The latter report on the

activities of the CFCB and the case law of the Investigatory Chamber. These bulletins are also published on the UEFA websites. Consequently, the clubs – including the Appellant – are well aware of the requirements for a settlement agreement. Bulletin 2013-15 advised – e.g. – the clubs that they "*must submit a robust business plan which demonstrates to the satisfaction of the CFCB Investigatory Chamber, that the club will become break-even compliant in the next three years following the conclusion of the settlement agreement*." Furthermore, the clubs are advised that the CFCB Investigatory Chamber "*will not accept a compliance plan if it is unclear whether the proposed actions will happen in the future and/or whether they will significantly improve the financial situation of the club.*"

(g) The Respondent submitted that there had not been unequal treatment with other clubs both on a substantive and on a procedural level:

- On a substantive level the Respondent submitted that the only point in common between this matter and the cases of Paris Saint Germain, Manchester City and FC Internazionale Milano is the huge size of the breach in relation to the break-even requirement, […]. All other circumstances (financial trend, going concern indicator, level of debt, maturity date of the debt, interest rates, prospects of refinancing, projected commercial revenues based on concluded [sponsorship] contracts, risks inherent in the club's projections, shareholding structure) differed considerably.
- On a procedural level the Respondent confirmed that in all cases (Paris Saint-Germain, Manchester City and FC Internazionale Milano) there had been two hearings before the CFCB Investigatory Chamber.

(h) The Appellant's financial situation was simply not comparable with the other cited cases. It is true that the size of the breach of the break-even requirement (in absolute and relative terms) was only one of many circumstances considered by the CFCB Chief Investigator. The latter also takes into account *"the business plan presented by a club, the trend in the club's annual break-even results, the going concern chances and all other evidence available*". In the case at hand, the Decision – based on the Referral Decision – looked at six criteria, i.e. the size of the breach, the lack of confidence in the business plan, the uncertainty around the refinancing of the Appellant's debts, the risk of an enforced change of ownership, the risk of business continuity of the Appellant and the negative trend of the future financial results. With respect to these criteria the Respondent noted that:

- The size of the breach was considerable;
- There was a clear lack of confidence in the business plan. AC Milan had presented three different business plans in a period of nearly a year. There were major inconsistencies in the plans presented with respect of the so-called China business and the refinancing of the loans with Elliott;

- The business plan contained many assumptions and hopes in order to achieve the break-even requirement in the future which were risky and unguaranteed (high sporting achievements, revenues derived from the transfer of players, etc.);
- The Appellant had ignored recommendations of the CFCB Investigatory Chamber to obtain new revenues before engaging in new transfers and making new investments;
- It is correct that a change of ownership is in itself not an obstacle to conclude a settlement agreement. However, "*a settlement agreement is not appropriate and cannot be granted in a situation where it is not clear which would be the consequences of the forced change of ownership. This is particularly true in a case like the one of AC Milan where (i) there are, besides a huge break-even deficit, very serious doubts about the ability of the Club to continue as a going concern, (ii) the owner refuses to give own guarantees and (iii) the shares of the Club itself are pledged to the finance investor. … there was and still is a lack of certainty of the future of AC Milan after the change of ownership occurred a few days ago. Elliott has still not provided a written guarantee/statement as to what will happen to AC Milan*."
- EY's auditing reports on AC Milan group's annual and interim financial statements raise "*shocking reservations about the ability of AC Milan to continue as a going concern, clearly containing an emphasis of matter*."
- There is a negative trend of AC Milan's finances. The projected figures for the financial year ending in 2018 show a significant deficit mainly due to major investment in players and a lack of any of the envisaged revenues.

(i) The Respondent submitted that based on the above facts the CFCB Chief Investigator did not breach any (internal or statutory) regulations when refusing to enter into a settlement agreement. In particular:

- There is no breach of the principle of equal treatment;
- The Appellant was granted several opportunities to present and update information, documents and different business plans;
- The Appellant provided no plausible evidence that it could get back to break-even;
- The CFCB Chief Investigator stayed well within the limits of the discretion afforded to him according to the applicable provisions;
- In any event the review of a discretionary decision is restricted to manifest errors;
- Proportionality is a yardstick when examining the Decision. However, in order to breach Swiss mandatory law, the Decision must be "grossly disproportionate";
- There is no breach of Article 28 CC. First, the Appellant voluntarily submitted to the rules and regulations of the Respondent in order to participate in the European club championships. It, thus, agreed to be

bound by its free will. In addition, there has been no illicit violation of AC Milan's personality rights. The CL&FFP Regulations pursue a legitimate goal. This has been upheld by CAS jurisprudence and is further evidenced by the fact that these regulations are endorsed by the European Parliament and the European Commission. Excluding AC Milan from European club championships does not amount to a severe infringement of its rights. No club "*has a right to participate every year in a European club competition. Exclusions for one or more years because of match fixing, financial fair play or other disciplinary reasons are … not violations of personality in the meaning of Article 28 of the Swiss Civil Code*."

- There is no breach of the principle of legality. The Appellant ignores that such principle only applies to disciplinary measures. Whether to propose a settlement agreement or not cannot be qualified as a disciplinary measure.
- UEFA did not breach competition law. First, EU competition law is not directly applicable to this case. Second, CAS jurisprudence has confirmed that the CL&FFP Regulations are compatible with EU competition law. Finally, the Respondent observes that the Appellant relied on an alleged violation of competition law for the first time before the CAS. "*Neither before the Investigatory Chamber … nor before the Adjudicatory Chamber of the CFCB …., the Appellant has ever raised doubts about the compatibility of the FFP system with Competition Law*."

(j) The Respondent submitted that whether or not the CFCB Chief Investigator was entitled to refuse a settlement agreement must be assessed based on the facts at that time. Any "*changes in the circumstances and financial situation of the club are irrelevant and do not render the refusal of the settlement agreement to AC Milan unjustified. The decision had to be taken on the basis of the reporting and monitoring period. If the future finance status of AC Milan will be better, …* [this] *is irrelevant for the present case*." An analysis "*can only be performed taking in to account the 'photo' of AC Milan's financial situation at that specific moment (22 may 2018), on the basis of the same documents and information presented to the CFCB Investigatory Chamber on that date.*"

80. The Respondent submitted the following prayers for relief in his Answer:

"- Primarily, declaring the appeal against the decision of 22 May 2018 of the Investigatory Chamber of the CFCB not to conclude a settlement agreement with AC Milan inadmissible;
- rejecting the relief sought by the Appellant;
- confirming the Appealed Decision of the Adjudicatory Chamber of the CFCB; and
- in any event, ordering the Appellant to bear the costs of these arbitration. With regard to the Respondent's costs, bearing in mind that UEFA is represented in these proceedings by in-house lawyers, no contribution is requested by UEFA."

V. JURISDICTION

81. The jurisdiction of the CAS derives from Article R47 of the CAS Code in connection with Article 62(1) of the UEFA Statutes and Article 34(2) of the Procedural Rules.

82. Article R47(1) of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."*

83. Article 62(1) of the UEFA Statutes reads as follows:

> *"Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration."*

84. Article 34(2) of the Procedural Rules provides as follows.

> *"Final decisions of the CFCB may only be appealed before the Court of Arbitration of Sport (CAS) in accordance with the relevant provisions of the UEFA Statutes."*

85. The Panel also notes that AC Milan has submitted to the UELR, which provide in Article 4.02 as follows:

> *"To be eligible to participate in the competition, clubs must … confirm in writing that they themselves, as well as their players and officials, agree to recognise the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, as defined in the relevant provisions of the UEFA Statutes …"*

86. It follows from all of the above that the CAS has jurisdiction to decide the present dispute. The Panel also takes note of the fact that neither of the Parties objected to the jurisdiction of the CAS and that they have signed the Order of Procedure without reservation.

VI. ADMISSIBILITY OF THE APPEAL

A. The Legal Framework

87. Article R49 of the CAS Code reads as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties."*

88. Article 62(3) of the UEFA Statutes provides that

> *"*[t]*he time limit for appeal to the CAS shall be ten days from the receipt of the decision in question."*

89. It is not entirely clear what the consequences are in case an appellant fails to meet the above deadline. The only matter being certain is that any non-observance of the deadline does not affect the jurisdiction of the CAS. However, it less clear whether non-compliance with the deadline results in the appeal being inadmissible or the appeal being dismissed on the merits. The Panel needs not to take a final stance on this matter. It merely holds that there are good arguments speaking in favour of holding an appeal inadmissible in case of non-compliance with the deadline in Article R49 of the CAS Code (cf. also MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. R49 no. 101). The CAS appeals arbitration proceeding is modelled on the assumption that the CAS comes into play as a "second instance", i.e. only on appeal against a first instance decision of a sports organisation. Deadlines provided for accessing an "appeal instance", however, are usually qualified as procedural (and not substantive) in nature. Such view would not be contradicted by the fact that the deadline provided for – e.g. – in Article 75 CC to challenge a resolution/decision of an association is substantive in nature, since such qualification is not mandatory in the context of arbitration (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. R49 no. 112 *et seq.*; CAS 2008/A/1705, no. 8.2.). Having said this, the Panel does not ignore that there is a mandatory element to Art. 75 CC, in particular the right to access to justice enshrined in that provision. In this respect the Swiss Federal Tribunal (SFT) ruled, in a decision rendered on 20 February 2018 (ATF 144 III 120, with regard to TAS 2016/A/4490), that

> " *cette disposition* [Art. 75 CC] *est de droit impératif en ce sens que les statuts de l'association ne peuvent pas exclure le contrôle des décisions de l'association par un tribunal indépendant. Il est généralement admis que les litiges relatifs à ce genre de décisions, y compris ceux ayant trait à des peines disciplinaires, peuvent être soumis à un tribunal arbitral pour autant que ce tribunal constitue une véritable autorité judiciaire et non pas le simple organe juridictionnel de l'association intéressée au sort du litige"*
>
> *[free translation: this provision [Art. 75 CC] is mandatory in the sense that the statutes of an association cannot exclude an appeal against the decision of the association to an independent tribunal. It is generally admitted that disputes relating to such type of decisions, including those of a disciplinary character can be submitted to an arbitral tribunal as long as such tribunal qualifies as a true adjudicatory authority akin to state courts and not just to a simple judicial body of the association that has a vested interest in the outcome of the dispute.]*

90. It follows from the above that Art. 75 CC is mandatory in the sense that the Statutes of the association cannot exclude true judicial control of its decisions by an independent tribunal. However, by qualifying a reasonable deadline of appeal (in the rules and

regulations of a sports organization) as a procedural issue, this mandatory right of access to justice remains untouched.

B. The Position of the Parties

91. The Respondent submitted that the appeal lodged by the Appellant is partially inadmissible. It stated that it has "*no objection relating to the admissibility of the appeal … against the UEFA Club Financial Control Body … of 19 June 2018 as regards and limited to the disciplinary consequences to be imposed on the Club for having violated the break-even requirements …* [h]*owever, UEFA firmly objects to the admissibility of the appeal as regards the appeal lodged by the Appellant against the decision of the CFCB not to conclude a settlement with the Club*". The Respondent is of the view that the Referral Decision of the CFCB Investigatory Chamber, i.e. to refer the case to the CFCB Adjudicatory Chamber and not to conclude a settlement agreement is final and binding. It had been issued on 22 May 2018 and was not appealed by the Appellant within the deadline prescribed in Article 62(3) UEFA Statutes. Thus, the Appellant is – according to the Respondent – barred from raising the legality of the non-conclusion of the settlement agreement in the context of its present appeal against the Decision.

92. The Appellant disagreed with the above. According to it the Referral Decision (i.e. the decision not to offer a settlement agreement) is not separately appealable. The Appellant submitted that only the operative part of a decision of a sports organisation may be subject to appeal, not the grounds. The operative part of the Referral Decision, however, only deals with the referral of the case to the CFCB Adjudicatory Chamber. The non-offering of a settlement agreement is not mentioned in the operative part of the Referral Decision and, thus, according to the Appellant cannot be separately appealed.

C. The Findings of the Panel

93. It is undisputed between the Parties that the Decision qualifies as an appealable decision within the meaning of Article R47 of the CAS Code and that the Decision is final within the meaning of said article, i.e. that there is no further internal remedy against the Decision provided for in the applicable rules of UEFA. What is disputed between the Parties is whether or not – in the context of the appeal against the Decision – the Panel is entitled to review the preliminary question, i.e. the decision of the CFCB Chief Investigator not to enter into or offer a settlement agreement to AC Milan.

94. The Panel would be barred from looking at the issue of the settlement agreement in the context of the present appeal, if the Referral Decision was separately appealable. In such case, the Appellant would have had to observe the prescribed time limit for appeal provided for in Article 62(3) of the UEFA Statutes. Failing to do so results in the Appellant being foreclosed to raise the (il-)legality of such decision in any other context at any later point in time, including the appeal stage against the Decision.

95. Whether or not a decision of a sports federation is appealable is not a question of form. It is, therefore, irrelevant whether a finding is incorporated in the "operative part of a decision" or elsewhere. CAS jurisprudence has constantly held that whether or not a decision is appealable is a matter of substance. Consequently, CAS Panels have held that also a mere letter of a sports federation may be appealed (cf. also MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. R47 no. 13 *et seq.*). A letter, however, never contains an "operative part".

96. Whether a decision is appealable must be assessed first and foremost in light of the applicable regulations of the relevant sports federation (UEFA). However, the autonomy of the sports federation is not unlimited. In case the decision affects the legal position of the addressee, the decision must be appealable – in light of the jurisprudence of the SFT – independently of whether or not the applicable regulations so provide, since a sports federation cannot arbitrarily prevent the affected individual concerned from access to justice.

97. The Panel finds that the applicable rules do not provide for a separate appeal against the Referral Decision. Article 34 of Procedural Rules provides for an appeal against a "*final decision of the CFCB*". The term "CFCB", in principle relates to both the CFCB Investigatory Chamber and the Adjudicatory Chamber (cf. Article 4(2) of the Procedural Rules). However, the provision in Article 34 of the Procedural Rules is located systematically in Chapter 2 of the rules dealing with the decision-making process of the CFCB, i.e. in the chapter covering the CFCB Adjudicatory Chamber. Thus, a systematic reading of the Procedural Rules indicates that Article 34 of the Procedural Rules is only applicable to decisions of the CFCB Adjudicatory Chamber. The Panel also notes that a similar provision as Article 34 of the Procedural Rules is missing in chapter 1 (Articles 12-18 of the Procedural Rules) that deals with the CFCB Investigatory Chamber. This is all the more noteworthy, considering that Article 16(1) of the Procedural Rules specifically provides that the decision of the Investigatory Chamber not to offer a settlement agreement (unlike the decision to conclude a settlement agreement) cannot be reviewed by the CFCB Adjudicatory Chamber.

98. The view held by this Panel according to which the applicable provisions do not provide for a separate possibility of appeal against the Referral Decision is further backed by UEFA's practice. The Referral Decision does not contain a note providing details of the available remedies. This indicates that UEFA itself never considered the Referral Decision to be a separate object of appeal. The Decision (by the CFCB Adjudicatory Chamber), on the contrary, includes such an express note in relation to the available remedies (cf. no. 108 of the Decision), which reads as follows:

> *"This decision may be appealed in writing before the CAS in accordance with Article 34(2) of the Procedural Rules and Articles 62 and 63 of the UEFA Statutes. According to the Article 62(3) of the UEFA Statutes, the time limit for appeal to CAS is ten days from the receipt of this Decision."*

99. Finally, the Panel notes that the decision of the CFCB Investigatory Chamber not to conclude a settlement agreement with AC Milan does not impact on the latter's rights and, therefore, cannot be qualified as a "*final decision of the CFCB*" within the meaning of Article 34(1) of the Procedural Rules, i.e. a decision subject to appeal. AC Milan's legal position is not affected by the form, in which UEFA regulates a specific matter, i.e. whether the CFCB issues a unilateral act (in the form of a disciplinary sanction) or whether it chooses to deal with a matter by entering into a settlement agreement. The legal position of a licensee is not affected by such formalities, but only by the substantive contents of the respective legal instrument chosen by UEFA. The Panel notes that the contents of a decision of the CFCB Adjudicatory Chamber within the meaning of Article 29 of the Procedural Rules covers any possible contents (such as a fine (suspended on conditions pursuant to Article 30 of the Procedural Rules), withholding prize money, limiting clubs from registering new players, limiting the number of players that could be registered for participation in UEFA Competitions, limiting the aggregate cost of employee benefit expenses and the like) that could be incorporated into a settlement agreement (entered into between the CFCB Chief Investigator and a license holder). Thus, by refusing to execute a settlement agreement and opting for a disciplinary measure instead, the possible contents of the decision of the CFCB Adjudicatory Chamber is in no way predetermined or less proportionate from the outset. This is all the more true considering that also the execution and the contents of a settlement agreement by the CFCB Chief Investigator can be reviewed (and amended) by the CFCB Adjudicatory Chamber (Article 16(1)-(3) of the Procedural Rules).

100. To conclude, therefore, the Panel finds that the applicable rules do not provide for a separate appeal against the Referral Decision and that such separate appeal is also not warranted in order to protect the interests of AC Milan. Instead, the refusal of the CFCB Chief Investigator to enter into a settlement agreement does not affect AC Milan's legal position in any material way.

VII. THE APPLICABLE PROCEDURAL PROVISIONS

101. The present case is governed by the CAS Code (to which Article 182(1) of the Swiss Private Internal Law Act ("PILA") refers) in conjunction with Articles 61 *et seq*. of the UEFA Statutes. It is undisputed that this matter is an appeals arbitration procedure to which – in particular – the Articles R47 *et seq*. of the CAS Code apply. Furthermore, the Parties have agreed on an expedited procedure within the meaning of Article R52(4) of the CAS Code. The UELR, to which AC Milan has submitted, provides in Article 4.02 as follows:

> *"To be eligible to participate in the competition, clubs must … confirm in writing that they themselves, as well as their players and officials, agree … that any proceedings before the CAS concerning admission to participation in or exclusion from the competition will be held in an expedited manner in accordance with the CAS Code of Sports-related Arbitration and with the directions issued by the CAS …".*

VIII. ACF FIORENTINA S.P.A'S REQUESTS FOR INTERVENTION

102. With letter dated 5 July 2018, ACF Fiorentina S.p.A. and Atalanta Bergamasca Calcio were advised by the CAS Court Office that AC Milan had filed an appeal against the Decision and that they were named in such appeal as "interested parties".

103. In the case at hand the appeal filed by the Appellant is directed (only) against the Respondent. However, according to Article R41.3 of the CAS Code a third party may participate as a party to the arbitration if it files an application to this effect with the CAS Court Office, together with the reasons therefor. Article R41.3 of the CAS Code provides that the application must be filed within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. These deadlines are not suited in case an appeal is dealt with in an expedited manner within the meaning of Article R52(4) CAS Code. Accordingly, the relevant deadlines can be adapted in an expedited procedure. This is exactly what happened in the case at hand, in which ACF Fiorentina S.p.A. was advised that any request to participate as a party in these proceedings must be filed by Monday 9 July 2018 at 13h.00.

104. On 9 July 2018, ACF Fiorentina S.p.A. wrote an email at 19h.49 to the CAS Court Office and requested to "*intervene pursuant to art. R41.3 of the CAS Code*." The Panel has dismissed the request for intervention by letter dated 12 July 2018. The request by ACF Fiorentina S.p.A was not only filed belated, i.e. after the expiry of the deadline. In addition, the request did not comply with the formalities of Article R41.3 of the CAS Code. These formalities are described in MAVROMATI/REEB (The Code of Arbitration for Sport, 2015, Art. R41 no. 89) as follows:

> *"The request for intervention should also meet some other formal requirements, notably it must have the same content as a request for arbitration / statement of appeal. In appeal arbitration proceedings, the formal requirements for the request for intervention derive from Article R39 and R48 of the Code. The request for intervention shall equally contain (even briefly) some reasons supporting the application."*

105. The Panel subscribes to the above findings and notes that the request filed by ACF Fiorentina S.p.A. does not observe the prescribed formalities and, therefore, must be rejected also for this reason.

106. ACF Fiorentina S.p.A. on 13 July 2018 filed a request for reconsideration. The Panel rejected such request with letter of the same day, because it saw no ground to deviate from its previous decision. Furthermore, it did not grant ACF Fiorentina S.p.A.'s request to participate in these proceedings as "interested party", since Article R41.3 of the CAS Code – differently from Article R41.2 of the CAS Code (joinder) – only provides for the participation "as a party" and not in any other capacity. This finding is not contradicted by Article R41.4 of the CAS Code that relates to both, joinder and intervention.

IX. OTHER PROCEDURAL ISSUES

A. The Request for the Audio File

107. In its Statement of Appeal the Appellant requested to be provided with the audio file of the hearing of the CFCB Adjudicatory Chamber on 19 June 2018. The Panel granted this request by letter dated 10 July 2018. According to Article R44.3 of the CAS Code a

> *"party may request the Panel to order the other party to produce documents in its custody or under its control. The part seeking such production shall demonstrate that such documents are likely to exist and to be relevant."*

108. The word "documents" within the above meaning must be construed broadly and also covers audio files. It is, furthermore, uncontested that the audio file was in the custody of the Respondent and that it could be easily produced by the latter without harming its legal position or interests. Finally, at least at the relevant stage of the expedited proceedings, the Panel could not exclude that the audio file may become relevant in the context of these proceedings.

B. The Request for the Unredacted Settlement Agreements and other documents/information

109. In its Appeal Brief the Appellant requested that the Respondent produces the following documents / information in its custody:

- (i) the unredacted version of the settlement agreement relating to the cases of Inter Milan (2015), Paris Saint-Germain Football Club (PSG) (2014) and Manchester City (2014);
- (ii) the determination by the Chief Investigator of the CFCB regarding the size of the above-mentioned clubs' failure to comply with the break-even requirement;
- (iii) any business plan(s) submitted by the above-mentioned clubs during the proceedings before UEFA; and
- (iv) documents establishing the assumptions on which each club's relevant business strategy was based.

110. The Respondent objected to the Appellant's requests on various grounds, *inter alia*, by arguing that the Appellant had requested their production from the Respondent before, that the latter had declined such request and that the Appellant had failed to appeal such decision and, therefore, was precluded from requesting the documents and information at a later stage.

111. In its letter dated 13 July 2018, the Panel decided on the Appellant's evidentiary requests as follows:

> *"(i) Respondent is ordered to provide the unredacted versions of the settlement agreements for the cases Paris Saint-Germain Football Club (2014), FC Internazionale Milano (2015), Manchester City Football Club Limited (2014) by 16 July 2018 at 11h.00 (CET).*

> *(ii) In case the determination by the Chief Investigator of the CFCB regarding the size of the respective club's failure to comply with the break-even requirement cannot be derived from the unredacted versions of the settlement agreement, the Respondent is invited to provide that information within the same deadline.*
> *(iii) All other or further reaching …. requests for document production are rejected.*
> *(iv) Appellant and Counsel for the Appellant are reminded that the documents provided by the Respondent in these proceedings must be treated confidentially and can only be used in these proceedings….*
>
> *UEFA is invited to summarise the Settlement Agreement process it undertook with each of the above referenced clubs in its Answer and confirm if it saw business plans, forecasts etc. and to explain what income/expenditure they disallowed (was it commercial income that was above the market norm, an assignment of IPR, etc.)."*

112. The Panel advised the Parties in its letter that the reasons for this procedural order will be given in the final award.

113. First and foremost the Panel notes that the Appellant is not barred from requesting the above information / documentation by the mere fact that it did not separately "appeal" the Respondent's decision not to disclose the requested information / documentation. In the view of the Panel, the right to request the production of documents / information within the meaning of Article R44.2 of the CAS Code is an auxiliary procedural right that arises in the context of a pending arbitration procedure. The Respondent cannot unilaterally dispose of such procedural right of the Appellant nor is there any evidence on file that the Appellant waived such procedural right at any moment in time. On the contrary, when looking at the correspondence between the Parties, it is rather obvious that the Appellant never accepted the Respondent's decision not to disclose the requested information / documents.

114. It is undisputed that the unredacted settlement agreements for Paris Saint-Germain, FC Internazionale Milano and Manchester City Football Club are in the custody of the Respondent and can be produced by the latter without much expense. At the relevant stage of the expedited proceedings, the Panel could further not exclude that the unredacted settlement agreements may become relevant in the context of these proceedings, considering that the Appellant based its case – *inter alia* – on a violation of the principle of equal treatment. However, unlike the audio file, the production of the unredacted settlement agreements does affect the interests of the Respondent, since the settlement agreements contain confidential information and Article 53 of the CL&FFP Regulations ensures "*full confidentiality of all information provided*" to the licensees. Despite of this, the Panel finds that – taking account of Art. 9 (3) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010) – the unredacted settlements agreements must be produced by the Respondent. In doing so the Panel takes into consideration that some of the information in the unredacted settlement agreements may be publicly available via the commercial register in the countries were the respective clubs are domiciled (e.g. for England at the Companies House Registry). Furthermore, the Panel finds that the Respondent's interest to keep certain information confidential can be

protected by other means more appropriate and proportionate than by disallowing disclosure altogether (cf. point iv of the Panel's procedural order).

115. Since the determination by the Chief Investigator of the CFCB regarding the size of the respective club's failure to comply with the break-even requirement could be derived from the unredacted settlement agreements, the Appellant's request (ii) has become moot.

116. The Panel has dismissed the Appellant's evidentiary requests (iii) and (iv). The Panel finds that such requests relate to very sensitive confidential information of the Appellant's immediate competitors and that, therefore, such information shall not be disclosed easily. Furthermore, the requests are not specific enough, because it is unclear what information the Appellant seeks to derive from the contents of these business plans of other clubs or from documents establishing the assumptions on which the club's relevant business strategy was based for its own cause, i.e. (but not limited to) that it has been discriminated. In order to prevent a fishing expedition and in light of the confidentiality implications of the information sought, the Panel found that it suffices that the Respondent summarises in its Answer the Settlement Agreement process it undertook with each of the above referenced clubs.

C. The Submission of a new Document by the Appellant

117. The Appellant at the hearing on 19 July 2018 submitted a new document (hereinafter the "New Document"), i.e. an updated profit and loss comparison forecast for the AC Milan group for the season 2017/2018. The Respondent opposed the production of such document.

118. Article R56 of the CAS Code provides as follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer."*

119. The Panel admitted the New Document on file, because it could not have been produced at an earlier stage of the proceedings and taking into account that the timing of these proceedings – being expedited – is extremely tight. These are – in the view of the Panel – exceptional circumstances that justify the decision to take the New Document on file.

D. The Testimony of Mr Yves Wehrli

120. Mr Yves Wehrli is the CFCB Chief Investigator. In its Appeal Brief, the Appellant stated that "*depending on the documentary evidence that the Panel might order UEFA to produce, AC Milan reserves the right to call Mr. Wehrli to testify at the hearing*." In its Answer the Respondent advised that it "*will do its best efforts to confirm the presence of the following persons: Mr Yves Wehrli, member of the Investigatory Chamber of the*

CFCB." Again with email dated 17 July 2018, UEFA reiterated "*that, subject to their final availability, the following persons may attend the hearing (as informed in UEFA's Answer – VII. Evidentiary Requests): Mr. Yves Wehrli, member of the Investigatory Chamber of the CFCB …*". With email dated 18 July 2018, the Appellant objected to Mr Wehrli being heard as a witness. The email reads in its pertinent parts as follows:

> *"With respect to Mr. Wehrli, AC Milan objects to Mr. Wehrli being heard as a witness for the Respondent as no witness statement was filed nor was any brief summary of his expected testimony contained in UEFA's Answer in violation of Article R55 CAS Code."*

121. In a letter dated 18 July 2018, the Appellant explained that *"having reviewed the limited documentary evidence produced by UEFA, AC Milan do not request UEFA to make Mr Wehrli available at the hearing and the reservation contained at para. 274 of the Appeal Brief is thus moot".*

122. With letter of the same day, the Panel rejected the objections raised by the Appellant and ordered the Respondent to prepare a short list of topics on which Mr Wehrli is supposed to testify. With email dated 18 July 2018, the Respondent submitted the list of topics. Further on the 18 July 2018, the Appellant in its letter declared as follows:

> *"As a preliminary point, with respect to the second identified topic of the envisaged testimony from Mr Wehrli, i.e. 'about other proceedings before the Investigatory Chamber', AC Milan objects to such testimony (with the exception that he will testify on documents that are already on file)."*

123. At the outset of the hearing the Panel discussed the matter together with the Parties. The Parties agreed that the Panel does not need to decide on the objections raised by the Appellant in the abstract. Rather the Panel shall decide only on specific objections raised by the Appellant in the course of Mr Wehrli's testimony should the witness testify on matters not already on file. No such specific objections were raised by the Appellant during the interrogation of the witness.

E. The Expert Opinion of Prof. Denis Waelbroeck

124. The Respondent – together with its Answer – has submitted a legal opinion by Prof. Denis Waelbroeck. At the hearing, Prof Waelbroeck was not available for interrogation. The Appellant, therefore, requested that Prof. Waelbroeck's expert opinion be removed from the case file. The Panel finds that Prof. Waelbroeck's absence impacts on the Appellant's right to test the findings of the expert and the Panel's right to pose questions. In light of this, in particular taking account of the right to be heard, the Panel thereby excluded the expert opinion from this procedure.

X. APPLICABLE LAW

125. Article 187(1) of the PILA stipulates in regard to the applicable law on the merits as follows:

> "*The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected*."

126. Article 187(1) of the PILA enshrines the principle of party autonomy with respect to the applicable law. The parties are free to choose the law applicable to the merits of the dispute. It is undisputed that such choice of law may be made directly (by referring to a specific law) or indirectly, i.e. by referring to a "conflict-of-law" provision contained in the rules of an arbitral institution. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

127. The "applicable regulations" within the above meaning are the UEFA's statutes, rules and regulations, in particular the CL&FFP Regulations and the Procedural Rules. In addition, i.e. on a subsidiary basis Swiss law applies, since UEFA has its seat in Switzerland.

XI. THE MANDATE OF THE PANEL

128. With respect to the mandate of the Panel, Article R57(1) of the CAS Code provides as follows:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."*

129. The Parties are in dispute with respect to certain elements of this mandate:

A. The Decisive Reference Date

130. The present procedure is an appeal arbitration procedure. Thus, this Panel must examine whether or not the Decision is factually and legally correct. Whether the Decision is factually correct or not may depend also on the relevant reference date. The Parties disagree on the latter. The Respondent submitted that the legality of the Decision must be assessed on the basis of the facts and information available at the time when the decision in question was taken. The Respondent figuratively spoke of a "photo finish" that cannot be called into question at the later stage. The Appellant, on the contrary, submitted that the decisive reference date for assessing the correctness of a decision is the date of the CAS hearing. The Appellant submitted that assessing the financial situation of a club is an "ongoing process" and that it would be "wrong to ignore today's reality".

131. Article R57 of the Code provides for a *de novo* hearing. Such concept implies – in principle – that also new evidence may be taken into account that was not presented or available before the first instance. Thus, in principle, the correct reference to judge the correctness of the Decision is the date of the CAS hearing. However, there are exceptions

to this rule. Article R57(3) of the CAS Code e.g. provides that evidence may be excluded in the CAS procedure if such evidence was available before the first instance and the Appellant did not act diligently or acted in bad faith. The Respondent does not avail itself of this exception in the present case.

132. The Panel is aware that the above concept of a *de novo* hearing results somehow in a moving target and that the insecurity that comes with it may be troubling in a situation where under tight time restraints a federation must decide whether or not to admit a club to a certain competition and where such decision not only affects the direct addressee, but also other competitors. The Panel notes that access to justice may be restricted (by freezing the relevant reference date) for just cause, i.e. in the interest of good administration of justice. Whether to do so or not is, in principle, in the autonomy of the relevant federation. The Panel notes that the Procedural Rules do not provide for a specific reference date in order to assess the correctness of a decision. Instead, the Procedural Rules provide that – once a case is referred to the CFCB Adjudicatory Chamber – the latter may hold a hearing (Article 21 Procedural Rules) and hear evidence (Article 23 of the Procedural Rules) that was not before the CFCB Investigatory Chamber. Thus, the Procedural Rules provide that the decision to be taken by the Adjudicatory Chamber may be based on an evidentiary bases different from the one of the CFCB Investigatory Chamber. The same principle applies – absent any rules to the contrary – in relation between the CAS and the CFCB Adjudicatory Chamber.

B. The Depth of Scrutiny

133. According to Article R57 of the CAS Code "*the Panel has full power to review the facts and the law*". There are, however, limits to a panel's powers of review depending on the nature of the decision being appealed. Thus, e.g., a panel can review a field of play decision only insofar as the decision is arbitrary, in violation of the principle of good faith or in violation of general principles of law (MAVROMATI/REEB, The Code of Arbitration for Sport, 2015, Art. R57 no. 57). The underlying idea for such restriction is that – with respect to field of play decisions – the organs of the respective federation are, in principle, in a better position to adjudicate the matter than a CAS panel examining the issues ex post. Consequently, there are good reasons of administration of justice to limit the scope of review in such circumstances.

134. Whether there are equally good reasons to limit the scope of review also in other instances, e.g. in disputes involving disciplinary sanctions (going beyond the field of play) appears questionable. CAS panels have frequently stated that *"[t]he measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence"* (cf. CAS 2013/A/3139 para. 114; CAS 2012/A/2762 para. 122; CAS 2011/A/2645 para. 44 with numerous references therein). The Respondent points to this jurisprudence and wishes to restrict the depth of review of this Panel. However, the above jurisprudence should be interpreted (and applied) with care:

- First, the above restriction to the scope of review originates in Swiss law of associations and was developed in the context of a review of disciplinary measures by state courts (cf. BK-ZGB/RIEMER, 1990, Art. 75 no. 25). The reason for imposing restrictions on state courts when reviewing decisions of associations follows from the Swiss Constitution (Article 23), i.e. the autonomy of associations, which protects sports federations from excessive state interference. No such state interference is at stake in the present context, where a private institution (CAS) was mandated by private parties to resolve a dispute between them.
- Second, according to Swiss law, no limited review applies from the very outset to questions of law. Whether and to what extent a federation is bound by the principle of proportionality or the principle of equal treatment when exercising its disciplinary powers is, however, a question of law (cf. CAS 2013/A/3139, para. 86) and not an issue within the free discretion of a federation.
- In addition, it appears rather arbitrary to try to draw a persuasive line between decisions that are "simply" or "grossly" disproportionate.
- Finally, the constant jurisprudence of the CAS according to which procedural flaws committed by the judicial organs of a federation "fade to the periphery" in appeals proceedings before the CAS (CAS 98/211) would have to be revised, if CAS were prevented from exercising its full mandate in disciplinary proceedings, i.e. to review the facts and the law of the case (CAS 2012/A/2912, para. 87).

135. To conclude, the Panel finds that its powers to review the facts and the law of the case are neither excluded nor limited. However, the Panel is mindful of the jurisprudence according to which a CAS panel *"would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally […] pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so"* (cf. CAS 2010/A/2283 para. 14.36; CAS 2011/A/2518 para. 15; CAS 2011/A/2645 para. 44).

XII. MERITS OF THE APPEAL

136. The Appellant challenges the Decision on a number of grounds, in particular it submits that:

- (i) the CFCB should have dealt with the breach of the break-even requirement by AC Milan by entering into / offering a settlement agreement instead of issuing a sanction. Not doing so constitutes – according to the Appellant – a breach of:
    - UEFA's own Regulations (Article 15 Procedural Rules);
    - the principle of equal treatment (Article 53(2) of the CL&FFP Regulations);
    - Article 28 CC and

- (European) Competition Law;

- (ii) the CFCB Adjudicatory Chamber based the Decision on a wrong assessment of the facts.

A. Should the CFCB have offered a Settlement Agreement to AC Milan?

1. The legal framework for a settlement agreement

137. Article 14(1)(b) of the Procedural Rules provides that the CFCB Chief Investigator (after consulting with the other members of the Investigatory Chamber) "*may decide to … conclude, with the consent of the defendant, a settlement agreement.*" Furthermore, Article 15(1) of the Procedural Rules provides that the settlement agreement "*shall take into account, in particular, the factors referred to in Annex XI of the UEFA Club Licensing and Financial Fair Play Regulations. Such agreement may be deemed appropriate in circumstances which justify the conclusion of an effective, equitable and dissuasive settlement without referring the case to the adjudicatory chamber*."

2. The Principle of Legality

138. The Appellant finds that the above provision violates the principle of legality that is both "*a fundamental principle of Swiss disciplinary law*" and enshrined in European Competition Law. Dr. Rompuy in his expert opinion stated as follows:

> "*While settlements are not presented as sanctions, they play a functionally equivalent role when they are systematically used in order to enforce specific rules, as is the case in the context of FFP Regulations. Clubs are in practice forced to accept the settlement agreement to avoid 'harsher sanctions', i.e. disciplinary measures. It is therefore essential that the conditions to be eligible for a settlement agreement are clearly known by and explained to the clubs. The open-ended list of 'other factors' to be considered in respect of the monitoring requirements' contained in Annex XI, does very little to alleviate this fundamental flaw*."

139. The Panel cannot follow this line of reasoning. The settlement agreement – just like a sanction – is a mere legal instrument at the disposal of the CFCB to regulate a certain matter, in the case at hand to react to infractions of the CL&FFP Regulations committed by a licensee. That settlement agreement and sanctions are somewhat interchangeable also follows from Article 15(2) of the Procedural Rule, according to which the settlement agreement "*may set out … the possible application of disciplinary measures*". The disciplinary measures that can be included in a settlement agreement do not differ from the disciplinary measures that can be imposed through a (unilateral) sanction. In fact, all of the unredacted versions of the settlement agreements submitted before this Panel contain disciplinary measures as described and defined in Article 29 of the Procedural Rules. By choosing one legal instrument over the other, the contents of the latter is no way predetermined. Also when looking at the factual basis of a sanction or a settlement agreement there is little difference. Both legal instruments must take into account all the (relevant) circumstances of the case (cf. Article 15(1) and Article 28 of the Procedural

Rules). Finally, both legal instruments serve identical purposes. Article 15(1) of the Procedural Rule provides that a settlement agreement may be concluded if it is "effective, equitable and dissuasive". The same criteria also apply to disciplinary sanctions. In the Decision, the CFCB Adjudicatory Chamber discussed – e.g. – the possibility of a suspended sanction and found that "*a suspension* [of an exclusion of UEFA competitions] *might be appropriate in a case in which the divergence from the acceptable deviation is such that it can be corrected within a defined timescale, under a business plan which is both credible and reasonable, and where the management of the club has demonstrated by its action a clear commitment to bring the club into compliance with the Break-even requirement*." These criteria are pretty similar to the ones enshrined in Article 15(1) of the Procedural Rules. Thus, it is simply not convincing – as submitted by the Appellant – that only the settlement agreements are designed to help a club to become compliant with the CL&FFP Regulations.

140. At the end of the day, settlement agreements and disciplinary sanctions are two legal instruments serving the same purpose, issued on a similar factual basis and with interchangeable contents. There is no need to define or limit the discretion in Article 15(1) in light of the principle of legality, since any solution obtainable by a settlement agreement can also be achieved via Articles 28 *et seq* of the Procedural Rules. The Panel finds that the principle of legality only applies in circumstances where a sports association infringes upon the rights of one of its stakeholder. Only in such case the strict requirements of the principle of legality apply. The choice, however, whether to regulate a matter via a disciplinary sanction or a settlement agreement is by itself neutral and has no impact on the rights of the relevant stakeholder. Consequently, in the view of the Panel, no issues relating to the principle of legality arise in the case at hand.

B. Breach of UEFA Provisions or Statutory Law?

141. Whether to offer a settlement agreement or not (and to refer the case to the CFCB Adjudicatory Chamber) is within the discretion of the CFCB Chief Investigator. The Panel finds that by referring the case to the CFCB Adjudicatory Chamber, the CFCB Chief Investigator did not breach Article 15(1) of the Procedural Rules, but remained within the limits of the discretion accorded to him. The Appellant has no right to be offered a settlement agreement under the applicable rules. Even if a settlement agreement would be "effective, equitable and dissuasive" in a given case, the Appellant cannot claim a settlement agreement according to the express wording of Article 15(1) of the Procedural Rules, because even in such circumstances it remains within the discretion of the Chief Investigator to proceed with the offering of a settlement agreement or to refer the case to the CFCB Adjudicatory Chamber.

142. Whether the Appellant has been discriminated – in relation to other licensees – by not being offered a settlement agreement, appears questionable. The Panel is not persuaded by this on the basis of the facts before it: the case of the Appellant differs in many aspects – both procedurally (e.g. prior attempts for a voluntary agreement) and in substance from the other cited cases (Paris Saint-Germain, FC Internazionale Milano and Manchester City

Football Club). But it is true that UEFA did not completely comply with the Procedural Order of 13 July 2018 in the sense that it did not fully, in its Answer, *"summarise the Settlement Agreement process it undertook with each of the above referenced clubs ... and confirm if it saw business plans, forecasts etc. and ... explain what income/expenditure they disallowed (was it commercial income that was above the market norm, an assignment of IPR, etc.)."*. It can thus not be excluded that the Appellant's allegations of unequal treatment could have been supported by other evidence, had the Answer contained the factual elements requested by the Panel. Be it as it may, from a legal point of view, the Panel finds that even if there had been unequal treatment, this would not render the Decision illicit, because – as previously stated – the choice of the legal instrument (settlement agreement or sanction) is in itself neutral, does not impact on the Appellant's rights and therefore, cannot invalidate or infect the Decision. The same is true when looking at the case in light of Article 28 CC or European competition law. Both legal concepts require that the Appellant's rights be infringed. The Appellant, however, failed to substantiate why the mere choice between two equivalent legal instruments – completely independently of their contents – infringes upon the Appellant's rights. The Panel, in particular, rejects Dr Rompuy's finding (that is neither backed by the rules, practice or any legal authority) according to which the offer of a settlement agreement per se – i.e. independently of its contents – is always more favourable and proportionate than a disciplinary measure.

G. Did the CFCB Adjudicatory Chamber assess the facts correctly?

1. The Factual Basis of the Decision

143. The CFCB Adjudicatory Chamber based its Decision (i.e. to exclude AC Milan from participating in the next UEFA club competition for which it would otherwise qualify in the next two seasons) on the following factual assumptions:

> *"Given the scale of the Club's failure to comply with the Break-even Requirement and the doubts about the credibility of the business plan, the CFCB Adjudicatory Chamber is of the view that an exclusion is the only appropriate measure to deal with the circumstances of this case."*

144. When contemplating whether to issue a suspended sanction or not, the CFCB Adjudicatory Chamber – in addition – referred to "*the considerations of the Investigatory Chamber in the assessment of the possibility of a settlement agreement*", in relation to which the CFCB sets out as follows:

> *"In that respect, when contesting the doubts expressed by the Chief Investigator, more particularly with regard to the successful implementation of the Club's strategy in China, the effective realization of the refinancing operation concerning the debts to Project Redblack, a possible change of ownership of the Club and the consequences there from, the Club has not been able to produce convincing evidence supporting their arguments in these respects or at least their plausibility.*

With regard to the doubts expressed about the ability of the Club to continue as a going concern, according to Article 62 (3) (i) of the CL&FFP Regulations, a club is considered in breach of the indicator 'Going concern', if 'the auditor's report in respect of the annual financial statements (i.e. reporting period T-1) and/or interim financial statements (if applicable) submitted in accordance with Articles 47 and 48 includes an emphasis of matter or a qualified opinion/conclusion in respect of going concern.'

The information contained in the EY's report is a specialized information (technical analysis) provided by the Club together with its financial statements. Therefore, it was the specialized opinion of EY that there was an 'Emphasis of Matter'.

In this context, although the board of Directors and the auditor's report confirm the ability of the Club to continue as a going concern, EY also confirms that there are significant risks which were raised by AC Milan itself."

2. The Findings of the Panel

145. It follows from the above that the CFCB Adjudicatory Chamber based the Decision factually on:

- (i) the scale of the Club's failure to comply with the break-even requirement;
- (ii) doubts concerning credibility of the business plan;
- (iii) doubts relating to the refinancing operation concerning the debts of Redblack;
- (iv) the possible change of ownership; and
- (v) doubts concerning AC Milan's ability as a going concern.

146. The Panel notes that the scale of AC Milan's breach of the break-even requirement is uncontested and amounts to EUR 121 million in excess of the maximum acceptable deviation. Consequently, the decision rendered on 19 June 2018 by the CFCB Adjudicatory Chamber (the Decision) establishing that AC Milan failed to fulfil the break-even requirement must be confirmed.

147. It is equally uncontested that other facts and circumstances (beyond the size of the breach of the break-even requirement) must be taken into account when determining the consequences of such breach. This follows from Article 28 of the Procedural Rules, which provides that the CFCB Adjudicatory Chamber shall determine the type and extent of the disciplinary measure to be imposed on the basis of all the circumstances of the case.

148. The Panel notes that the CFCB Adjudicatory Chamber to a certain extent "rubber-stamped" the factual findings of the CFCB Chief Investigator at the time of the Referral Decision. Such factual assessment, however, is not in compliance with the mandate of the CFCB Adjudicatory Chamber (and even less with the mandate of this Panel). The CFCB Adjudicatory Chamber should have determined the relevant facts at the time of its decision-making process, i.e. at the time of the hearing on 19 June 2018. In addition – as already explained – the relevant reference date for this Panel's mandate is the closing of the evidentiary hearing before CAS (i.e. 19 July 2018).

a) The Business Plan

149. The business plan is an important factor when determining the consequences of a breach of the break-even requirement, because its shows the (future) financial trajectory of the club. In order to fulfil this role, the business plan must be robust and reliable. The CFCB Adjudicatory Chamber expressed "*doubts about the credibility of the business plan*" submitted by AC Milan. These doubts were based on the fact that "*AC Milan's business strategy contained many assumptions necessary to achieve the break-even requirement in the future based on very high sporting achievements in the future*" and on the fact that the original projections for the so-called China business had "*greatly decreased from the first business plan to the latest business plan presented in a period of less than a year*".

150. It is true that the latest business plan dated April 2018 (the third business plan) foresees that AC Milan will participate in the Europa League in 2017/2018 and 2018/2019 and in the Champions League in 2019/2020 and 2020/2021 (quarter finals). Mr Wehrli explained in his testimony that he thought that this scenario was rather unrealistic considering that in the past years AC Milan had never reached the quarter finals of the Champions League in two consecutive years. It is equally true that the revenues from the China business were significantly revised downwards in the (third) business plan of April 2018. Mr Wehrli in his testimony conceded that business plans must be revised based on time taking account of the latest developments. Mr Wehrli, however, also pointed out that the magnitude of the changes in the case at hand within a rather short period of time were such that the CFCB questioned the credibility of the forecasts and the business practice of AC Milan.

151. Whether the above was sufficient to disregard AC Milan's business plan of April 2018 altogether appear rather questionable. On the contrary, the Panel notes that the business plan contains a number of sensitivity analysis, i.e. "what-if-scenarios". The sensitivity analysis contemplates different scenarios whereby AC Milan does not participate in the Champions League (but in the Europa League) for the seasons 2019/2020 and 2020/2021, the net results from the China business are downsized by 50% or 75% or a combined scenario whereby AC Milan fails to qualify for the Champions League and the China net results are downsized by 50%. In all of these alternative scenarios the business plan provides for an aggregate break-even loss for the years 2018/2019 – 2020/2021 below the maximum acceptable deviation. However, the Decision does not discuss or challenge the sensitivity analysis or the assumptions made therein. Absent any submissions by the Respondent to this effect, the Panel cannot follow the CFCB Adjudicatory Chamber's conclusion that the business plan was not reliable or not sufficiently robust to forecast AC Milan's trajectory. The mere fact that AC Milan has submitted three different business plans (within a year) is equally not enough to discard the latest business plan as "not credible" without analysing its substance. This is all the more true considering that the latest business plan revised those assumptions (e.g. China business) that were heavily criticized by the CFCB before. In addition, Mr Fassone explained in his testimony at the hearing that the first business plan had been drafted hastily with little experience on the Chinese market. The assumptions in the final business plan were much more realistic and

based on experience as well as information obtained in the field. He explained that AC Milan today had secured a footprint on the Chinese market and had obtained EUR 1.65 million in signed sponsorship contracts which corresponded to the forecast for 2017/2018 in that business plan.

b) Change of ownership and the refinancing of the debt

152. The CFCB Adjudicatory Chamber also based the Decision on the finding that there was an eminent risk of change of ownership at AC Milan and that "*it was not clear which would be the consequences of it*". Mr Wehrli explained in his testimony that the change of ownership by itself was not a problem, if properly assessed in its consequences and planning. He also stated that in the case at hand the change of ownership was significant for the planned capital injections and for the viability of the business plan. Mr Wehrli stated that the CFCB Investigatory Chamber had doubts as to goals of the (ultimate) owner of AC Milan and what the latter was planning in the ambit of the difficult financial situation of AC Milan. He further stated that no information had been provided about the (ultimate) owner Mr Li and that the latter "*did not even come to the hearing before the Investigatory Chamber*".

153. This situation has significantly changed since the Referral Decision. In June 2018, HoldCo failed to make a EUR 32 million capital contribution demanded by AC Milan. Redblack injected the full amount in lieu of HoldCo. HoldCo then did not repay the relevant amount to Redblack within the agreed deadline. This constituted an event of default that entitled Redblack to enforce the pledge over the shares in HoldCo. As a result of these events on 10 July 2018, Redblack – through HoldCo – became the new controlling shareholder of AC Milan. Elliott is a well-known company that manages two multi-strategy funds which combined have approximately USD$ 35 billion of assets under management. Its flagship fund, Elliott Associates, L.P., was founded in 1977, making it one of the oldest funds of its kind under continuous management. The Elliott funds' investors include pension plans, sovereign wealth funds, endowments, foundations, funds-of-funds, and employees of the firm. Elliott Advisors (UK) Limited is an affiliate of Elliott Management Corporation. Furthermore, Elliott made it clear – in its letter dated 19 June 2018 and the press release on 10 July 2018 – what its plans were for AC Milan and that it supported AC Milan's business plan of April 2018 and its strategy. Furthermore, up until today all planned capital injections into AC Milan have been made (including the ones projected in the business plan of April 2018). Due to the change of control on 10 July 2018 in favour of Elliott, AC Milan's situation with respect of the refinancing of the debts has significantly improved, since now the creditor of HoldCo and AC Milan (Elliott) is also the ultimate owner of HoldCo and AC Milan. Mr Wehrli conceded in his testimony that the situation in relation to AC Milan's ownership and refinancing of its debt as at the date of the CAS hearing was significantly different from the time of the Referral Decision and that "*based on today's situation maybe we* [the Investigatory Chamber] *would have taken a different decision*."

c) Going Concern

154. The CFCB Adjudicatory Chamber found that there was a risk that AC Milan would not continue as a going concern. The CFCB Adjudicatory Chamber based this finding – *inter alia* – on a quote in EY's Review Report on the interim consolidated financial statements (as at 31 December 2017), which states as follows:

> *"Emphasis of Matter*
> *We draw your attention to the Going Concern note (the "Note") of the interim consolidated financial statements as at 31 December 2017, which indicates that Milan Group incurred a consolidated loss for the period amounting to Euro 27,9 million and its financial indebtedness amounts to Euro 162,1 million, a relevant part of which due within one year. As stated in the Note, this event or condition, along with other matters as set forth in the Note, indicate that a material uncertainty exists that may cast significant doubt on the Milan Group's ability to continue as a going concern. The assumptions on which the Directors have prepared the interim consolidated financial statements on a going concern basis are highlighted in the Note. Our conclusions are not modified in respect of this matter."*

155. The Appellant submitted that the CFCB misinterpreted the above quotation and that as a matter of fact there was no risk that AC Milan would not continue as a going concern. The Appellant submitted that according to Italian law the consolidated financial statements must contain a note by the board assessing whether or not the company can continue as a going concern. The purpose of the above quote is to highlight that the board complied with such examination, that it found that it was entitled to prepare the consolidated financial statements based on a going concern and that the auditors (EY) in light of such conclusion saw no reason to modify its conclusion that reads as follows:

> *"Based on our review, nothing has come to our attention that causes us to believe that the interim consolidated financial statements of Milan Group as of 31 December 2017 and for the six-month period then ended do not give a true and fair view in accordance with the Accounting Principle OIC 30."*

156. Accordingly, the Appellant submitted that the above quotation cannot be qualified as a warning by EY with respect of AC Milan's ability to continue business as a going concern. The Panel notes that the Respondent has not challenged this submission by the Appellant in a substantiated manner and therefore holds these allegations as accurate.

C. Consequences of the Above Findings

157. The Panel concludes that in light of the above the Decision of the CFCB Adjudicatory Chamber must be upheld insofar as it determines the extent of the breach of the break-even requirement. Beyond such determination the Panel finds that the CFCB Adjudicatory Chamber has not assessed the relevant facts correctly or that the facts have changed by the time of the Panel's hearing (on 19 July 2018). The Panel finds that such incorrectness / changes are – in light of Mr Wehrli's testimony – causal for the contents of the Decision and that, therefore, the sanction contained in the Decision by the mere fact that it is based on incorrect determinations is not proportionate to the aim pursued and must be partially annulled.

158. Article R57 (1) of the CAS Code provides that "*the Panel may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*". In the case at hand the Panel opts to refer the case back to the CFCB Adjudicatory Chamber. In doing so the Panel respects the autonomy of the CFCB Adjudicatory Chamber to find a proportionate response based on a careful and thorough assessment of the underlying facts as provided for in Article 28 of the Procedural Rules. Furthermore, the Panel feels itself bound by the requests of the Parties. The latter have not requested that the Panel substitutes its own decision for the annulled decision of the CFCB Adjudicatory Chamber. Instead, the Appellant – specifically –requested that the case be sent back to the CFCB. In addition, the Panel finds that in light of the nature of the present proceedings (expedited procedure) the Panel is not in a position to fully investigate and assess the factual basis of this case.

D. Conclusion

159. The Panel concludes that the Decision of the CFCB Adjudicatory Chamber must be upheld insofar as it determines the extent of the breach of the break-even requirement. Other than that the decision must be annulled and the case is referred back to the CFCB Adjudicatory Chamber to take a proportionate decision based on the findings in this Award and a proper assessment of the facts at the relevant reference date. All other or further reaching requests by the Parties are herewith dismissed.

XIII. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by AC Milan on 4 July 2018 against the decision rendered on 19 June 2018 by the Adjudicatory Chamber of the UEFA Club Financial Control Body is admissible.
2. The appeal filed by AC Milan on 4 July 2018 against the decision rendered on 19 June 2018 by the Adjudicatory Chamber of the UEFA Club Financial Control Body is partially upheld.
3. The decision of the Adjudicatory Chamber of the UEFA Club Financial Control Body rendered on 19 June 2018 establishing that AC Milan failed to fulfil the Break-Even requirement is confirmed.
4. The decision of the Adjudicatory Chamber of the UEFA Club Financial Control Body rendered on 19 June 2018 to exclude AC Milan from participating in the next UEFA Club competition for which it would otherwise qualify in the next two (2) seasons (i.e. the 2018/19 and 2019/20 seasons) is annulled.
5. The case is referred back to the Adjudicatory Chamber of the UEFA Club Financial Control Body to issue a proportionate disciplinary measure.
6. (…).
7. (…).
8. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne
Operative part of the award: 20 July 2018
Full award: on 1 October 2018

THE COURT OF ARBITRATION FOR SPORT

Ulrich **Haas**
President of the Panel

Judge Pierre **Muller**
Arbitrator

Mark **Hovell**
Arbitrator