IN THE MATTER OF AN ARBITRATION UNDER

SECTION X OF THE PREMIER LEAGUE RULES

MANCHESTER CITY FOOTBALL CLUB LIMITED — **Claimant**

- and –

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED — **Respondent**

Sir Nigel Teare
Christopher Vajda KC
Lord Dyson

PARTIAL FINAL AWARD

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I INTRODUCTION

1. Manchester City Football Club Limited ("MCFC") is, as its name suggests, a company whose business is football. In 2008 MCFC was acquired by a company owned by His Highness Sheikh Mansour bin Zayed Al Nahyan, a member of the Royal Family of Abu Dhabi. It has since become a most successful football club.

2. The Football Association Premier League Limited ("the PL") is a private company whose shareholders are the clubs which make up the Premier League. The PL exists to commercialise the Premier League competition ("the League") on behalf and under the control of its member clubs and to organise and regulate the League.

3. The relations between the PL and the member clubs are governed by the Premier League Rules ("the Rules") which take effect as a contract between the PL and its member clubs, which include MCFC, and between the clubs themselves. Changes to the Rules require a two-thirds majority of shareholders.

4. In this arbitration MCFC seeks, *inter alia,* a declaration that Rules E.55-79 of the Rules which concern Associated Party Transactions ("APTs") are unlawful and an order that two decisions of the Board of the PL ("the Board") concerning APTs to which MCFC were party should be set aside. The APT Rules were introduced in December 2021 and were amended in February 2024 ("the Amended APT Rules"). The challenge is to both the APT Rules and the Amended APT Rules.

5. The grounds of the challenge to the APT Rules and the Amended APT Rules are that they breach sections 2 ("the Chapter I prohibition") and 18 ("the Chapter II prohibition") of the Competition Act 1998 ("the 1998 Act") and the requirements of public law as to procedural fairness.

6. The grounds of the challenge to the two decisions are that the Board erred in principle in its application of the APT Rules, that the Board failed to act with procedural fairness and that the Board reached a decision which could not have been reached by a reasonable Board which had applied its mind properly to the issues to be decided. In addition, it is said that the length of time taken to reach the two decisions (and a third decision) did not comply with the APT Rules.

7. This arbitration commenced on 24 January 2024 when MCFC made a request for arbitration. MCFC appointed Christopher Vajda KC as arbitrator and the PL appointed Lord Dyson as arbitrator. On 10 February 2024 Christopher Vajda KC and Lord Dyson appointed Sir Nigel Teare as the third arbitrator and chairman of the Tribunal.

8. Pursuant to a CMC on 26 February 2024 directions were given by the Tribunal for a hearing between 10 and 21 June 2024. That hearing took place at the IDRC in London.

9. MCFC was represented by Lord Pannick KC, Paul Harris KC, Rob Williams KC, David Gregory, Luke Kelly and Natalie Nguyen instructed by Freshfields Bruckhaus Deringer. The PL was represented by Marie Demetriou KC, Andrew Hunter KC, Daniel Piccinin KC, Max Schaeffer, Jason Pobjoy, Tom Pascoe and Alastair Richardson instructed by Slaughter and May.

10. Both parties adduced considerable factual and expert evidence. A list of the witnesses is included in the Appendix to this Award.

11. Before deciding the issues which the Parties have raised for decision it is necessary to give an account (in outline, compared with the immensely detailed evidence adduced before us) of the surrounding facts, which in essence were not in dispute. We do so under five headings:

    a) The Rules prior to the adoption of the APT Rules in December 2021 (see [12-16] below).

b) The consultation with the clubs which led to the adoption of the APT Rules in December 2021 (see [16-48] below).

c) The APT Rules (see [49-72]) below.

d) The challenged assessments (see [73-134] below).

e) The Amended APT Rules (see [135-151] below).

II SUMMARY OF THE FACTS

THE RULES PRIOR TO THE ADOPTION OF APT RULES IN DECEMBER 2021

12. Mr. Jamie Herbert, the PL's Director of Governance, gave evidence of the events leading up to the adoption to the APT Rules. There was no effective challenge to his narrative of those events.

13. Following the financial difficulties faced by Portsmouth Football Club in 2009/10, which went into insolvency, the PL considered the introduction of financial regulations designed to require clubs to be profitable in order to achieve sustainability by limiting a club's aggregate losses over three years. In December 2012 the clubs of the PL, by a non-binding show of hands, supported a profitability and sustainability test. Some clubs expressed concern that "related party transactions ("RPTs") were a major issue as they could be used to inflate profits and hence show that a club was profitable even though it was dependent on them." In April 2013 two-thirds of the clubs in the PL voted in favour of the Profit and Sustainability Rules ("the PSR").

14. The PSR were inspired by, and are similar to, the Financial Fair Play ("FFP") Rules of UEFA which are "to improve the financial fairness in European competitions, as

well as the long-turn stability of European club football." The central principle of FFP regimes, like the PSR, is to protect sustainability by limiting the extent to which any club's football related expenditure can exceed its revenue.

15. The PSR contained (a) a £105 million limit on the aggregate loss a club may suffer over a three-season period (if covered by sufficiently secure funding – principally equity but not debt) and (b) an ability for the Board of the PL to restate the consideration in the club's accounts from any RPTs to fair market value ("FMV") RPT was defined as "any transaction disclosed in a company's annual accounts as a related party transaction or which would have been disclosed as such except for an exemption under the accounting standards under which the annual accounts were prepared." (Rule A 1.173 of the Rules in the form in which they appeared in the PL Handbook for the 2021/22 season.). Although there was no definition of what substantively was meant by a RPT, we understand it to have included not just sponsorship agreements but also shareholder loans. Thus the PSR covered not just revenue received by clubs but also costs expended by them. FMV was defined as "the amount for which an asset could be sold, licensed or exchanged, a liability settled, a service provided between knowledgeable, willing parties in an arm's length transaction." (Rule A 1.71 of the same edition of the Rules).

16. Under the PSR the onus was on the clubs to identify in their accounts where a transaction was a RPT. Thus the ability of the Board to restate RPTs depended upon clubs and their auditors having identified a transaction as an RPT. Any assessment of the FMV of an RPT would take place after a club had identified an RPT. In this arbitration that system has been described as *ex post*.

THE CONSULTATION WITH CLUBS WHICH LED TO THE ADOPTION OF THE APT RULES IN DECEMBER 2021

17. Mr. Herbert gave evidence that the PL had been considering the need for amendments to the PSR over a period of years. This evidence was challenged by MCFC and we deal with that challenge at [180-185] below. However it is agreed that there was no evidence of any formal initiative before the Autumn of 2021 to amend

the PSRs in the manner in which they were amended in December 2021.

18. The PL had also been investigating reports of potential breaches of the PSR since December 2018. It was also public knowledge that similar investigations had been carried out by UEFA of breaches of its FFP Rules which had brought to light the potential for RPTs to be abused by inflating the value of sponsorship deals.

19. A number of representatives of clubs gave evidence that it became apparent that the PSR regime was deficient in policing FMV transactions. The regime relied on clubs essentially making a self-declaration in their annual accounts that a transaction was with a related party. If a club failed to make a self-declaration, the PL had no practical way to determine whether a transaction was an RPT. MCFC did not make any declarations of RPTs under the PSR.

20. On 7 October 2021 Newcastle United was acquired by an investment group led by the Saudi Arabian Public Investment Fund.

21. On 12 October 2021 [redacted] emailed the PL on behalf of his club and 10 other clubs in the League. In that email [redacted] requested that notice be given of:

> - a vote in five days time (sooner if permitted) to introduce a short term ban on any related party transactions of any kind. This rule should have the widest possible definition of a "related party" perhaps using the Takeover Code definitions when applied to companies like those in the Gulf region;
>
> ……..
>
> - the rules covering related party transactions and new cost control measures, together with any sanctions for breaches, should be formulated by the PL legal and financial teams with support from a working group of Club CEO's who can volunteer.

22. On 15 October 2021 Mr. Masters, the Chief Executive of the PL emailed all member clubs stating that the PL would commence a consultation process to review certain aspects of the PSR, including the status of RPTs. Attached to his email were draft

amendments to the Rules which would put in place a moratorium on what were now to be called APTs. The amendments had been prepared with the benefit of external legal advice. Mr. Masters noted that the drafting could be reviewed at the shareholders meeting scheduled for 18 October 2021.

23. On 18 October 2021, before the shareholders' meeting, there was a meeting of the Legal Advisory Group ("LAG"), which was a long-standing working group of in-house lawyers from certain of the clubs, whose meetings were attended by representatives of the PL. This meeting lasted from 0830 to 0910. The minutes record the following:

> "He [redacted] asked whether the recent takeover of Newcastle United FC ('NUFC') and the subsequent reaction from other Clubs had accelerated the PSRs consultation process (while accepting that the Premier League had advocated for one previously). JH [Jamie Herbert] and KP [Kevin Plumb, General Counsel of the PL] acknowledged that the takeover has highlighted that we now have a spectrum of owners of Clubs with some complex structures and corporate relationship. Therefore, it is an appropriate time to assess whether these Rules are still fit for purpose. The Premier League had been looking at the PSRs since 2018 particularly as regards to achieving financial sustainability and maintaining the competitive balance of the Premier League competition.
>
> He raised concerns from a competition law perspective and requested confirmation that the Premier League had received legal advice in respect of the Rule Amendments. JH and KP confirmed that legal advice had been received, that the proposals were not without risk and that a challenge was conceivable. However, the Rule Amendments had been drafted on the basis of that advice."

24. The shareholders' meeting took place later that day from 1600 with most representatives attending remotely. Mr. Masters is recorded in the minutes as stating:

> "…..the Meeting had been convened to consider the long-term sustainability of the financial provisions of the Premier League Rules ('Rules'), including the status and treatment of 'Related Party Transactions', a topic that has been discussed by the League on a number of occasions in previous years. He explained that the Board intended to create a specific advisory group to consider a range of issues that Clubs had been asked to submit volunteers to be part of that advisory group with a deadline of the end of the day, with appointments then to be made by the Board. Once appointed, the group would hold its first meeting extremely quickly, with a view to providing recommendations for wider Club consideration at the 11 November 2021 Shareholders' Meeting.

25. A proposal was made that there should be no APTs until the new advisory group had reported and the shareholders could consider the matter on 11 November 2021. Mr. Plumb explained that:

> "….the purpose of the suspension was to protect the work of the working group and allow it time to consult with all affected parties, to address issues that have affected the League for a protracted period and to ensure that no Club takes any steps while that work is ongoing to dilute or undermine the recommendations that follow by signing agreements that might irreversibly impact competition. Finally, he reinforced the fact that the suspension would apply equally to all Clubs, have no retrospective effect and conclude extremely quickly."

26. 18 clubs voted to suspend APTs until 30 November 2021, Newcastle United voted against and MCFC abstained.

27. On 21 October 2021 the Financial Controls Advisory Group ("FCAG") was set up with representatives of 8 clubs, including Newcastle United and MCFC. There were detailed terms of reference which stated that FCAG was to:

> "make recommendations to Clubs at the 11 November 2021 Shareholders' Meeting to arrive at new Rules that safeguard the financial stability, integrity and competitive balance of the league competition and the game, in a manner that is transparent and certain, and that strikes a fair, reasonable and proportionate balance between competing interests."

28. The first meeting of FCAG took place on 25 October 2021 from 1400-1630. The minutes of the meeting span 5 pages. Mr. Herbert gave evidence that there was broad agreement that: (i) the Board (or an appointee), rather than a member club's auditor, should be able to determine whether or not a transaction was an RPT; and (ii) the retrospective approach to enforcement in the PSR was insufficient. He described the meeting as "an extremely engaged meeting, with every individual participating and providing useful views and perspectives".

29. On 29 October 2021, the Executive of the PL produced a Provisional Proposal which sought to take account of the views expressed at the first meeting of FCAG and of comments received by clubs which were not represented on FCAG. It is set out over 14 pages with 4 appendices attached. The document stated what was common ground and identified the issues to be addressed in these terms :

"There is consensus among Clubs (both on the FCAG and not) and the Executive that RPTs should not be permanently prohibited outright. There is a place for them, provided that they are transparent, that they are captured within the scope of the Rules, which are not circumventable, and that they do not permit the relevant Club to distort unfairly the competitive integrity of the league competition and the game. Once that conclusion is reached, the following consequential questions arise:

a. Is the current definition of RPT sufficient and, if not, what should it capture?

i. What type of transactions should be captured?

ii. Should there be a cap/limit on the value of RPTs?

iii. How should the definition be formulated?

b. Once identified, how should RPTs (and the assessment of value of them) be treated?

i. When should that assessment take place?

ii. Who should be responsible for that assessment?

iii. What FMV test should be applied?

iv. What should be the consequences if an RPT is assessed to be in excess of FMV?

c. How should the ancillary issues that flow from any new system be addressed? These include:

i. How should breaches of the relevant Rules be sanctioned?

ii. Should the new Rules be aligned with EFL regulations?"

30. The document set out various options and the Executive's view on them. As regards the definition of RPTs, the provisional view of the Executive was that the definition should include not only sponsorship and other commercial deals but also "[..] a reduction in costs incurred by the Club (for example, interest free loan finance from "Related Parties")". As Mr. Herbert explains in his evidence:

> "The reason for this was simple: the entire purpose of reviewing these Rules was to ensure robust policing of the PSR; the PSR consider not only revenues received by member clubs from third parties but also costs expended. If a member club could utilise relationships with connected third parties to artificially reduce costs (and thereby improve their PSR position), as a matter of logic that needed to be factored in as part of any new Rules."

31. There was then much activity. The PL received written submissions from clubs who were not members of FCAG; the PL's proposals were revised in the form of 17 Recommendations to be presented to the Shareholders; and there were further meetings of FCAG on 1 and 5 November. It was suggested by [redacted] that FCAG discuss whether interest free loans from related party should require an allocation of interest at FMV in line with the UEFA regulations. Following a discussion, it was agreed that the proposal should exclude interest-free loans as requiring re-assessment at FMV. Mr Herbert's recollection is that it was not the purpose or function of the PSR, or the proposed new rules, to prohibit or limit investment by owners in clubs provided it was done in a way that was direct (i.e. from the owner straight to the member club, rather than via a third party), open and transparent.

32. By an email dated 2 November MCFC set out its views and Newcastle United set out its views by an email dated 4 November. The PL obtained legal advice on the lawfulness of the Recommendations, principally but not exclusively under competition law from Helen Davies KC and Richard Blakely on 7 November. Counsel "consider[ed] that "the Recommendations regarding the treatment of RPTs have at least a good prospect of resisting any sustained legal challenge." As regards the proposed FMV assessment, they observed that "The standard of "evidently in excess of FMV should ensure that it is only obviously abusive transactions that are prevented and thus that there is no unintended collateral adverse effect on competition." On 8 November the PL circulated an updated version of the 17 Recommendations (which had been discussed by FCAG on 5 November) and copies of the legal advice.

33. The shareholders' meeting took place on 11 November to consider the 17 Recommendations. The PL's proposals described their aim as being :

> "…..to safeguard the financial stability, integrity and competitive balance of the league competition and the game, in a manner that is transparent and certain, and that strikes a fair, reasonable and proportionate balance between competing interests. These objectives are not only for the long-term benefit of the League and its Clubs, but also for other stakeholders in our game, including fans, by encouraging a competitive level playing field that is underpinned by financial responsibility."

34. In the light of certain issues debated in this arbitration it is necessary to refer specifically to certain of the Recommendations.

35. Recommendation 1 was that RPTs should continue to be permitted but subjected to a more robust regulatory scheme. However, Recommendation 2 was that shareholder loans and equity injections were to be excluded from the definition of RPTs (unlike, for example, UEFA). This was to "continue to encourage investment".

36. Recommendation 9 concerned the assessment of the FMV of an APT. It was expressed in these terms:

> "The Board is responsible for making the assessments required but utilising three 'inputs': its own independent expert assessment; an assessment provided by the Club (whether by itself or with external assistance) and such comparable evidence as is available. To assist with the last of these 'inputs'. Clubs should be compelled to assist the Executive in creating a databank of transactions which, once established, must also be used by the Board. Determinations of the Board should be reviewable under the Section X (Arbitration) mechanics only where a Club can show that the Board's conclusions are outside the bounds of reasonable assessment."

37. In making this Recommendation the PL considered a number of options and concerns. In reaching its preferred view it said:

> "51.We believe this provides the right balance between independence of the process, appropriate expertise and providing the Board (which is ultimately responsible for regulating the competition) with the autonomy to deal with issues on a case by case basis. It also allows all parties to utilise the Section X arbitration provisions where there is a dispute.

> 52. The assessment of FMV should be a matter of discretion for the Board (whether on the basis of independent recommendation or otherwise). The Board should always give the Club an opportunity to respond in the event that it considers the transaction not to be at FMV. Should the Board remain of the same view, notwithstanding the Club response, its determination should only be reviewable (under Section X (Arbitration) of the Rules) if the conclusion on FMV is outside the bounds of a reasonable assessment. In other words, it must not be for the Board to prove that the valuation put on the transaction by the Club is unreasonable. It must be for the Club to show that the Board's decision (whether on the basis of the independent recommendation or otherwise) is unreasonable, given the evidence that was before it. This is the same approach as in other sports. Given the need for expediency, the timetables in Section X should be abridged to provide for a fast-track process, should a Club wish to challenge a decision by the Board."

38. Recommendation 10 was that there should be no change to the current definition of FMV but that a detailed FMV Protocol should be adopted to determine process. The PL explained that this was "to provide specific guidance on the factors to be considered by the assessor in determining FMV in relation to commercial partnerships and should assist with consistency in valuations." It was also "to set out the Club's ability to make submissions and adduce evidence and the specific question to be asked of the League's independent expert (whether that is to identify a single value as FMV or a range)." Finally, it was to deal with the deadline by which the PL would respond to a submission by the Club.

39. Recommendation 11 was that Club valuations will not be restated by the Board unless they are, in the reasonable opinion of the Board, evidently in excess of FMV. The PL explained that:

> "Given the different ways of calculating FMV and the likelihood that different experts would come to different calculations entirely legitimately (and potentially then in the form of a range of possible valuations), the Executive is of the view that a tolerance should be built into the Board's assessment. Rather than use an arbitrary number or %, the Executive prefers that restatement should only take place if the Club's valuation is evidently in excess of FMV."

40. Recommendation 12 was that transactions that fall to be assessed should be permitted at FMV and clubs should not be able to retain the "excess value" above FMV. The PL explained that:

> "to ensure that the competitive integrity of the league competition and the game is not distorted unfairly, it should not be permissible for a club to enjoy the benefits of artificially above market commercial deals, whether for the purposes of the PSRs or otherwise. The Executive considers that there is a reputational element to this debate that should not be ignored. Any new rules in this area should seek to promote transparency, an aim that would seemingly be defeated if Clubs were able to continue to be able to take any benefits of artificially inflated transactions."

41. At the shareholders' meeting on 11 November 2021 all these Recommendations were approved with 19 members, including MCFC, voting in favour and Newcastle United abstaining.

42. On 19 November 2021 the fourth meeting of FCAG took place. The detail of the proposed drafting of the new rules was discussed.

43. On 23 November 2021 the LAG considered the proposed rule changes. In particular the arrangements concerning the confidentiality of the databank referred to in Recommendation 9 (see [36] above) ("the Databank") were discussed. Access to it would be restricted to the PL's Regulatory Team so that the PL's Commercial Team would not have access to it. In addition, the independent expert would not have access to it. Both of these restrictions were sought by some of the clubs.

44. On 26 November 2021 the suspension in respect of APTs was extended until 14 December, with MCFC voting against. On the same day Mr. Masters of the PL provided to the FCAG (i) an updated draft of the Rule Amendments, (ii) the FMV protocol and (iii) a paper setting out proposals for the Databank.

45. On 1 December 2021 the fifth meeting of FCAG took place. The PL advised that Nielsen Sport ("Nielsen") was recommended as the independent expert. There was no objection. This is not surprising since, as we learnt from the evidence in this case,

Nielsen is well known in the field of valuation of sports rights and has worked for many clubs, including MCFC.

46. On 8 December 2021 Helen Davies KC provided further legal advice. On the same day the PL provided to all member clubs the papers for the upcoming shareholders' meeting on 14 December 2021 and advised that Nielsen had been appointed as the independent expert.

47. On 14 December 2021 the shareholders' meeting took place. There was a vote on (i) the proposed amendments to the Rules, (ii) the FMV Protocol (see [59] below) and (iii) the Databank terms and conditions. They were all passed. 18 clubs were in favour and MCFC and Newcastle United voted against. Following the approval of the rule changes by the FA on the same day, the new APT Rules came into effect. MCFC reserved its right to challenge the lawfulness of the rule changes and the FMV process.

48. The Databank became operational on 20 December 2021 and member clubs began uploading their transactions and commercial agreements into it.

THE APT RULES

49. Having described the process which led to the adoption of the APT Rules in December 2021, it is now necessary to set out the most material of them, with others set out in the Appendix to this Award.

50. APTs are dealt with between E.55 and E.75 of the Rules. There is "Guidance" following the text of some Rules.

51. Rules E.55-57 are entitled "Associated Party Transactions" and provide as follows:

> "E.55 Each Associated Party Transaction must be submitted to the Board (in such form and including such detail as required by the Board) in order for the Board to conduct a Fair Market Value Assessment of it.
>
> E.56 The submissions required by Rule E.55 must be made to the Board either:

E.56.1. prior to execution of the agreement governing the Associated Party Transaction; or

E.56.2. within two clear working days after the execution of the agreement governing the Associated Party Transaction.

E.57 Where the Club opts to execute an Associated Party Transaction prior to receiving written confirmation from the Board in accordance with these Rules that it approves the Transaction and that no further action will be taken in respect of it, the Club must ensure that the receipt of consideration, of any kind, by it under the terms of the Associated Party Transaction is made expressly subject at all times to confirmation by the Board (in accordance with Rule E.64) that the Board approves the Transaction and no further action will be taken in respect of it.

Guidance

For the avoidance of doubt, a Club may provide rights to a counterparty under the terms of an Associated Party Transaction prior to receiving approval from the Board in respect of that Transaction under the Rules but may not receive any consideration. Receipt of any consideration whatsoever by a Club under the terms of an Associated Porty Transaction prior to confirmation that the Board approves the Transaction shall be a breach of these Rules."

52. In the context of the competition law challenge, an important feature of the new *ex ante* system introduced by the APT Rules is that the club is prevented from receiving the consideration agreed to be paid by an Associated Party until the APT is approved by the Board.

53. The definitions of Associated Party and APTs are in Rules A.1.23 and A.1.24. They are set out in the Appendix to this Award.

54. The exclusion of shareholder transactions from APTs is provided for by Rule A.1.244 which defines "transaction" as:

"an agreement or a transfer, licence, provision and/or fulfilment of resources, right, services or obligations … in any form, save for

(a) any loan or security provided to the Club by a Person that is in the same group of companies as the Club and/or a Person that holds (whether directly or indirectly) a Holding in excess of 5% of the Shares in the Club."

Rule A.1.244(b) also excludes from APTs "any equity investment or capital contribution in/to the club by a Person".

Rule E. 58 provides that where an APT is submitted or discovered the Board will conduct a FMV of it.

55. FMV is defined in Rule A.1.94 as:

> "the amount for which an asset, right or other subject matter of the Transaction could be sold, licensed or exchanged, a liability settled, or a service provided, between knowledgeable, willing parties in an arm's length transaction."

56. An important word in this definition is "could" which requires an assessment of the amount for which a right "could" be sold for, not what it "would" be sold for.

57. "Fair Market Value Assessment" is defined in Rule A.1.95 as:

> "…….an assessment as to whether the consideration either paid or received or to be paid or received by the Club, Player, Manager or Senior Official (as applicable) pursuant to a Transaction represents Fair Market Value. In conducting a Fair Market Value Assessment, the Board is required to:
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> (a) consider:
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> (i) an assessment of the value of the Transaction produced by an independent expert procured by the Board .....;
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> (ii) any relevant information provided by the Club (including any assessment of the value of the Transaction produced or procured by the Club); and
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> (iii) such comparable evidence of the values of similar Transactions as is appropriate, relevant and readily available to it at the time of the assessment; and
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> (b) comply with any protocols agreed by Clubs for that purpose (including the Fair Market Value Assessment Protocol - Commercial Rights Agreements at Appendix 18 of the Rules). For the avoidance of doubt, where there is no such protocol in place applicable to a particular type of Transaction, the Board will conduct the Fair Market Value Assessment as it sees fit, in compliance with paragraph (a), above."

58. This Rule thus identifies the three categories of information to which the Board must have regard in making an assessment of FMV.

59. Appendix 18 (the FMV Protocol) runs to 14 paragraphs. It is set out in its entirety in the Appendix to this Award. Part A, paragraphs 1-2, describes the types of APTs and Threshold Transactions to which the Appendix applies. Part B, paragraphs 3 and 4, sets out the definitions of FMV and FMV Assessment which are stated in the body of the Rules. Part C, paragraphs 5-7, deals with the process to be followed. Paragraph 5(c) states that where a Club is required to submit a Transaction it "must" submit "any relevant information, evidence or submissions that the Club wishes to be considered by the Board as to the FMV of the Transaction". Paragraph 6 provides for the Board to obtain an assessment of FMV from the independent assessor based on the FMV Assessment Factors. Paragraph 7 provides that the PL may require further information or documents from the Club and that the Club must provide complete and assistance in that regard. Part D, paragraphs 8-10, contains the list of the FMV Assessment Factors. Paragraph 10 provides that the assessor will provide its decision as to FMV "whether expressed as a single value or a range of values, as it deems appropriate". Part E, paragraphs 11-14, concerns the Board's assessment. Paragraph 11 requires the PL's Regulatory Team to provide a report to the Board. Paragraph 13 provides:

> "Where, having reviewed the report referred to in paragraph 11, above, the Board determines, in its reasonable opinion, that the Transaction is evidently not at Fair Market Value, it will inform the Club, Player, Manager or Senior Official of its provisional determination in writing. The Club, Player, Manager or Senior Official will then be given seven days in which to respond to this provisional determination. Where following receipt and consideration of the response, the Board remains of the view that the Transaction is evidently not at Fair Market Value, it will confirm that decision in writing and Rule E.65 will apply."

60. Rule E.64 provides as follows:

> "Where the Board is required to conduct a Fair Market Value Assessment in accordance with these Rules, it will conclude that Fair Market Value Assessment (and communicate its findings, including whether the Board approves the relevant Transaction, to the Club) within 10 clear working days of either receipt of the Associated Party Transaction in accordance with Rule E.55, or its determination in

accordance with Rule E.63, as applicable, save where further time is required due to exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision."

61. This Rule is significant because MCFC alleges that the time taken by the PL to determine three FMV Assessments submitted by the Club was longer than permitted by this Rule.

62. Rule E.65 provides that where the Board has determined that an APT (yet to be executed) is evidently not at FMV, then the Club may not execute the APT and where it has been executed the Club is obliged to end the APT or vary it so that the consideration is not in excess of FMV. The Guidance to this Rule provides:

"Where the Boord considers that a Transaction is evidently not at Fair Market Value, it will, prior to making the determination, provide the relevant Club with a provisional indication to that effect, together with written reasons, and an opportunity to produce any further submissions it wishes to make within seven days, which the Board will consider before making a final determination."

63. Rules E.70 and 71 deal with challenges to a determination of FMV.

64. E.70 provides that:

"A Person may challenge a determination by the Board under Rules E.63, E.65 or E.68, by way of arbitration pursuant to Rule X.3, with the dispute deemed to be a 'Board Dispute', for the purposes of Rule X.3.2."

65. Rules X.5 provides that in the case of a "Board Dispute" the permitted grounds of review include that the decision could not have been reached by any reasonable Board which had applied its mind properly to the issues to be decided or was contrary to English law. Thus there is no right of appeal on the merits .

66. Rule E. 71 concerns FMV disputes, the most material of which is E.71.2 which provides:

"notwithstanding Rule X.18.3, and with the sole exception of information concerning any specific Transactions considered by the Board in order to inform its decision under Rule E.65 (the "Comparable Transaction Data") - the disclosure

> of which, if requested, shall in accordance with Rule E.71.3 - no party shall be entitled to any disclosure in respect of the Databank (and for this purpose, all Persons bound by these Rules hereby undertake not to seek disclosure of the Databank in any forum for any purpose), and the tribunal shall not have jurisdiction to order disclosure of all or part of the Databank for any reason. All parties to these Rules agree that the non-disclosure of the Databank shall not prevent them having a fair and reasonable opportunity to present their case (or deal with that of their opponent(s)) in the context of an FMV Dispute;

67. This provision is relevant to at least one of MCFC's arguments based on procedural fairness.

68. Rule E.71.3 provides arrangements to protect the confidentiality of Comparable Transaction Data when it is disclosable, the first of which is that Comparable Transaction Data shall be disclosed to external legal advisers and independent external experts but not to any parties to a dispute, subject to Rule E.71.4 which provides that:

> "the single arbitrator or chairman of the tribunal (as applicable) will have the power, in exceptional circumstances, where a party is able to demonstrate that it is necessary to remedy or avoid any unfairness in the process, to order disclosure of the Comparable Transaction Data to one or more identified representatives of the Club, subject at all times to the provisions of Rules E.71.3. Where such an order is made, the individual(s) to whom the Comparable Transaction Data is/are to be disclosed will be treated as External Recipients of Data for the purposes of Rules E.71.3.2 to E.71.3.5 and E.71.3.7 to E.71.3.9.

69. Rules E.72-74 deal with the Databank.

70. Rule E 72 provides that the clubs are obliged to submit Databank Transactions to the PL.

71. Rule E.74.1 provides that such submissions will be subject to strict information security measures agreed by the Board and the clubs. The Tribunal was informed that there was a Databank Protocol. We were referred to a document entitled Commercial Databank Terms and Conditions of Use (effective as of 9 February 2024). Clause 5(b) (which we assume also applied prior to February 2024) provides:

> "Subject to point (a) above [which provides that each Club may access its own data], access to the complete CDB [the Databank] will be strictly restricted to the

League's Regulatory team and members of its IT Department for the sole purpose of assisting with Fair Market Value Assessments and maintaining and operating the CDB ('Permitted Persons'). No other use of the CDB for any other purpose whatsoever will be permitted. A list will be maintained (and be made available to Clubs on request) of Permitted Persons."

72. This provides that only the Regulatory Team (and members of the IT Department) may have access to the Databank and is consistent with Rule E. 74.2 which provides that the Databank will be used to assist the Board with the process of FMV Assessments.

THE CHALLENGED ASSESSMENTS

First Abu Dhabi Bank ("FAB")

73. In April 2023 MCFC negotiated a sponsorship agreement with FAB. The agreement was for [redacted] and provided for a total consideration of [redacted] for that period.

74. On 20 April 2023 MCFC submitted the FAB transaction to the PL together with a valuation report from [redacted]. On 2 May 2023 the PL informed MCFC that it had determined that FAB was an Associated Party and invited any submission to the contrary by 9 May 2023. On 4 May 2023 MCFC said it did not wish to make representations on that issue.

75. On 15 May 2023 Nielsen sent its FMV report to the PL's Regulatory Team. On 19 May 2023, following receipt of information from MCFC which had been requested by the PL, Nielsen provided an updated report which extended to over 30 pages.

76. Ms. Blake of the Regulatory Team gave evidence that, in order to ascertain whether directly comparable transactions were held in the Databank, all of MCFC's transactions held in the Databank that had an average annual value of between [redacted] were identified. [redacted]. This meant that any transaction that MCFC had entered into for similar rights at a similar value to that attributed to the transaction by either [redacted] or MCFC would have been identified.

This exercise, which was undertaken by more junior members of the Regulatory Team upon instruction from Ms. Blake, identified [redacted] transactions that MCFC had submitted to the Databank.

77. On 23 May 2023 the Regulatory Team sent its report to the Board. The report ran to 7 pages and enclosed the Nielsen report, the submissions and evidence provided by MCFC and a summary of comparator transactions from the Databank. The report recommended that the Board decide that the FAB Transaction was evidently not at FMV.

78. The Board's sub-committee dealing with this matter was Ms. Fyfield and Mr. Ryder KC. Ms. Fyfield gave evidence to the Tribunal, effectively on behalf of the Board. It was apparent from her evidence when cross-examined that she had applied her mind most carefully and conscientiously to the task of assessing the FMV of the transactions placed before her. Her approach was not simply to accept the recommendation of the Regulatory Team but to consider the question before the Board critically and with care and diligence.

79. Ms. Fyfield [redacted] It is apparent from her evidence that she had well in mind that the definition of FMV required her to assess the amount for which an asset "could" be sold, not "would" be sold. [redacted]

[redacted] So the Regulatory Team requested Nielsen to say "what, in their view, the top end of the range as to the value a Club could expect to receive for the FAB Transaction would be". [redacted] Ms. Fyfield [redacted]

80. Thus on 31 May 2023 the Board issued its Provisional Determination that the FAB transaction was evidently not at FMV. The Determination ran to 7 pages and explained the Board's reasoning. Some information was given with regard to comparable transactions (all of which were with MCFC). The Board requested any further submissions by 7 June 2023. On that date MCFC requested further documentation and information concerning the Provisional Determination. In particular MCFC requested the report prepared by the Regulatory Team, details of the comparator transactions from the Databank and details of the comparator transactions considered by Nielsen.

81. On 27 June 2023 the PL replied saying that the report by the Regulatory Team would not be provided. However, details of the [redacted] comparator transactions from the Databank were provided. With regard to Nielsen's own database the comparable transactions in that resource had not been provided to the PL and so could not be provided to MCFC.

82. On 2 August MCFC emailed to the PL a letter dated 28 July 2023 which contained further submissions. It was said that the PL had selected comparator transactions on a flawed basis (by reference to value rather than to comparable rights).

83. The Regulatory Team considered MCFC's letter of 28 July 2023.

84. With regard to the criticism by MCFC of the selection of comparator transactions, Ms. Blake gave evidence that the Regulatory Team carried out further analysis of the Transactions in the Databank by running a search for 'Affinity Agreements'. That search identified [redacted] potential comparator Transactions, but the Regulatory Team ultimately concluded (i) that [redacted] of the Transactions (to which MCFC was not a party) were of limited value and also materially different (in terms of the tangible inventory provided) to the FAB Transaction, and (ii) that the other [redacted] (being Transactions to which MCFC was a party and one of which had fallen within the [redacted] Transactions considered prior to the Board making its provisional determination) were for lower values than the FAB Transaction and were in respect of regions with much larger populations than the UAE.

85. The Regulatory Team sent a further report to the Board on 15 September 2023. It ran to 6 pages. The recommendation remained unchanged from the previous report, namely, that the Board should find the FAB Transaction to be evidently not at FMV, and that it should determine in its reasonable opinion that the FMV of the FAB Transaction was [redacted] per year. The report included the MCFC's letter (received on 2 August 2023) and anonymised details of the comparator transaction analysis that the Regulatory Team had completed, both prior to the provisional determination letter and following MCFC's submissions.

86. On 18 September 2023 Ms. Fyfield and Mr. Ryder had a call with the Regulatory Team to discuss the information provided, following which they approved the recommendation set out in the Regulatory Team's report to the Board.

87. Due to what Ms. Fyfield understood to be an oversight within the Regulatory Team (which was confirmed by the evidence of Ms. Blake of the Regulatory Team), the

PL's final determination letter was only issued on 13 November 2023. The final determination was that the FAB Transaction was evidently not at FMV and as such MCFC was required to vary the Transaction so that it did not exceed FMV (determined to be [redacted] per year).

Emirates Palace ("EP")

88. The transaction with EP was also submitted to the PL on 20 April 2023. The transaction was for a period of [redacted] with a total consideration of [redacted], or [redacted] per year. In the event, although the PL issued a Final Determination that this transaction was evidently above FMV, it subsequently reconsidered that Determination and concluded that it no longer considered the transaction to be evidently not at FMV. However, the time taken to resolve this question is the subject of a complaint by MCFC and so it is necessary to summarise the relevant chronology, though not in as much detail as the FAB Transaction.

89. Following an exchange of correspondence the PL advised MCFC on 26 May 2023 that EP was an Associated Party and requested any representations to the contrary by 2 June 2023. On 7 June 2023 MCFC confirmed that it would not make any.

90. Between 13 and 19 June MCFC provided the PL with clarification of certain matters.

91. On 2 August 2023 MCFC wrote to the PL complaining about the time being taken by the PL to assess the FMV of the EP Transaction. On 6 August 2023 the PL rejected those criticisms and referred to resource constraints in both the PL and Nielsen. The PL said that the 10 day period in the Rules was not absolute.

92. On 4 August 2023 the Regulatory Team sent its report to the Board recommending that the Board determine that the EP Transaction was evidently above FMV, the upper end of Nielsen's range being [redacted] per year.

93. Ms. Fyfield again focused on identifying the main drivers which were causing the difference between Nielsen's valuation and the valuation from [redacted] submitted

by MCFC. She asked certain questions and on 10 August 2023 the Regulatory Team provided a supplementary report. By 13 August 2023 both Ms. Fyfield and Mr. Ryder had approved the Regulatory Team's recommendation and on 14 August 2023 the PL issued its Provisional Determination that the EP Transaction was evidently above FMV. Further submissions were requested by 21 August 2023. At the request of MCFC that date was extended until 4 September 2023.

94. Between 30 August 2023 and 8 September 2023 MCFC requested further information and the PL replied to that request. On 18 September 2023 MCFC requested an extension of time in which to make further submissions until 2 October 2023. PL agreed to that request and to a later request that time be extended until 6 October 2023.

95. On 13 October 2023 MCFC raised further questions to which the PL replied on 23 November 2023.

96. On 5 January 2024 MCFC provided its final submissions in response to the Provisional Determination.

97. On 17 January 2024 the PL requested certain information from MCFC to which MCFC replied on 19 January 2024.

98. On 7 February 2024 the Regulatory Team sent its report to the Board with its FMV recommendation of [redacted], slightly adjusted to reflect further information provided by MCFC on 2 February 2024.

99. Ms. Fyfield studied the report and raised further questions about, [redacted]. In response a further report, with input from Nielsen, was provided on 23 February 2024. Following further comments of Ms. Fyfield the FMV of the EP Transaction was revised to [redacted]. [redacted].

100. On 1 March 2024 the PL issued its Final Determination that the EP Transaction was evidently above FMV.

101. On 29 March 2024 MCFC sought to challenge the Final Determination in this arbitration and provided to the PL additional submissions in respect of the EP Transaction. As a result of this further information, the Regulatory Team instructed Nielsen to conduct further analysis and produce an updated FMV Report.

102. On 25 April 2024 the Regulatory Team provided the Board with a further report in which it recommended that it would be appropriate for the Board to reconsider the earlier Final Determination.

103. The Board considered this and decided to revise its earlier decision and determined that the EP Transaction was not above FMV.

Ethiad Aviation group ("EAG")

104. On 17 November 2023 MCFC notified the PL that it had agreed a new sponsorship agreement with EAG for the period from [redacted]. MCFC stated that the EAG Transaction was an APT and enclosed the draft agreement entitling MCFC to receive up to a maximum of just over [redacted] over the [redacted] term, a report from [redacted] valuing the EAG Transaction at [redacted], a letter from [redacted] dated 18 September 2023 containing an offer of [redacted] for the 2024/2025 season increasing by [redacted] and an email offer from [redacted] dated 28 September 2023.

105. On 22 November 2023 the PL requested Nielsen to carry out an FMV assessment of the EAG Transaction.

106. Before recounting the events which followed we would observe that Ms. Blake was informed by Nielsen that, based on their experience, the breadth of the rights granted to EAG under this single transaction was as large as the rights that some football clubs would grant across all of their sponsorship agreements with multiple counterparties. Ms. Blake commented that the significant scope and potential value

of the EAG Transaction meant that the FMV Assessment had been particularly complex and required the PL to engage more closely with Nielsen than usual to satisfy itself that their assessment of the EAG Transaction and the Board's provisional determination were reasonable and robust. Accordingly, the FMV Assessment of the EAG Transaction required the PL to make multiple requests for further information from MCFC and involved numerous exchanges with MCFC and with Nielsen on an iterative basis as the assessment progressed.

107. On 28 November 2023 the PL raised 16 questions and said there were likely to be further questions in due course.

108. The inventory in the EAG Transaction comprised 90 pages. On 1 December 2023 the PL advised that having regard to the considerable inventory and the questions asked by Nielsen, the PL would not be able to provide a determination in line with the 10 working days provided by Rule E.64.

109. Between 6 December 2023 and 10 January 2024 MCFC provided certain information and further requests were made by the PL.

110. On 16 January 2024 Nielsen provided its draft report to the PL.

111. On 23 January 2024 the PL advised MCFC that having regard to the exceptional circumstances there was no requirement on the PL to conclude its FMV assessment within 10 working days.

112. On 9 February 2024, following discussions between Nielsen and the PL, Nielsen provided a revised draft report.

113. The Regulatory Team compared the [redacted] report which had been submitted by MCFC and the draft Nielsen report. Ms. Blake gave evidence that, given the "delta" between Nielsen's and [redacted] valuations and the fact that the difference appeared to result from the different valuation methodologies adopted, as well as the quantum of the consideration and the scale of the rights granted under the EAG Transaction, the Regulatory Team considered that it would be appropriate to share

the [redacted] report with Nielsen for their consideration (with figures redacted, analogous to the redaction of the figures in transaction agreements, as required under the Rules). This was both to enable Nielsen to take the [redacted] report (including the assumptions noted and methodologies used) into account in their valuation of the EAG Transaction (to the extent Nielsen felt it was appropriate to do so), and to aid the PL's understanding of the different methodological approaches they had each adopted and why they had arrived at materially different valuations. Nielsen was provided with this material, as well as redacted versions of the offers made by [redacted] and [redacted], on 13 February 2024.

114. On 16 February 2024 Nielsen provided a further draft report.

115. On 20 February 2024 Nielsen and the PL discussed the further material which had been sent to Nielsen.

116. On 22 February 2024 the PL asked questions of Nielsen concerning its methodology and other matters.

117. On 27 February 2024, following a CMC on 26 February 2024, the Tribunal ruled that the PL should issue its Provisional Determination by 15 March 2024, that MCFC should provide its submissions on that Provisional Determination by 22 March 2024 and that the PL should issue its Final Determination by 5 April 2024.

118. On 8 March 2024 Nielsen provided its final report.

119. Throughout this period, the Regulatory Team had been considering the matter of comparable transactions. [redacted]. Ms. Blake [redacted]

[redacted]

120. On 9 March 2024 the Regulatory Team provided its report of 22 pages to the Board which was accompanied by 11 lengthy appendixes (including the 130-page report from [redacted]). The Regulatory Team recommended that the Board determine that the EAG Transaction was evidently above FMV because Nielsen's estimated FMV was between [redacted] and [redacted].

121. Once again Ms. Fyfield focused on identifying the key drivers for the different assessments by Nielsen and [redacted]. She and Mr. Ryder were assisted in doing so by the fact that Nielsen had already examined the [redacted] Report. The key drivers were (i) the different methodologies adopted and (ii) the "escalator". As to the latter, to calculate the value of rights over years [redacted] of the transaction, [redacted] had applied a [redacted] rate as well as a further Compound Annual Growth Rate ("CAGR")] of [redacted] to the value of certain [redacted] rights. In contrast, Nielsen considered that the only appropriate escalator was a CAGR of [redacted]. As this difference was giving rise to a large difference over the [redacted], Ms. Fyfield and Mr Ryder wanted to test Nielsen's determination that a CAGR of [redacted] was appropriate.

122. On 12 March 2024 there was a meeting between Ms. Fyfield, Mr. Ryder and representatives of the Regulatory Team and Nielsen.

123. On 14 March 2024 the Regulatory Team provided a supplementary report to the Board dealing with the questions raised by the Board. On the same day Nielsen provided a revised Final Report and a further short report on CAGR which provided an explanation of how its CAGR of [redacted] had been assessed.

124. On 15 March 2024 the Board issued its Provisional Determination that the EAG Transaction was evidently above FMV.

125. On 23 March 2024 at 2.23 am. MCFC provided its further submissions. These were accompanied by a supplementary report by [redacted], and an additional four valuation reports prepared for MCFC by [redacted] and [redacted] and a report prepared by [redacted] for EAG. They ran to some 600 pages.

126. From 28 March 2024 to 12 April 2024 there was considerable correspondence between the PL and MCFC. The PL made 96 requests in 5 letters for further documents or information (some of which had been requested by Nielsen). From 2 April 2024 until 19 April 2024 MCFC made various requests of the PL.

127. In the light of the volume of material provided by MCFC the Tribunal was requested to extend the time for the issue of the Board's Final Determination. The Tribunal initially extended time until 22 April 2024 and then to 25 April 2024.

128. In addition to seeking the response of Nielsen to the submissions made by MCFC and to the additional valuations provided by MCFC, the Regulatory Team decided that it was necessary to seek further assistance from another consultant, [redacted].

129. On 18 April 2024 (before all of the PL's requests for information had been answered and whilst the PL was responding to the Club's requests) the PL requested [redacted] to provide "observations and conclusions on the material that has been provided to the Board." [redacted] was requested to provide its "observations and conclusions by reference to these documents and any publicly available information that you consider relevant." The letter of instruction concluded by saying: "In view of the short timeframes that the Board is working to in order to reach a final determination, any indicative views that you might have on the material in the time available and based on the data accessible to you would be of great assistance."

130. In response [redacted] provided two reports, one which set out observations in respect of the alternative valuations provided by the Club (described in this arbitration as the [redacted] Memorandum) and another which provided a benchmarked assessment as to the

FMV of the EAG Transaction by reference to publicly available information (described in this arbitration as the [redacted] Benchmarking Analysis). The Regulatory Team provided them to the Board at 2300 on 23 April 2024.

131. Early in the morning of 25 April 2024 the Regulatory Team provided the Board with Nielsen's finalised revised FMV assessment and a supplementary report. (Together they appear to comprise just over 180 pages.)

132. The Regulatory Team's further report was provided later on 25 April 2024. It consisted of 39 pages plus appendices.

133. Following calls between the Board, the Regulatory Team and Nielsen the Board was able to reach its decision on 25 April 2024, communicated to MCFC the same day, with its reasons provided on 26 April 2024. With respect to the total value to be received by MCFC over the [redacted] of the EAG Transaction the determination was that it was at least [redacted] ([redacted]) in excess of FMV. In its reasons the Board addressed the submissions which had been made by MCFC and the evidence which MCFC had provided.

134. It is apparent that the Board and the Regulatory Team worked extremely hard to meet the deadline set by the Tribunal for the issue of the Final Determination. Ms. Fyfield referred in her evidence to getting up extremely early to read the reports and Ms. Blake gave evidence that the members of the Team had to work very long hours, working every weekend, and often into the early hours of the morning.

THE AMENDED APT RULES

135. In February 2023 FCAG was re-constituted with terms of reference which included consideration of the impact and effectiveness of the new system of APTs, whether it needed to be amended and the monitoring and enforceability of the system.

136. On 20 July 2023 FCAG had its first meeting at which a number of "areas of review" were identified.

137. On 10 August 2023 the second meeting of FCAG took place. The PL's executive set out its provisional recommendations for consideration and discussion.

138. On 7 September 2023 the third meeting of FCAG took place. The PL executive set out 14 recommendations that were being proposed following the feedback from the second meeting.

139. The first of the proposed changes which are relevant in the context of this arbitration concerned the removal of "could" and its substitution by "would" and the insertion of the term "normal market conditions" in the definition of Fair Market Value. Thus the definition would read:

> "Fair Market Value" means the amount for which an asset, right or other subject matter of the Transaction *would* be sold, licensed or exchanged, a liability settled, or a service provided, between knowledgeable, willing parties engaging in an arm's length transaction *in normal market conditions*." (our emphasis)

140. The second relevant change was to lower the standard of proof by removing the "evidently" qualification from the requirement that the Board's determination under Rule E.65 was to be that the relevant Transaction was not at FMV.

141. The third relevant change involved shifting the burden of proof so that the burden would be on a club submitting an APT to show that it is at FMV rather than on the Board to prove that it is not.

142. The fourth relevant change was the replacement of the 10 day time period for concluding a FMV assessment where the Board requires further information or discussion with a 30 day backstop for standard commercial and player APTs provided the club supply information in a timely fashion. The new time provisions are Rules E.65 and 66 which are set out in the Appendix.

143. On 10 September 2023 legal advice on the proposed rule changes was obtained from Helen Davies KC.

144. On 21 September 2023 there was a shareholders' meeting. Prior to this meeting MCFC wrote to the PL expressing its concerns as to the above changes.

145. At the meeting 15 clubs voted in favour of the proposed amendments and 5, including MCFC, voted against.

146. On 27 October 2023 MCFC wrote to the PL expressing its concern that the proposed amendments were unlawful

147. On 21 November 2023 at another shareholders' meeting the amended rules were put to a vote. 13 clubs voted in favour but 7 (including MCFC) voted against it. Accordingly, the resolution to approve the amended rules was not carried. There was evidence that some clubs were concerned about the personal liability of club directors.

148. On 18 January 2024 the PL circulated a revised version of the proposed amendments which removed the amendments concerning personal liability of directors.

149. On 24 January 2024 MCFC commenced these arbitration proceedings.

150. On 9 February 2024 the proposed changes were again the subject of a vote. On this occasion 12 voted in favour, 6 (including MCFC) against and 2 abstaining. It followed that the resolution was carried.

151. On 4 March 2024 the FA approved the rule changes. The relevant changes are set out in the Appendix to this Award.

III THE ISSUES

152. The Parties exchanged over 280 pages of statements of case and defence and 150 pages of skeleton arguments. The Tribunal requested a list of issues before the Parties made their closing oral submissions. A most helpful four page document was provided in which the FMV Rules and the Amended FMV Rules denote what we refer to in this Award as the APT Rules and the Amended APT Rules. The Issues are as follows:

COMPETITION LAW CHALLENGE

1. Do the FMV Rules (and/or the Amended FMV Rules) have the object of preventing, distorting or restricting competition:

a. by reason of the principles and/or framework in European SuperLeague applying in the present case and the FMV Rules (and/or the Amended FMV Rules) failing to comply with those principles/that framework;

b. for any other reason?

2. Do the FMV Rules (and/or the Amended FMV Rules) have the effect of preventing, distorting or restricting competition?

3. If the FMV Rules (and/or the Amended FMV Rules) do have the effect of preventing, distorting or restricting competition, does the 'ancillary restraint' doctrine apply, such that they nevertheless do not infringe competition law?

4. If the FMV Rules (and/or the Amended FMV Rules) do have the object or effect of preventing, distorting or restricting competition, and the ancillary restraint doctrine does not apply, do they meet the criteria for exemption under s. Competition Act ?

5. Do the FMV Rules (and/or the Amended FMV Rules) give rise to an abuse of a dominant position by the Respondent?

6. If the FMV Rules (and/or the Amended FMV Rules) do give rise to a prima facie abuse of a dominant position by the Respondent, are they nevertheless justified by objective necessity?

PROCEDURAL FAIRNESS CHALLENGE TO THE RULES

7. Are the FMV Rules (and/or the Amended FMV Rules) procedurally unfair [or lacking in transparency (to the extent that this differs from procedural unfairness)] because, cumulatively or alternatively:

a. A club is not provided with the Databank material considered by the Board prior to the Board's assessment of FMV?

b. A club has no access to the Databank and cannot assess whether there is any additional material not identified by the Regulatory Team which would assist the club in relation to the Board's assessment of FMV?

c. Prior to the Board's provisional or final assessment of FMV, a club is not provided with a copy of the report sent by the Regulatory Team to the Board ?

d. A club has no access to the Independent FMV Assessor's own repository of comparable transactions?

7A. Does the principle of transparency add anything to the common law principle of

procedural fairness in relation to the matters addressed in paragraph above?

EAG TRANSACTION CHALLENGE

8. Did the Board misdirect itself in its interpretation and application of the PL Rules, in terms of the test to be applied to the FMV Assessment of the EAG Transaction?

9. Did the Board misdirect itself by asking whether the Nielsen valuation was a reasonable one and not by asking whether one or more of the valuations submitted by the Club was, of itself, reasonable?

10. Did the Board fail to act in accordance with procedural fairness in its application of the FMV Rules in its determination of the EAG Transaction. Specifically, was it procedurally unfair that the Club:

a. did not have an opportunity to respond to the [redacted] Memorandum and/or the [redacted] Benchmarking Analysis prior to the Board's decision and, if so, can it be said that it would have made no difference?

b. was not provided with underlying data, including other clubs' confidential material in the Databank, in relation to the contextual factors regarding the excluded compound annual growth rate ("CAGR"), and, if so, can it be said that it would have made no difference?

c. was not provided, at any stage, with the underlying CAGRs relevant to the Independent FMV Assessor's calculation of the % CAGR used and, if so, can it be said that it would have made no difference?

11. Did the Board otherwise act unreasonably (as defined in Rule X.5.2) in its FMV Assessment of the EAG Transaction in respect of its treatment or consideration of: (a) the offers from [redacted] and/or [redacted]; (b) Nielsen's [redacted] valuation; (c) Nielsen's [redacted] rights valuation; (d) Nielsen's valuation of [redacted] rights; (e) Nielsen's calculation of a CAGR; (f) the [redacted] Benchmarking Analysis and/or the [redacted] Memorandum; and/or (g) the [redacted] Report?

12. As regards the duration of the FMV Assessment of the EAG Transaction, did the Board fail to comply with Rule E. 64 of the FMV Rules in relation to the EAG Transaction (including having regard to the carve-out for "exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision") and/or otherwise act unreasonably and/or unlawfully?

FAB TRANSACTION CHALLENGE

13. Did the Board misdirect itself in its interpretation and application of the PL Rules, in terms of the test to be applied in determining the FMV of the FAB Transaction?

14. Did the Board misdirect itself by asking whether the Nielsen valuation was a reasonable one and not by asking whether the valuation submitted by the Club was, of itself,

reasonable?

15. Did the Board fail to act in accordance with procedural fairness in its application of the FMV Rules in its determination of the FAB Transaction? Specifically, was it procedurally unfair that the Club was not provided, prior to the final determination, with the [redacted] Databank transactions entered into by other clubs, which the Board referred to in its final determination, and, if so, can it be said that it would have made no difference?

16. Did the Board act unreasonably (as defined in Rule X..) in the enquiries it conducted in relation to potential comparator transactions?

17. Did the Board fail to apply the correct test and/or act unreasonably (as defined in Rule X.5.2.) in failing to give proper consideration to the submissions and evidence provided by the Club, in particular the [redacted] valuation?

18. Did the Board otherwise act unreasonably (as defined in Rule X.5.2) in its FMV Assessment of the FAB Transaction in respect of its treatment or consideration of: (a) [redacted]; (b) [redacted] rights; and/or (c) [redacted]?

19. As regards the duration of the FMV Assessment of the FAB Transaction, did the Board fail to comply with Rule E. 64 of the FMV Rules in relation to the FAB Transaction (including having regard to the carve-out for "exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision") and/or otherwise act unreasonably and/or unlawfully?

EP TRANSACTION

20. As regards the duration of the FMV Assessment of the EP Transaction only, did the Board fail to comply with Rule E. 64 of the FMV Rules in relation to the EP Transaction (including having regard to the carve-out for "exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision") and/or otherwise act unreasonably and/or unlawfully?

IV COMPETITION LAW

INTRODUCTORY OBSERVATIONS

153. Although the alleged breaches of competition law are pleaded as breaches of the Chapter I and/or Chapter II prohibitions under the 1998 Act, most of the authorities cited to the Tribunal were EU authorities, both pre- and post- Brexit and particular reliance was placed by both parties on the judgment of the CJEU delivered on 21 December 2023 in Case C-333/21 *European Superleague Company SL v. UEFA and*

FIFA ("ESL"), which is a post-Brexit case.

154. Section 60A of the 1998 Act provides

> "(2) [A tribunal] must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between—
>
> (a) the principles that it applies, and the decision that it reaches, in determining the question, and
>
> (b) the principles laid down by the Treaty on the Functioning of the European Union and the European Court before [December 31, 2020], and any relevant decision made by that Court before [December 31, 2020], so far as applicable immediately before [December 31, 2020] in determining any corresponding question arising in EU law, …
>
> …
>
> (7) Subsection (2) does not apply if the [tribunal] thinks that it is appropriate to act otherwise in the light of one or more of the following— …
>
> (b) differences between markets in the United Kingdom and markets in the European Union; …
>
> (e) a principle laid down, or decision made, by the European Court on or after [December 31, 2020];
>
> (f) the particular circumstances under consideration."

155. Neither party submitted that we should not apply any of the EU authorities cited. Accordingly the Tribunal will apply the Chapters I and II prohibitions on the basis of the EU authorities.

156. Section 2 of the 1998 Act (the Chapter I Prohibition) provides, so far as is material, as follows:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which-
>
> a. may affect trade within the United Kingdom, and
>
> b. have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which-

a. directly or indirectly fix purchase or selling prices or any other trading conditions;

b. limit or control production, markets, technical development or investment;

c. share markets or sources of supply;

d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void….."

157. So far as the Chapter I prohibition is concerned we understood that the PL did not dissent from the submissions made by MCFC that:

i) the APT Rules and Amended APT Rules constitute agreements and/or decisions of an association of undertakings, namely the members of the PL and the Pl itself,

ii) those undertakings engage in economic activity, and

iii) such agreements and/or decisions regulate economic activity, namely the pricing of APTs of the Clubs falling within the scope of such rules.

158. In our view those submissions are properly derived from what the CJEU said in *ESL* [83, 90-94]. We are conscious, as the PL pointed out, that *ESL* did not concern the regulation of pricing of transactions of Clubs but was a case on the prior of approval FIFA and UEFA of certain international football competitions. We will deal with this point at [170] below but it does not affect the correctness of the submissions at [157] above.

ISSUE 1: DO THE APT RULES AND AMENDED APT RULES HAVE THE OBJECT OF PREVENTING, DISTORTING OR RESTRICTING COMPETITION?

The test for an object restriction

159. In *ESL* the CJEU explained the concept of an object restriction in the following terms:

> *"(1) Categorisation of the existence of conduct having as its 'object' the prevention, restriction or distortion of competition*
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> *161 According to the settled case-law of the Court, as summarized, in particular, in the judgments of 23 January 2018, F. Hoffmann-La Roche and Others (C-179/16, EU:C:2018:25, paragraph 78), and of 30 January 2020, Generics (UK) and Others (C-307/18, EU:C:2020:52, paragraph 67), the concept of anticompetitive 'object', whilst not, as follows from paragraphs 158 and 159 of the present judgment, an exception in relation to the concept of anticompetitive 'effect', must nevertheless be interpreted strictly.*
>
> *162 Thus, that concept must be interpreted as referring solely to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects. Indeed, certain types of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see, to that effect, judgments of 30 June 1966, LTM, 56/65, EU:C:1966:38, page 249; of 23 January 2018, F. Hoffmann-La Roche and Others, C-179/16, EU:C:2018:25, paragraph 78; and of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 67).*
>
> *163 The types of conduct that must be considered to be so include, primarily, certain forms of collusive conduct which are particularly harmful to competition, such as horizontal cartels leading to price fixing, limitations on production capacity or allocation of customers. Those types of conduct are liable to lead to price increases or falls in production and, therefore, more limited supply, resulting in poor allocation of resources to the detriment of user undertakings and consumers (see, to that effect, judgments of 20 November 2008, Beef Industry Development Society and Barry Brothers, C-209/07, EU:C:2008:643, paragraphs 17 and 33; of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraph 51; and of 16 July 2015, ING Pensii, C-172/14, EU:C:2015:484, paragraph 32).*
>
> *Without necessarily being equally harmful to competition, other types of conduct may also be considered, in certain cases, to have an anticompetitive object. That is the case, inter alia, of certain types of horizontal agreements other than cartels, such as those leading to competing undertakings being excluded from the market*

(see, to that effect, judgments of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraphs 76, 77, 83 to 87 and 101, and of 25 March 2021, Lundbeck v Commission, C-591/16 P, EU:C:2021:243, paragraphs 113 and 114), or certain types of decisions by associations of undertakings (see, to that effect, judgment of 27 January 1987, Verband der Sachversicherer v Commission, 45/85, EU:C:1987:34, paragraph 41).

164 In order to determine, in a given case, whether an agreement, decision by an association of undertakings or a concerted practice reveals, by its very nature, a sufficient degree of harm to competition that it may be considered as having as its object the prevention, restriction or distortion thereof, it is necessary to examine, first, the content of the agreement, decision or practice in question; second, the economic and legal context of which it forms a part; and, third, its objectives (see, to that effect, judgments of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 23 January 2018, F. Hoffmann-La Roche and Others, C-179/16, EU:C:2018:25, paragraph 79).

165 In that regard, first of all, in the economic and legal context of which the conduct in question forms a part, it is necessary to take into consideration the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question (judgments of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 23 January 2018, F. Hoffmann-La Roche and Others, C-179/16, EU:C:2018:25, paragraph 80). It is not, however, necessary to examine nor, a fortiori, to prove the effects of that conduct on competition, be they actual or potential, or negative or positive, as follows from the case-law cited in paragraphs 158 and 159 of the present judgment.

166 Next, as regards the objectives pursued by the conduct in question, a determination must be made of the objective aims which that conduct seeks to achieve from a competition standpoint. Nevertheless, the fact that the undertakings involved acted without having a subjective intention to prevent, restrict or distort competition and the fact that they pursued certain legitimate objectives are not decisive for the purposes of the application of Article 101(1) TFEU (see, to that effect, judgments of 6 April 2006, General Motors v Commission, C-551/03 P, EU:C:2006:229, paragraphs 64 and 77 and the case-law cited, and of 20 November 2008, Beef Industry Development Society and Barry Brothers, C-209/07, EU:C:2008:643, paragraph 21).

167 Lastly, the taking into consideration of all of the aspects referred to in the three preceding paragraphs of the present judgment must, at any rate, show the precise reasons why the conduct in question reveals a sufficient degree of harm to competition such as to justify a finding that it has as its object the prevention, restriction or distortion of competition (see, to that effect, judgment of

11 September2014, CB v Commission, C-67/13 P, EU :C :2014, paragraph 69). »

160. It follows that in order to determine whether an agreement/decision of an association of undertakings reveals, by its very nature, a sufficient degree of harm to constitute an object restriction, it is necessary to examine (i) the content of the agreement or decision, (ii) the economic and legal context of which it forms a part, and (iii) its objectives. As regards the objectives one needs to look at the objective aims of the conduct. The fact that the undertakings acted without any subjective intention to restrict competition and that they pursued certain legitimate objectives are not decisive in determining whether there is an object restriction.

161. It is instructive at this point also to look at the section of the judgment dealing with conduct that falls outside the scope of Article 101(1) TFEU (the equivalent to section 2 of the 1998 Act). This provides guidance as to the type of conduct that is not an object restriction. The CJEU said this:

"(a) Consideration of the possibility of finding certain specific conduct not to come within the scope of Article 101(1) and Article 102 TFEU

183 According to the settled case-law of the Court, not every agreement between undertakings or decision of an association of undertakings which restricts the freedom of action of the undertakings party to that agreement or subject to compliance with that decision necessarily falls within the prohibition laid down in Article 101(1) TFEU. Indeed, the examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding, first, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition. That case-law applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association concerned demonstrates that the aforementioned conditions are satisfied (see, to that effect, judgments of 19 February 2002, Wouters and Others, C-309/99, EU:C:2002:98, paragraph 97; of 18 July 2006, Meca-Medina and Majcen v Commission, C-519/04 P,

EU:C:2006:492, paragraphs 42 to 48; and of 28 February 2013, Ordem dos Técnicos Oficiais de Contas, C-1/12, EU:C:2013:127, paragraphs 93, 96 and 97).

184 More specifically, in the area of sport, the Court was led to observe, in view of the information available to it, that the anti-doping rules adopted by the International Olympic Committee (IOC) do not come within the scope of the prohibition laid down in Article 101(1) TFEU, even though they restrict athletes' freedom of action and have the inherent effect of restricting potential competition between them by defining a threshold over which the presence of nandrolone constitutes doping, so as to safeguard the fairness, integrity and objectivity of the conduct of competitive sport, ensure equal opportunities for athletes, protect their health and uphold the ethical values at the heart of sport, including merit (see, to that effect, judgment of 18 July 2006, Meca-Medina and Majcen v Commission, C-519/04 P, EU:C:2006:492, paragraphs 43 to 55).

185 However, the case-law referred to in paragraph 183 of the present judgment does not apply in situations involving conduct which, irrespective of whether or not it originates from such an association and irrespective of which legitimate objectives in the public interest might be relied on in support thereof, by its very nature infringes Article 102 TFEU, as is, moreover, already implicitly but necessarily apparent from the Court's case-law (see, to that effect, judgment of 1 July 2008, MOTOE, C-49/07, EU:C:2008:376, paragraph 53).

186 Given that the absence of a subjective intention to prevent, restrict or distort competition and the pursuit of potentially legitimate objectives are not decisive either for the purposes of application of Article 101(1) TFEU and that, moreover, Articles 101 and 102 TFEU must be interpreted consistently, the Court finds that the case-law referred to in paragraph 183 of the present judgment does not apply either in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, reveals a degree of harm in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition. Thus, it is only if, following an examination of the conduct at issue in a given case, that conduct proves not to have as its object the prevention, restriction or distortion of competition, that it must then be determined whether it may come within the scope of that case-law (see, to that effect, judgments of 28 February 2013, Ordem dos Técnicos Oficiais de Contas, C-1/12, EU:C:2013:127, paragraph 69; of 4 September 2014, API and Others, C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraph 49; and of 23 November 2017, CHEZ Elektro Bulgaria and FrontEx International, C-427/16 and C-428/16, EU:C:2017:890, paragraphs 51, 53, 56 and 57).

187 As regards conduct having as its object the prevention, restriction or distortion of competition, it is thus only if Article 101(3) TFEU applies and all of the conditions provided for in that provision are observed that it may be granted the benefit of an exemption from the prohibition laid down in Article 101(1) TFEU

(see, to that effect, judgment of 20 November 2008, Beef Industry Development Society and Barry Brothers, C-209/07, EU:C:2008:643, paragraph 21)."

162. We draw the following propositions from those paragraphs:

(i) rules of a sporting association may be justified first if they pursue one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; second, if the specific means used to pursue those objectives are genuinely necessary for that purpose; and, third, even if those means prove to have the inherent effect of, at the very least potentially, restricting or distorting competition, if that inherent effect does not go beyond what is necessary, in particular by eliminating all competition.

(ii) rules adopted by sporting associations which have the inherent effect of restricting potential competition between athletes fall outside the scope of Article 101(1) TFEU where they safeguard the fairness, integrity and objectivity of the conduct of competitive sport, ensure equal opportunities for athletes, and uphold the ethical values at the heart of sport, including merit.

(iii) but rules that by their very nature infringe Article 102 TFEU (section 18 of the 1998 Act).or are an object restriction under Article 101(1) TFEU cannot fall outside the scope of Article 101(1) TFEU by virtue of *Meca-Medina.*

We will term these propositions the *Meca-Medina* principle.

163. It follows, in our view, that restrictions:

(i) that are justified by the pursuit of legitimate objectives in the public interest,

(ii) where the specific means used to pursue those objectives are genuinely necessary for that purpose, and

(iii) any inherent effect of, at the very least potentially, restricting or distorting competition, does not go beyond what is necessary, in

particular by eliminating all competition

are not restrictions by object. According to *ESL* such restrictions are, however, able to benefit from the *Meca-Medina* principle. If that were not so, that principle would become a dead letter.

164. The specific authorization rules in *ESL* were found to be object restrictions and so could not benefit from the *Meca-Medina* principle. Those rules required the prior approval by FIFA and/or UEFA of football tournaments organised by bodies other than FIFA and UEFA. The CJEU held that, although the need for prior approval might include pursuit of legitimate objectives, such as ensuring the observance of the principles, values and rules of the game underpinning professional football, the rules in question conferred on FIFA/UEFA the power to control completely access to the market for any potentially competing undertaking and make it possible by their nature to exclude any competing undertaking from the market. The CJEU went on to observe that since such rules contained no substantive criteria or detailed procedural rules suitable for ensuring that those rules were transparent, objective, precise and non-discriminatory, they constituted a restriction of competition by object.

165. One of the cases referred to by the CJEU in *ESL* was *Beef Industry Development Society and Barry Brothers* ("*BIDS*"). BIDS involved agreements between beef processors which sought to tackle the crisis of over capacity among Irish beef processors. Those arrangements provided for the reduction in processing capacity by means of a compensation scheme whereby those who were to remain in the industry ("the stayers") agreed to compensate those who agreed to leave ("the goers"). One of the obligations that a goer had to accept was to decommission, or put beyond use, its processing plants. The question was whether those arrangements were a restriction of competition by object.

166. Although the object of the BIDS arrangements was to remedy the effects of a crisis in the industry, the CJEU held that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole

aim but also pursues other legitimate objectives. The CJEU went on to reject the argument that only agreements on horizontal price fixing, limitation of output or sharing of markets can be considered object restrictions. Thus the types of agreement listed in Article 101 TFEU did not constitute an exhaustive list of object restrictions. The CJEU found that the object of the BIDS arrangements was to change appreciably the structure of the market through a mechanism intended to encourage the withdrawal of competitors. This was an object restriction as the arrangements deliberately substituted practical cooperation between undertakings for the risks of competition. The CJEU went on to find that the means put into place to attain those objectives also included restrictions whose object was anti-competitive. One of those restrictions was the restriction imposed on the goers as regards disposal and use of their processing plants. Such a restriction was intended to dissuade new entry as the investment necessary for the construction of a new plant was much greater than the costs of taking over an existing plant.

Application of the object test to this case

167. The main points relied on by MCFC in support of the argument that the challenged provisions of the APT Rules and Amended APT Rules constitute object restrictions are that:

(i) they prevent clubs receiving monies from sponsorship arrangements prior to an FMV assessment,

(ii) there is considerable delay in making such an assessment which means that clubs are not able to spend or budget for the amounts commercially agreed in sponsorship agreements,

(iii) where the PL finds that the price agreed is evidently not at FMV, the price will be re-fixed (and the position is *a fortiori* in the 2024 Rules).The key relevant provisions of the APT Rules have been set out at [55-59] above,

(iv) they do not set out objective, transparent, precise criteria, including as to time limits and with an effective right of review that eliminates

even the risk of distortions,

(v) shareholder loans are excluded from the APT Rules which distorts the PSR calculations, and

(vi) they distort competition between the clubs and PL.

The first two points were referred to by MCFC as "timing distortions", the third as "pricing distortions", and the fifth "the exclusion of shareholder loans". We term the fourth point the "lack of precise criteria and effective right of review", and the sixth point "distortion of competition between the PL and the Clubs".

168. An over-arching point made by MCFC was that there was no evidence before the PL of the ineffectiveness of the existing FMV rules in the PSR Rules or of the necessity or proportionality of introducing these changes via the APT Rules and indeed further changes via the Amended APT Rules.

169. Before examining those points made by MCFC, we will consider three submissions made by the PL as regards the application of *ESL* to the APT Rules.

170. The first point made by the PL is that *ESL* has no application to the APT Rules because *ESL* was concerned with a case where the sporting regulators excluded competitors from the market by way of a collective boycott. That is a well-known category of agreements which restrict competition. By contrast the APT Rules are not a collective boycott but rules intended to prevent the circumvention of PSR. While we accept that the APT Rules do not amount to a collective boycott, it does not follow that *ESL* has no application to such rules. It is clear both from *ESL* at [164] and *BIDS* at [23] that the categories of restrictions by object are not closed. It is the task of a court or tribunal being asked to decide whether a particular restriction is an object restriction to have regard to the test set out in those cases in order to determine whether such a restriction meets that test. The fact that that category of restriction has not previously been classified as an object restriction is of little weight.

171. The second point made by the PL is that *ESL* does not establish a principle that if

there is an agreement between undertakings which lays down certain rules, all of those rules have to be proportionate, necessary, clear and precise otherwise they will be a restriction of competition by object. We consider that there is some force in this point. Article 101 TFEU, like section 2 of the 1998 Act, is concerned with prohibiting restrictions of competition. It is not concerned to regulate collective conduct that does not restrict competition. So for that provision to apply one needs to identify a restriction of competition, whether by object or effect. Nevertheless we consider that *ESL* is authority for the proposition that in determining whether rule-making provisions of sporting associations do restrict competition by object, it is relevant to consider whether there are substantive criteria and detailed procedural rules suitable for ensuring that such rules are, transparent, objective, precise, non-discriminatory and proportionate, see *ESL* [175]. Whether the absence of such criteria and procedural rules do indeed render a rule a restriction by object requires a case by case analysis.

172. The third point made by the PL is that, in any event, the APT Rules satisfy the *ESL* test. We consider this argument in the following paragraphs.

The content of the APT Rules and Amended APT Rules

173. They provide for an *ex ante* assessment by the PL of APTs entered into by the Clubs. They cover all transactions entered into by a club save for shareholder loans (and equity investments). Prior to the approval of an APT by the PL, the Club is not entitled to receive any consideration pursuant to the APT. The PL will determine the FMV of an APT, having regard to the assessment by an independent expert (Nielsen), any information provided by the club, and such other compatible evidence of similar transactions whether in the Databank or elsewhere. FMV is determined under the APT Rules as the amount that an asset or right "could".be sold for. Under the APT Rules where the PL determines that an APT is "evidently not" at FMV, the club may not receive consideration in excess of FMV. The PL is required to conduct an FMV assessment within 10 clear working days "save where further time is required due to exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision."

174. The key relevant provisions of the APT Amended Rules are set out in the Appendix. The main relevant differences are as follows. First the word "could" is replaced by the word "would" and the term "normal market conditions" is inserted in the definition of FMV, secondly the word "evidently" has been removed, thirdly the burden of proof as to whether a transaction is at FMV has shifted from the PL to the club, and fourthly, where the PL requires further information, the 10 day period for making a FMV assessment is replaced by a 30 day period.

The economic and legal context

175. The CJEU stated in *ESL* [166] that the economic and legal context includes the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question. The services that we are here concerned with are the organisation of, and participation in, a professional football competition, namely the PL.

176. Although MCFC does not challenge the principle of PSR, there is no agreement as to the content of the rules or as to whether there was evidence to support the introduction of the APT Rules. Indeed MCFC's case was that there was no evidence before the PL which justified the introduction of the APT Rules. As this issue straddles both the economic and legal context of the APT Rules as well as their objectives, we will deal with this issue in the section beginning at [180].

177. As part of the context, MCFC also relies on the fact that the PL, apart from regulating the PL also engages in economic activity, in particular sponsorship agreements, in parallel with the clubs but is not subject to the same APT Rules. It is said that this gives rise to a lack of "equal opportunity" between the PL and the clubs as well as a conflict of interest between the PL's regulatory role, in adopting the APT Rules, and its commercial role in seeking sponsorship agreements. In particular it has led to the distortion of competition between the PL and clubs for potential sponsors. We deal with this point at [265-270] below.

The objectives

178. Under this head it is necessary to determine "the objective aims which that conduct seeks to achieve from a competition standpoint" bearing in mind that the subjective intentions of the undertakings involved are not decisive, *ESL* [167].

179. The PL's case is that the objective purpose of the APT Rules (and the Amended APT Rules) is to prevent or reduce circumvention of the PSRs, namely to ensure that clubs are not able to rely on transactions with associated parties artificially to increase revenue or reduce costs thereby unfairly improving their position under the PSR and jeopardising sustainability and competitive balance. In the PL's submission, an obvious way of getting round the PSRs is for an entity which is closely linked to a club to pay more for sponsoring the club than a sponsor operating at arm's length would pay. The PL went on to submit it is equally obvious that circumventing the PSRs in that way undermines the aim that the PSR serve, namely ensuring financial sustainability and a certain level of competitive balance. Under the old RPT regime, the ability of the Board of the PL to restate RPTs depended upon clubs and their auditors having identified a transaction as an RPT. Any assessment of the fair market value of an RPT would take place only after a club had identified an RPT. It had proved not to be effective.

The question of evidence

180. In this respect the PL relied on three categories of evidence. The first is the evidence of Mr. Herbert (summarised at [17-18] above). Secondly, the fact that the PL had started proceedings against MCFC in respect of alleged breaches of the PSR dating back many years. Thirdly, the evidence given by a number of clubs in these proceedings, including Arsenal, Manchester United, Liverpool, and West Ham as well as letters written in support of the APT Rules for the purpose of this arbitration from Brentford, Bournemouth, Fulham, and Wolverhampton Wanderers who are smaller clubs in the PL. The evidence of the clubs was, in essence, that the existing PSR were not effective because they relied on clubs to make self-declarations in their annual accounts that there was a transaction with a related party; if they failed to do so, there was no practical way to determine whether a transaction was an RPT.

181. By contrast, MCFC's case, as put to Mr. Herbert, in cross-examination, was that there was no evidence before the PL of the ineffectiveness of the PSR, of the necessity for, or proportionality of the APT Rules, and there were no documents recording consideration of the PSR until the takeover of Newcastle United in October 2021.

182. Counsel for MCFC, in opening, also relied on a slide deck, which he stated was created in 2022, entitled "Winning Formula – How the game is funded and financially regulated" in which it is stated. "There is limited evidence of need for stronger financial controls to ensure club "financial viability" ". On this basis he said that there was no evidence of a supposed financial sustainability problem. The evidence on which the PL relied in order to introduce the APT Rules was said to be i) disputed allegations about historic deals done by MCFC, ii) misplaced references to one administrative procedure of one PL club 14 years ago, and iii) fear mongering about the takeover of Newcastle United at the end of 2021.

183. We accept that there was no document recording any discussion about a revision to the PSR until the email of Mr. Masters of the PL sent on 15 October 2021, which was prompted by the e-mail three days earlier from [redacted] to the PL. We also find that during the consultation process between mid-October 2021 and the decision of the PL on 14 December 2021 to adopt the APT Rules the PL did not engage any outside consultants to consider either the effectiveness of the then current RPT Rules or the necessity for or proportionality of moving to an *ex ante* system along the lines of the APT Rules.

184. However we do not consider that those matters require us to conclude that there was no evidential basis to justify a move from the *ex post* regime in the PSR to the *ex ante* system that was introduced in the APT Rules.

185. We accept the evidence of Mr. Herbert and the clubs that gave evidence in these proceedings that both the PL and the clubs had concerns since at least 2018 that the PSR were being circumvented by the failure to report sponsorship agreements with RPTs and the practical difficulty of effective enforcement of the PSR on an *ex post* basis. This is supported by the minutes of the meeting of the LAG on 18 October

2021 (see [23[above) in relation to the period since 2018. We do not consider that the PL slide deck to which Counsel for MCFC referred to in opening (see [182] above) undermines the evidence that the PSR were ineffective in controlling APTs at inflated values. Counsel for MCFC told us that this slide deck was created in 2022, that is to say after the APT Rules had been adopted. So we take the reference to "limited evidence of need for stronger financial controls to ensure club "financial viability" " to be referring to the position after the adoption of the APT Rules. Nor do we find that the weight of the evidence relied on by the PL for a change to the PSR to be undermined, as submitted by MCFC, by the existence of just one administrative procedure of one PL club 14 years ago.

186. Mr. Herbert gave evidence that [redacted] This Tribunal is not concerned with whether or not the allegations in the disciplinary proceedings are made out or not. However, we are entitled to take note of the fact that, as recorded in the PL's Statement of Facts in the disciplinary proceedings, those proceedings relate to a four year investigation that commenced in December 2018 in respect of events that took place over nine previous football seasons (2009/10–2017/18). The PSR came into force in 2013 so the disciplinary proceedings cover a significant time period when the PSR applied. In our view these facts illustrate the difficulties in the speedy and effective investigation of potential breaches in an *ex post* system, such as under the PSR, which the PL was entitled to take into account as a reason for moving to an *ex ante* system.

187. We accept that the acquisition of Newcastle United by an investment group led by

the Saudi Arabian public investment fund on 7 October 2021 was the catalyst for the consultation process leading up to the APT Rules which led to the setting up of FCAG on 21 October, and the imposition of a moratorium on APTs agreed at the shareholders' meeting on 11 November 2021. The consultation process ran from 21 October to mid-December 2021, as set out at [27-47] above.

188. We do not, however, find that the APT Rules were targeted specifically at clubs owned by companies in the Gulf region but were rather intended to apply to any club that might use APTs. [redacted] was called to give evidence by the PL and was cross-examined. Although his email dated 12 October 2021 was said by counsel on behalf of MCFC in closing submissions to be evidence that the APT Rules were targeted at certain clubs, in particular, those in "the Gulf region", it was clear from his evidence that it was not so targeted save in the sense that at the time the email was sent there was concern that Newcastle United might be about to enter into APTs with entities in Saudi Arabia. [redacted] considered that "any club that benefits from a transaction not at fair market value should be subject to the same rules, just as we would expect that." He explained that "if, for example, we were talking about a takeover of another club by an American consortium who had links to lots of American companies" he would have expressed the same concerns. He said that "there had been concern for a number of years about related party transactions, associated party transactions taking place at above market value". He explained that "the takeover of Newcastle United heightened those concerns again and encouraged the clubs to seek action." We were satisfied that, whilst it was the takeover of Newcastle United which caused him to send his email when he did, [redacted]'s concern related to any club that might use APTs.

189. In conclusion, we find that there was a sufficient evidential basis for the PL and the clubs to conclude that the *ex post* PSR rules were ineffective in controlling APTs, and that it was necessary to move to *ex ante* regime. This was the objective of the APT Rules (and later the Amended APT Rules).

190. We now examine the alleged distortions of competition in the APT Rules which, it is submitted by MCFC (see [167] above), amounted to restrictions for competition

by object.

i) and ii) The alleged timing distortions

191. MCFC submitted that the introduction under the APT Rules of an *ex ante* regime is an object restriction of competition: the club is prevented from receiving the consideration agreed to be paid by an AP until the APT is approved by the Board, and until then is unable to use the funds for any purposes (PSR or non-PSR purposes). MCFC submitted that those rules involve a fundamentally different market intervention from the previous *ex post* regime, principally because no monies can be used under APTs until there has been a FMV determination which delays the putting into effect of APTs that generate money for the clubs, principally through sponsorship.

192. We agree that the move to an *ex ante* regime with a freeze on monies being used until there has been a determination that the APT is evidently not above FMV is a more intrusive market intervention than the previous *ex post* regime. However, as we have found, the evidence referred to at [180] above, indicates that there were difficulties in the speedy and effective investigation of potential breaches under the *ex post* regime. RPTs were not being declared, and any restatement would be made long after the money had been done. As a result, the PSR was not effective. There has been no challenge to the PSR or to the principle of detecting and eliminating subsidies by way of RPTs with the clubs.

193. There is, as the PL pointed out, an analogy between the APT Rules and the EU state aid rules. Under the EU state aid rules the European Commission often has to determine whether a transaction between the State and an undertaking involves state aid to the undertaking because the transaction is not at FMV. The state aid regime under Article 107 TFEU provides for mandatory *ex ante* notification of aid. Pending determination of whether there is aid and, if so, if it is justified, the money cannot be paid. Although the EU state aid rules are statutory, unlike the APT Rules which are contractual, the purpose of both rules is the same, namely to ensure competition is not distorted by aid or subsidies and to do so through an *ex ante* regime.

194. Applying the approach in *ESL*, we conclude that the move from an *ex post* to an *ex ante* regime was justified by the pursuit of a legitimate objective, namely to prevent avoidance of, and ensure the effectiveness of, the PSR which are not anti-competitive in nature. We also consider that the specific means used to pursue that objective, namely, that no monies are to be paid until there has been a FMV determination, were necessary for that purpose.

195. Having regard to this economic and legal context as well as the objectives pursued by the APT Rules, we conclude that the *ex ante* regime does not of itself reveal a sufficient degree of harm to competition for it be classified as an object restriction. For the avoidance of doubt, we have not considered the evidence of the effect of the *ex ante* regime as that evidence is not relevant to the object analysis. It is important not to conflate, on the one hand, the object analysis and, on the other hand the effects analysis.

196. We turn now to MCFC's case that the time provisions in Rule E.64 are a restriction of competition by object and indeed aggravate the intrusive (and, in the view of MCFC, the distortive) nature of the *ex ante* regime. MCFC's case is that the duration of an FMV determination under Rule E.64 is essentially open-ended. As soon as the PL requires additional information or where there are exceptional circumstances, the obligation to conclude a FMV determination within 10 day is suspended and the time taken is or at least can be considerably longer. MCFC relies on the following passage in *ESL*: "*The power in question must also be placed within a framework of transparent, non-discriminatory detailed procedural rules relating, inter alia, to the time limits applicable to... the adoption of a decision*." [136, emphasis of MCFC]

197. MCFC refers to the time taken for the FAB, EP, and EAG Final Determinations following submission of those APTs, namely 8, 9, and 5 months respectively. In the case of the EAG APT, the PL had to work to deadlines set by this Tribunal to ensure that the determination was made in sufficient time for it to be challenged, if necessary, in these proceedings, see [117] and [127] above. MCFC also refers to the evidence of Ms. Blake that the average time taken by the PL Board to reach a decision where no further information is required is 14 days; where a transaction is

provisionally determined by the Board to be evidently not at FMV the average time for this decision is 65 days, the average time taken for the Board to reach a final determination following a provisional determination is 87 days; and the average total time from submission to final determination is 126 days. It also relies on the evidence of [redacted] from [redacted] in respect of three APTs entered into by that club which took, in the first case of a player loan 150 working days from the date of submission to the PL to the provisional determination, and in the second case 126 working days from date of submission to the provisional determination, and in the third case 142 working days since the APT was submitted to the PL. [redacted] gave evidence that it was not commercially practical to start negotiations earlier with a potential sponsor in order to mitigate the effect of any delay by the PL in making an FMV determination.

198. MCFC described this as a "systemic issue". MCFC's complaint about the time taken is regardless of whether PL actually produces a FMV determination adverse to the club. The example given was the EP transaction which was submitted in April 2023, was the subject of an adverse FMV determination in March 2024 and a month later was cleared as not being evidently above FMV.

199. The evidence of [redacted], the PL's expert economist, was that, at the time of writing his report, 52 APTs had been submitted to the PL and only 11 of them had taken more than 25 days. It was also largely common ground that in some of the most difficult cases the time taken has been too long. One of the causes of this has been the lack of resources in the PL Regulatory Team and Nielsen. Since this lack of resources has become apparent, the PL has increased resources in its regulatory team and also asked Nielsen to increase its own resources.

200. As can be seen from the above, both parties sought to rely on how Rule E.64 has operated in practice in relation to the object case. Evidence as to how Rule E.64 operated in practice is evidence of its effect. We question to what extent we can take account of this evidence under the object analysis which is a distinct from the analysis of the effects of the agreement. We do not think that evidence of how Rule E.64 operated in practice falls within the rubric of the content of the rule, or its

objective. It is conceivably relevant to the economic context of the APT Rules, but we think we need to be cautious in looking at all this evidence when deciding whether there is a restriction by object. In our view, the correct approach is to see whether it was foreseeable that Rule E.64, when adopted, would create a systemic issue of significant delays to FMV determinations that would have an obvious impact on competition.

201. It is apparent from both the text and the objective of Rule E 64 as well as the context within which it was adopted, that FMV determinations are to be made as quickly as possible. However, the wording and objective of Rule E64, viewed within the context of the APT Rules is also to permit sufficient time to enable a proper assessment of the FMV of an APT to be carried out. This includes the time needed by the PL Regulatory Team, Nielsen, and the Board to ask for further information from the club and then to give proper consideration to the submission of the club prior to making any Provisional Determination, potentially adverse to the club. It also includes time for the club to make a response (with evidence if necessary), and for the PL Regulatory Team, Nielsen, and the Board to consider that response before making a Final Determination which again may be adverse to the club. Nor can it really be disputed that in a difficult case (involving considerable evidence) an extension of time beyond the 10 days may be necessary. Indeed, a failure to grant an appropriate extension of time might lead to procedural unfairness. The evidence of Mr. Herbert is that a balance had to be struck between the need for speed and the importance of allowing sufficient time particularly in complex and high value cases. This is reflected In Rule E.64 which permits the PL to disapply the 10 day period where further time is required due to exceptional circumstances or the requirement is for further information from the club in order for the PL to reach a conclusive decision.

202. As regards MCFC's point about "systemic delays" as to how Rule E.64 has operated, we do not accept that it was foreseeable that Rule E.64 would create, on a systemic basis, significant delays to FMV assessments so as to have an obvious impact on competition. The objective was to carry out FMV assessments as quickly as possible, as is reflected in the default position of 10 days in Rule E.64., but balancing speed with the need for the PL and its team to have all the necessary information and a

proper time for a fair process from the side of the club. We would add that we have seen no evidence that, in agreeing the APT Rules, it was foreseen that the FMV assessment process should take a long time.

203. We would add that the passage relied on from *ESL* (see [196] above) was in a case where there was no approval process and hence no time limits at all. The position is completely different here where there are detailed rules for determining whether a transaction is evidently not at FMV and time limits are laid down in Rule E.64. The fact there is a discretion to extend those time limits in an individual case where more time is needed does not therefore mean it falls foul of what was said in *ESL*.

204. Thus we reject the argument that Rule E.64 is a restriction of competition by object on the basis of the alleged timing distortions.

iii) The alleged pricing distortions

205. As we understand it, MCFC makes two submissions. First, it says that subjecting sponsorship rights to an FMV test is by its nature distortive of competition since different sponsors may value sponsorship opportunities differently. Hence one cannot objectively price the value of a sponsorship agreement. Secondly, MCFC submits, the ability of the Board to re-state a price in an APT constitutes price fixing that is an object restriction of competition.

206. As regards its first submission, MCFC relied on the evidence of [redacted]. His evidence was that the value of a specific sponsorship deal depends on the strategy of the sponsor and it is very difficult for an external party to know what the strategy is. This is because within that sponsor there may be many strategic objectives that the sponsor is trying to achieve. Sponsorship is one element of the marketing mix. He gave as an example, during his time with [redacted], the time when [redacted]. Although the rights on offer to both parties were exactly the same, [redacted], in the light of its own strategic goals and objectives

valued them much higher than [redacted]. [redacted] objective was to launch a whole new brand direction for [redacted] with mass appeal across the world. [redacted] was therefore prepared to spend a certain amount of money on that overall strategy of which the [redacted] sponsorship was part. He made the point that no two sponsorship deals are precisely the same. The parties always have their own unique set of motivations and strategic objectives and, as a result, sponsorship deals cannot have an objective correct value. He gave as another example [redacted] sponsorship deal with [redacted] which was intended to help market the launch of a new [redacted]. [redacted] [redacted]. [redacted] paid [redacted] a very significant amount of money - an amount that third party outsiders may consider higher than what [redacted] should have paid. Yet for [redacted] it was worth it.

207. He also pointed out that some sponsors may wish to pay a premium because they wish to benefit from a geographical connection between them and the rights to be sponsored. He gave the example of [redacted], as a Japanese company, which was willing to pay a premium to partner with the [redacted] who at the time was the face of sports in Japan. [redacted] value to [redacted] was greater than the value of, for example, a Spanish player. He observed the same phenomenon in relation to MCFC whose ultimate shareholder is from Abu Dhabi. As a result some brands based in Abu Dhabi wish to affiliate themselves with MCFC. This also made sense for MCFC since a core pillar of its sponsorship strategy is to ensure close strategic alignment with its sponsors and so developing a deep understanding of cultural and commercial practices in Abu Dhabi and the surrounding regions. The same point was made by [redacted] who gave evidence of the long- term benefits of the partnership between Etihad and a club owned by a senior figure in the same country, namely His Highness Sheikh Mansour. [redacted] pointed out that a sponsorship deal is not a homogenised product like milk.

208. [redacted] view was that the operation of the FMV rules to determine what the FMV of a given set of commercial rights is inherently flawed because a fair price to

one sponsor with its own set of strategic objectives and available resources may be a completely unreasonable price to another potential sponsor, given that sponsors own strategic objectives and available resources. Giving evidence for the PL, Ms. Fyfield accepted that a FMV assessment is not objective but she added that the assessment has to be anchored around market data such as comparable transactions in the Databank.

209. In this context MCFC also points to the risk of false positives, that is to say making a wrong (generally too low) FMV assessment under the APT Rules. In this respect MCFC relied on the EP transaction which was originally found to be evidently not at FMV and then subsequently not (see [103] above).

210. We accept [redacted] evidence that the value of a specific sponsorship deal depends on factors that may be specific to a particular sponsor and we also note that the PL, in closing, accepted that APTs can have legitimate economic advantages. But, for reasons set out below, we cannot accept his evidence that the operation of the FMV rules to determine what the FMV of a given set of commercial rights is inherently flawed which is relied on by MCFC in support of its first submission (see [205] above, namely that subjecting sponsorship rights to an FMV test is by its nature distortive of competition since different sponsors may value sponsorship opportunities differently.

211. First, while it is common ground that the FMV of an APT transaction is not an exact science, we consider it to be inherent in the PSR that there should be an ability to restate the price of a transaction; otherwise the PSR would be largely ineffective. Indeed, when the PSR were introduced in the 2013-14 season Rule E.53 gave the Board the power to restate a RPT.

212. As part of the context and objectives of the PSR and APT Rules, one has to balance the legitimate interest of the PL scrutinising APTs to ensure compliance with the PSR by assessing whether such transactions are evidently not at FMV, against the freedom of clubs to enter into APTs without any such scrutiny. An APT carries with it an inherent risk that the price might be distorted and hence undermines the PSR. While

we have accepted [redacted] evidence that the value of sponsorship agreements may be specific to a specific sponsor, in none of the [redacted] examples he cited was there any suggestion that they were APTs.

213. Secondly, we consider the method chosen by the APT Rules for determining the FMV of an APT is sufficiently robust to, if not eliminate, at least reduce the risk of false positives.

214. Section D of Appendix 18 (the FMV Protocol - commercial rights agreements) sets out a large number of what are termed non-exhaustive FMV Assessment Factors. Of particular relevance to this case are the following factors:

- fees derived from comparable Transactions in football or in other sports or industries (albeit it is stated that comparable football transactions are likely to be the most applicable),
- fees derived from any preceding Transaction entered into by the club in the same category,
- assets and rights delivered as part of the Transaction,
- evidence of the existence or absence of other offers to engage in the Transaction at a similar level for similar assets and rights,
- the Fan base of the Club,
- the Brand value of the Club,
- the geographic spread of fan base, including elements which may be a particular appeal to particular partners (such as demographic information),
- the Club's commercial strategy,
- playing success of the Club.

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215. The wide range of FMV Assessment Factors provide sufficient scope for a club to put forward arguments and evidence, specific to its own position and that of its sponsor, to show that the agreed price of an APT is at FMV. Those factors, which are non-exhaustive rather than prescriptive, do not preclude the club relying on other factors. Although, the non-exhaustive FMV Assessment Factors indicate that other

comparable football (as opposed to non- football) transactions are likely to be the most applicable, we do not read the factors in Part D of Appendix 18 as precluding the club relying on factors specific to that club and its sponsor, such as a geographical link between the club and the sponsor which might not exist in an otherwise similar transaction between the club and another sponsor. Put another way, we consider that the concept of FMV is broad enough to ascertain the FMV between a particular club and a particular sponsor, taking account of features specific both to the club and the sponsor.

216. Thirdly, the APT Rules build in a margin of tolerance before any restatement of a price could take place. First, Rule A.1.94 defines FMV as the amount for which an asset "could" be sold for, not what it "would" be sold for. Secondly, Appendix 18 of the Rules provides that the PL will only refix the price of the APT where it determines in its reasonable opinion that it "is evidently not at Fair Market Value." The evidence of Ms. Fyfield was that Nielsen would produce a range of figures and that the board Sub-Committee on which she sat always took the highest figure in the range. In our view these are important safeguards which reduce the risk of false positives.

217. Fourthly, the process to be followed in assessing FMV, set out in Part C of Appendix 18, is wholly independent of the other PL clubs whose only input into the process is the provision of their commercial transactions into the Databank which can then be used by the independent Regulatory Team of the PL and the independent expert, Nielsen. If a club is dissatisfied with the process it has a right of challenge before an independent arbitral Tribunal with access to the transactions on the Databank on which the PL Board relied in making its FMV determination.

218. We are therefore unable to accept that the APT Rules are inherently incapable of capturing the specific features of a particular sponsorship agreement and, for that reason, are by their nature distortive of competition.

219. These rules are very different from the complete absence of any rules determining how FIFA or UEFA were to approve any competing football tournament which was part of the reason that the requirement for prior approval of such tournaments was

held to be a restriction of competition by object in *ESL*. The APT Rules provide a detailed framework both for the substantive and procedural aspects of an FMV assessment.

220. We would add that, despite accepting the principle of PSR, MCFC put forward no alternative to the assessment methodology set out in section D of Appendix 18.

221. One of the differences that MCFC relies on between the two Rules is the move from an *ex post* to an *ex ante* regime. However, in both regimes there is an ability to restate the price and hence a risk of false positives. MCFC has accepted that the *ex post* regime is not a restriction of competition. In the light of that, it is difficult to see why an *ex ante* regime should, unlike an *ex post* regime, be a restriction of competition on grounds of the ability to restate the price of the transaction. But we should stress that we have reached our view that the *ex ante* regime does not constitute an object restriction independently of the view that MCFC takes of the *ex post* regime under the PSR.

222. We now turn to MCFC's second submission, namely that the APT Rules involve price fixing of a kind that is an object restriction. Although the PL has set up a mechanism whereby the price in an APT can be restated or "refixed" this, in our view, cannot be equated to price fixing in a horizontal cartel as referred to in *ESL* [163].

223. As the PL submitted, such equating ignores the context and objectives of the APT Rules. As we have found (see [189] above), the APT Rules were adopted in order to ensure that the PSR were effective (by preventing circumvention of the RPT rules) and thereby to promote financial stability and competitive balance between the clubs. Any refixing of a price only arises where the price is not the result of a competitive process, that is to say where the price is evidently not at FMV. Thus, if the price of an APT is evidently not at FMV, competition is liable to be distorted as the club would be benefitting from a subsidy from the AP. Where such a subsidy is found to exist, the refixing of the price is necessary in order to eliminate that subsidy and thereby ensure that the APT does not undermine the objectives of the PSR. Any

refixing of a price is therefore intended to ensure that the PSR is effective and to avoid unsubsidized or undistorted competition between the clubs. Indeed, as we have observed, it is difficult to see how the PSR can be effective without such a mechanism.

224. We would also observe that MCFC's submission fails to take account of the fact that the determination of an individual FMV in respect of an APT entered into by a club is not made collectively by the other competitor clubs in the PL but by an independent sub-committee of the Board, based on the recommendation of the independent IFA, Nielsen, which has, in turn, regard to the confidential submissions and evidence put forward by the club as well as information contained in the confidential Database. Strict confidentiality is observed so that no club has access to any competition sensitive data from another club. The importance of ensuring strict confidentiality was stressed in the legal advice obtained from Helen Davies KC and Richard Blakely (see [32] above).

225. It follows that we accept the PL's submission that the APT Rules are distinguishable from the cap on football agents' fees imposed by FIFA and the FA which were found to be an object restriction in *CAA Base.* In that case there was an agreement between the clubs, as competing purchasers of football agency services, which fixed a maximum fee that they would pay for those services. It was akin to a buyers' cartel. That was a clear restriction of undistorted competition between clubs as to the price they would pay for football agents' services to the detriment of such agents. By contrast, the APT Rules are intended to ensure the effectiveness of the PSR by providing that competition between clubs is not distorted by APTs that are evidently not at FMV. The only price that is re-stated is one that is not evidently at FMV. and this is done by a person independent of the clubs.

226. For these reasons we reject the argument that the FMV determination process is an object restriction that involves either price distortions or price fixing.

iv) The "lack of precise criteria and effective right of review"

227. An overarching criticism by MCFC of the APT Rules is that, as was as articulated

in its skeleton argument, "the FMV rules do not set out objective, transparent, precise criteria, including as to time limits, and with an effective right of review that eliminates even the risk of distortions" (the heading preceding [75]). The text continues "Contrary to the requirements in *ESL*, the FMV rules do not operate according to transparent, objective, criteria because they give far too much discretion to the PL. As in *ESL* there can be no objectivity "*precisely because of their discretionary nature*", original emphasis." (Footnote 115 to that last sentence cites [203] and [148] in support of that proposition.) .In support of this submission, MCFC relies, in its skeleton argument, on a passage in *ESL* in the following terms: "**Effective review:** *ESL* provides that a regulatory body determining the conditions on which undertakings may access the market "… *must … be subject to … review suitable for eliminating the risk of abuse of a dominant position* …" (Emphasis as in the skeleton argument). A footnote gives para. 138 of *ESL* as the reference.

228. As that passage indicates, it comes from a section in the judgement where the CJEU is looking at the question of whether there is an abuse of a dominant position not the issue of when conduct infringes Article 101 TFEU. That would suggest this passage relates only to abuse under Article 102 and not agreements under Article 101. However, in support of the conclusion reached by the CJEU on Article 102 at para 138, the CJEU relies on Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* ("*Contas*") EU:C:2013:127 which is a case under Article 101 and not 102 TFEU. The CJEU said:

> "*135. More specifically, where the undertaking concerned has the power to determine the conditions in which potentially competing undertakings may access the market or to make determinations in that regard on a case-by-case basis, through a decision on prior authorisation or refusal of such access, that power must, in order not to infringe, by its very existence, Article 102 TFEU, read in conjunction with Article 106 TFEU, be placed within a framework of substantive criteria which are transparent, clear and precise (see, by analogy, judgment of 28 February 2013, Ordem dos Técnicos Oficiais de Contas, C-1/12, EU:C:2013:127, paragraphs 84 to 86, 90, 91 and 99), so that it may not be used in an arbitrary manner. Those criteria must be suitable for ensuring that such a power is exercised in a non-discriminatory manner and enabling effective review (see, to that effect, judgment of 28 February 2013, Ordem dos Técnicos Oficiais de Contas, C-1/12, EU:C:2013:127, paragraph 99)"*

229. Paragraph 99 of *Contas* is in the following terms:

> "*Similarly, as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question.*"

230. While paragraph 99 of *Contas* is contained in the section of that judgment dealing with restriction by effect rather than restriction by object, we consider that, following *ESL*, those conditions are now relevant also to the applicability of Article 101 TFEU in an object case:

> *"178. For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, such as those referred to in paragraph 151 of the present judgment, rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects."*

231. It is true that no mention is made there of the need for effective review but we see no reason of principle why effective review should not also be relevant.

232. However, (leaving aside the exclusion of shareholder loans which we deal with below) we do not accept that the APT Rules do not contain "clearly defined, transparent, non-discriminatory, reviewable criteria". In determining what is meant by those words one needs to bear in mind the context of the judgments in *Contas* and *ESL*. In *Contas* the issue was the terms on which competing providers could provide training courses for accountants in competition with courses run by the Portuguese Order of Chartered Accountants. In essence, complaint was made of a system of prior approval for competing providers that lacked transparency. In considering whether this system of prior approval could be regarded as necessary to guarantee the quality of services offered by Chartered Accountants, the CJEU considered that the legitimate objective of guaranteeing quality of services offered by competing providers could be met by a system of clearly defined, transparent,

non-discriminatory, reviewable criteria without specifying any level of particularity. In *ESL* neither FIFA nor UEFA had any criteria at all for the approval of rival football competitions.

233. The position here is very different. The APT Rules set out written and detailed criteria as to the determination of FMV (see in particular Appendix 18, the FMV Protocol – commercial rights agreements). It is true that the determination of FMV involves the exercise of discretion but the criteria for the exercise of the discretion are reviewable and are clearly defined, transparent and non-discriminatory.

234. Nor can it be said that the lack of an appeal on the merits is at odds with what the CJEU said in *ESL* at [138]. The phrase "review suitable for eliminating the risk of abuse of a dominant position" again needs to be read in context. The context there was a situation where FIFA/UEFA have a dominant position in the organisation of professional football matches and the power to authorise competing football tournaments but with no criteria whatsoever laying down the conditions on which such competing football tournaments could take place. It is obvious that in such a situation FIFA/UEFA had every incentive to favour their own tournaments over competing tournaments. Thus the CJEU was concerned to ensure that there was in place a fair approval system with sufficient safeguards, at a review stage, to avoid the risk of FIFA/UEFA favouring their own tournaments to the detriment of potential competitors.

235. While it is true that the PL, like FIFA and UEFA, is both a regulator and an undertaking engaged in the market in an economic sense, the object of the PSR and the APT Rules is not to prevent a rival tournament to that of the PL starting up but rather to ensure that the PL's own tournament complies effectively with the PSR.

236. In any event, the APT Rules do provide for a review of a FMV determination by the PL Board. MCFC claims this does not go far enough because, as it puts it in its skeleton argument, it sets a "high bar to the challenging club that is expressly not a merits review." However, MCFC did not explain why an appeal on the merits was required by *ESL* and why a review as provided for in the APT Rules was not

sufficient.

237. Under this head MCFC also objects to the subjectivity and imprecision inherent in Rule A.1.94 that defines FMV as the amount that "*could*" … be obtained "*between knowledgeable, willing parties in an arm's length transaction*". MCFC relies in its skeleton on the fact that the PL accepts that such a valuation is an "*inexact science*", *"[Nielsen's] methodology is not the only legitimate methodology",* and that Neilsen accepts that "*there is no single, universal approach to conducting sponsorship evaluation assessments*". According to MCFC, it follows that when the PL assesses APTs essentially by reference to a single method of valuation employed by Nielsen, the PL is subjectively choosing in its discretion to disregard other legitimate valuation approaches. Even if, as the PL claims, the Nielsen assessment is not determinative, the PL treats Nielsen's valuation as the presumptively valid starting point. MCFC submits that this indicates that the PL approach is the application of the FMV rules in a subjective manner as is illustrated in its FMV assessment of the EAG transaction. Thus, in its view, the FMV assessment process fails to respect the requirement laid down in *ESL.* for substantive criteria and detailed procedural rules suitable for ensuring that the rules are transparent, objective and non-discriminatory.

238. We reject these arguments that the FMV assessment criteria breach the requirements laid down in *ESL* for the reasons given at [214-2] above.

239. We have also rejected the argument that the time limits in Rule E.74 breach the requirements laid down in *ESL*, see [204] above.

240. Accordingly, we reject this ground of challenge to the APT Rules.

v) The exclusion of shareholder loans

241. As explained by Mr. Herbert:

> "The Provisional Proposal stated the Executive's view at the time that, in addition to sponsorship and commercial deals and transfers of fixed intangible assets, the definition of RPTs should also capture "*A reduction in costs incurred by the Club (for example, interest free loan finance from Related Parties)*". The reason for this

> was simple: the entire purpose of reviewing these Rules was to ensure robust policing of the PSR; the PSR consider not only revenues received by member clubs from third parties but also costs expended. If a member club could utilise relationships with connected third parties to artificially reduce costs (and thereby improve their PSR position), as a matter of logic, that needed to be factored in as part of any new Rules. Albeit, as I explain below, the specific example referred to in the paper (i.e. interest free shareholder loans) would be the subject of further discussion, debate and ultimately consensus between the member clubs.".(original emphasis, footnotes omitted).

242. However, at the second meeting of FCAG on 1 November 2021 it was decided to exclude interest-free loans from the proposed APT regime. The justification put forward for this exclusion, which was to be found in Recommendation 2 put to the clubs in November 2021 (see [35] above), "was to continue to encourage investment" by owners. Mr Herbert elaborated on this in his evidence saying that it was not the purpose or function of the PSR and the APT Rules to prohibit investment by club owners, whether by way of debt or equity, provided it was done directly by the owner in an open and transparent way rather than via a third party. He drew a distinction between such investment which he considered to be transparent unlike the (non-transparent) artificial inflation of commercial revenues.

243. The precise scope of the shareholder exclusion is set out at rule A.1.244 of the Rules (set out at [54] above). To benefit from that exclusion the "Person" needs to be in the same group of companies as the Club and/or hold, directly or indirectly, more than 5% of the shares.

244. The PL's case is that the shareholder exclusion permits transparent investment by owners in clubs, is not discriminatory as it applies equally to all clubs and treats shareholder loans and equity investment in the same way. It is to be distinguished from sponsorship agreements with APTs that may contain a concealed subsidy.

245. MCFC submits that the exclusion of shareholder loans from the APT Rules is an object restriction. It says that such loans are obviously APTs as they come from a shareholder and such loans are obviously not at FMV because a non-interest bearing loan or a low interest bearing loan or a non-repayable loan is plainly not at FMV. Such an exclusion is discriminatory, distortive, and/or has a differential impact on

different clubs.

246. Once again, we consider that the starting point of the object analysis is to consider the purpose of the PSR - which the PL submits are the basis for the APT Rules, which are intended to avoid circumvention of the PSR. We have referred to and accept the evidence of Mr. Herbert at [14-15] above.

247. The PL explained the purpose and context of the PSR more fully in its Written Opening Submissions in the following terms:

"[44] …Under the PSR, the default limit [for losses] is £15m per three-year period, but this can be increased up to £105m, if covered by sufficiently secure funding (principally equity, not debt). Beyond that limit, however, neither debt nor equity funding can be used to make up gaps between football-related expenditure and revenues.

[redacted]

[45] First, no owner's commitment to a club is guaranteed. It is difficult to imagine a better resourced, more committed football magnate than Roman Abramovich, the erstwhile owner of Chelsea, but the Ukraine war took matters out of his hands: he was sanctioned, and his assets frozen. (A similar event befell MCFC's last owner). No-one can safely predict which club may be (as a recent DCMS report put it) "*just one shock - a geopolitical shift, a failed gamble for promotion, or a disinterested benefactor - away from a crisis*"

[46] Second, such rules do not protect only the shareholder's club.. Unfettered spending by some owners, even if they can afford it, pushes others that cannot in the same direction …

[47] Third, and relatedly, is fairness between clubs … It would be unfair to let clubs with wealthy owners spend without limit. *Per* the UEFA-Commission joint statement §8, .. FFP is aimed at "*preserving fair competition between football clubs"*, in much the same way as these state aid rules. As the Appeal Panel in Everton observed at §22, owner funding, like state aid, is subsidisation. That is particularly so when other sources of external funding are not permitted.

[48] Fourth, to permit such unfettered spending would seriously undermine the approach to competitive balance under the PL rules as a whole, which … is central to both the PL's vision of fair competition, and the bargain between its member clubs. The treatment of shareholder funding by the PSR is thus a constitutive rule, which helps define the League *qua* both sporting competition and product.

[redacted]

[redacted]

[redacted]

248. The same point was made by [redacted] whose evidence in these proceedings was. "Allowing clubs to rely on shareholder support to cover excessive losses is not therefore a sustainable way for the PL or their clubs to operate and the PSRs were introduced to ensure that clubs' finances reflected their sustainable core football revenue rather than the willingness of a shareholder to continue to fund the club."

249. We agree with those observations which are an essential part of the economic and legal context and purpose of both the APT Rules and the shareholder exclusion.

250. Those observations make it clear that encouraging investment by a club owner, the justification advanced by Mr Herbert for the exclusion of shareholder loans from the APT Rules, is a justification that is at odds with the whole rationale of PSR, namely to ensure that a club operates in a sustainable way and does not rely on shareholder support. It is also at odds with the proposal to tighten up the PSR to prevent avoidance of those rules. Nor, in our view, is it legitimate to draw a distinction between investment made by an owner (namely someone with a shareholding of more than 5%) which is transparent and the artificial inflation of commercial revenues. The effect on competition between clubs and the sustainability of a particular club is the same whether the money is received in a transparent manner from the owner or in a non-transparent way from a third party. There does not appear to have been any discussion or analysis as to how such an exclusion would affect the effectiveness of the PSR, and the principle of sustainability of club finance which underlies the PSR or the competitive balance between the clubs.

251. We turn next to the PL's argument that the shareholder loan exclusion is not

discriminatory because it is open to all club owners to provide loans on non-commercial terms. We are unable to accept this argument.

252. A limitation in the scope of the APT Rules so as to cover only certain APTs is discriminatory. It subjects APTs that have the equivalent impact on distorting competition between the clubs (the target of the PSR) to different treatment. Having regard to the purpose of the PSR, a subsidy via a non-commercial loan is just as damaging to its effectiveness of PSR and to competition between clubs as a subsidy via an inflated sponsorship agreement. It distorts competition.

253. As Counsel for the PL accepted in opening, if the ambit of the APT Rules were limited only to APTs from Gulf States, that would be discriminatory and hence an object restriction because, looking at the economic and legal context, although such a measure would still be an anti-circumvention measure, it would be aimed only at Gulf States and therefore objectively it would be discriminatory. We can see no difference in principle between that situation and limiting the ambit of the APT Rules to excluding shareholder loans.

254. Nor is the fact that it is open to all clubs to have access to such a subsidy an answer. Even if it could be said that this meant there was no discrimination in a formalistic sense, a difference of treatment between shareholder loans and other APTs is, in our view, an obvious distortion of competition as it permits one form of subsidy, namely a non-commercial loan, but not another, a non-commercial sponsorship agreement. Both are equally injurious to the objective of the PSR.

255. In this context it is instructive to look at the EU state aid regime which the PL relied on, by analogy, to justify the APT Rules. However, the PL did not seek to justify the distinction made in the APT Rules between subsidies via shareholder loans and via inflated sponsorship agreements as something that would be permitted under the EU state aid regime.

256. Nor was there any evidence that the PL had in fact carried out any analysis as to the impact of the shareholder exclusion on different clubs and to seek to justify such an exclusion. MCFC submitted that it was not necessarily easy for all clubs to receive

non-commercial shareholder loans as it depended on their ownership structure. The position here is to be contrasted with the adoption of the other elements of the APT Rules where we have found that there was sufficient evidence to move from an *ex post* to an *ex ante* regime, and where the changes were to prevent circumvention of the PSR. Here, by contrast, the exclusion of shareholder loan would appear seriously to undermine the PSR and its objectives.

257. The PL also argued that the exclusion of shareholder loans from the APT Rules is justified on the basis that shareholder loans are treated in the same way as equity injections into clubs by owners which also fall outside the APT Rules. In answer to this argument, MCFC submitted that a shareholder loan should not be considered to be equivalent to an equity injection: an equity injection might well involve the dilution of others' equity stakes unlike a loan and so it could not be assumed that the two forms of assistance were equivalent.

258. We have not been asked in these proceedings to determine whether the equity exclusion amounts to a distortion of competition in the context of the PSR and the APT Rules. Nor do we do so. Rather we have been asked to determine whether the exclusion of shareholder loans from the PSR distorts competition. In our view, whether or not shareholder loans can be equated to equity injections, the exclusion of shareholder loans from the APT Rules distorts competition in permitting one form of subsidy, namely a non-commercial loan but not another namely a non-commercial sponsorship agreement.

259. We would add that there is no similar shareholder exclusion in the UEFA FFP Rules. We are not saying that the PL Rules need to be identical to the UEFA Rules but where the PL has, in the passage quoted at [247], cogently explained the need to include contributions from owners, including shareholder loans, within PSR, we would expect some justification as to why a different approach should be taken under the APT Rules.

260. In the light of these observations we now consider whether the shareholder exclusion reveals, in accordance with *ESL*, a sufficient degree of harm to competition such as

to justify a finding that it is a restriction of competition by object.

261. We refer again to the Written Opening Submissions of the PL which state that "owner funding, like state aid, is subsidisation. That is particularly so when other sources of external funding are not permitted." We agree with that statement. The whole point of the PSR is to ensure that no club is able artificially to inflate its income or reduce its costs.

262. In our view, having regard to the economic and legal context and the objective of the APT Rules, to permit owner funding via shareholder loans that are not at FMV, while subjecting other forms of funding to the FMV test, is a clear distortion of competition between clubs. The distortion of competition occurs regardless of whether the distortion arises from a non-FMV transaction with an owner or a related party. Thus, we conclude that the shareholder exclusion amounts to a sufficient degree of harm for it to be categorised as a restriction of competition by object.

263. We would add that we see no reason why the shareholder exclusion cannot constitute an object restriction even though we have found that the other challenged provisions of the APT Rules are not an object restriction. The other provisions considered above can be seen as being necessary in order to prevent the PSR being circumvented. By contrast, the shareholder exclusion provides an obvious way for the PSR to be circumvented. In this context we would observe that in *BIDS* (see [165-166]. above) the CJEU found not only that the objectives of the BIDS arrangements were anti-competitive by object but also the particular means put in place to attain those objectives. This indicates that, in an object analysis, one examines both the scheme as a whole as well as the particular means used to obtain the objective of such a scheme. A key objective of the PSR is to ensure that no club is in receipt of subsidies that do not reflect market forces.

264. As there is no change to the shareholder exclusion in the Amended APT Rules, we reach the same conclusion in respect of those rules, namely that the shareholder exclusion remains an object restriction.

vi) The alleged distortion of competition between the clubs and PL

265. It is common ground that PL wears two hats ("double hatting"). It is a regulator of the PL and has the powers that one would associate with a regulator. It also engages in economic activity, in particular, by selling the media rights in PL matches and entering into sponsorship agreements itself. However, it is clear from *ESL* that EU competition law does not preclude a person, such as FIFA or UEFA, acting as both regulator of a sporting competition, such as football, and engaging at the same time in economic activity by, for example, the sale of media rights. What the case law of the CJEU is seeking to ensure is that such sufficient safeguards are in place to ensure that such "double hatting" ensures equality of opportunity between competing undertakings and hence that there is no risk of a distortion of competition, see [132-137].

266. So the question is whether the fact that the APT Rules do not apply to agreements between the PL and associated parties gives rise to a lack of equal opportunity leading to a risk of a distortion of competition. The distortion of competition relied upon is that between the PL and the clubs in seeking sponsorship agreements. It follows that lack of equal opportunity must also be between the PL and the clubs. Thus, for example, it is said by MCFC (relying on the evidence of [redacted]) that [redacted] it was in advanced negotiations for a sponsorship agreement with [redacted] which ultimately decided to sponsor the PL instead.

267. While we accept that sponsoring the PL or an individual club may be alternatives for some prospective sponsors, we consider that the fact that any sponsorship deal negotiated by the PL has to be approved by the clubs shows that competition between the clubs and the PL is limited as the clubs can veto any PL agreement that they consider is not in their interests.

268. However, more significantly, the PL is in a very different situation from a club. It is a not a football club. Unlike a club its success does not arise from winning the PL, or buying top quality players. Nor does it face the threat of relegation. Its income comes from the sale of media and sponsorship rights for the PL. Its commercial success depends on the success of the PL as a competition. Since the PL is not a

club, the PSR have never applied to the PL itself. Nor does MCFC rely on any evidence to show that the PL should be subject to the PSR for the same reasons as the clubs are and, in particular that there is a risk of distortion of competition in a relevant market as a result of RPTs that might be entered into by the PL.

269. We would add that MCFC alleges, on the basis of an internal email sent by Mr. Masters, the Chief Executive of the PL to Mr. Brass, the Chief Commercial Officer of the PL in October 2021 (which was prior to the adoption of the APT Rules and the Databank Protocol), that the PL was proposing to use material in the Databank for its own commercial purposes. Mr Brass gave evidence that any such proposal was never implemented. Indeed we observe that it is prohibited by the APT Rules and the Databank Protocol. We are not sure whether MCFC was still pursuing that allegation in closing but in any event we reject it.

270. Accordingly, we reject the argument that the non-application of the APT Rules to the PL is an object restriction of competition.

Other points on the APT Rules

271. MCFC also complained that under the APT Rules, unlike under the PSR, if a transaction is re-stated, the monies cannot be used for any purpose, [redacted]. This was foreshadowed in Recommendation 12 (set out at [40] above). The justification given for this approach was that a club should not enjoy the benefit of artificially above market commercial deals for reputational reasons and that, in effect, if clubs were permitted to take any benefit of an artificially inflated transaction it would undermine the promotion of transparency which is an important feature of the APT Rules.

272. No challenge was made by MCFC to this justification which we need to consider as part of the relevant context and objectives for the purpose of an object analysis applying *ESL*. Accordingly we are unable to conclude that, applying the test in *ESL*, this provision reveals a sufficient degree of harm to competition such as to categorise it as a restriction of competition by object.

273. MCFC also complained that the scope of the RPT regime has been extended by a new definition of Associated Parties in the APT Rules. However MCFC did not develop this complaint nor did it explain how such an extension was a restriction of competition by object. Suffice it to say that we cannot see, applying the test in *ESL*, how this extended definition reveals a sufficient degree of harm to competition such as to categorise it as a restriction of competition by object.

The Amended APT Rules

274. We turn next to consider MCFC's argument that the Amended APT Rules are an object restriction. To recap the material changes are set out in [139-142] above and in the Appendix:

(i) the substitution of the word "would" for "could" and the insertion of the term "normal market conditions" in the definition of FMV,

(ii) the removal of "evidently" as a threshold for intervention by the Board in a FMV assessment and the insertion of "Normal market conditions",

(iii) a shift in the burden of proof so that the burden is on a club submitting an APT to show that it is FMV rather than on the Board to prove that it is not, and

(iv) the replacement of the default 10 day time period for concluding a FMV assessment, in a case where the Board requires further information or discussion, with a 30 day backstop for standard commercial and player APTs provided the club supply information in a timely fashion

275. Mr. Herbert gave unchallenged evidence as to the reason why these amendments, other than the addition of the words "in normal market conditions", were proposed. However, the concept of "normal market conditions" was explained in a Guidance Note circulated by the PL before the meeting of the clubs on 9 February 2024 which is to be found in identical terms in Appendix 18 of the Amended APT Rules, as follows:

"Normal market conditions are typically those in which revenues bear a

> reasonable relationship to any costs incurred taking into account the economic value of the product supplied or service provided. […][They] shall typically be assessed through benchmarking, i.e. in the light of the terms under which comparable Transactions carried out by comparable Clubs have taken place in comparable circumstances."

276. The change from 'could' to 'would' was in view of feedback from Nielsen that the use of the word 'could' in the FMV definition was having a potential inflationary effect in Nielsen's assessment, by requiring it to engage in a theoretical exercise as to potential realisable value and was having a compounding effect due to the two-stage process that was involved. The substitution of 'could' for 'would' shifted the analysis from the theoretical to the actual, and would provide a narrower (and thus more accurate) FMV.

277. The word "evidently" had initially been introduced to provide a 'buffer', in view of the inexact nature of FMV assessment and the advice provided by Ms. Davies KC. Feedback from Nielsen and the Board sub-committee suggested that the word was redundant because this 'buffer' was already established by the FMV range returned by Nielsen. By contrast Ms. Fyfield's evidence was that the change of wording would mean that Nielsen would come up with a narrower range of figures in an FMV assessment. In his oral evidence [redacted] commented on Ms. Fyfield's evidence and considered that the change from "could" to "would" could have a very material impact. This was because if one limits one's intervention to the comparators in the top decile (the top 10%) but then changes that to look at the average of comparators across the board, that would materially increase the risk of false positives. This is particularly in the light of Ms. Fyfield's evidence that her decisions on FMV were often finally balanced.

278. The shifting of the burden of proof was based on feedback from the clubs that, consistently with other regimes including the Takeover Code, it should be for a party wishing to enter into an APT to establish that such a transaction is at FMV.

279. The change in timing was introduced since the iterative nature of APT assessments and resource constraints took longer than the 10 days on certain occasions. At the same time the PL executive took steps to increase its own internal team and

requested Nielsen to increase the size of its ring-fenced team.

280. The criticism by MCFC in its skeleton of these new rules was that they significantly aggravate and exacerbate the distortions of the FMV Rules and their non-compliance with the *ESL* criteria by rendering the concept of FMV still vaguer, lowering the threshold for intervention, and reversing the burden of proof.

281. The Tribunal will assess them under the separate headings of pricing and timing changes to the FMV determination.

Pricing changes to the FMV determination.

282. We consider that we should examine together the three changes made to the pricing determination, namely the substitution of "would" for "could" together with the addition of the term "normal market conditions", the removal of the adverb "evidently" qualifying the FMV, and the reversal of the burden of proof from the PL to the club to show that a transaction is at FMV. This is consistent with the approach in competition law that one looks at all the surrounding circumstances to determine an effect on competition.

283. Applying the test laid down in *ESL* we need to look at the content, context, and objectives of the Amended APT Rules.

284. We start with the content of the Amended APT Rules.

285. In our view the combined effect of these changes is likely to increase the risk of false positives in an FMV determination. The more false positives there are, the greater the likelihood that there is a distortion of competition.

286. We accept [redacted] evidence that the change in wording could have a material impact on an FMV determination. We also agree with [redacted] point that the value of a specific sponsorship deal depends on factors that may be specific to a particular sponsor - a proposition from which the PL did not dissent (see [210] above). Put another way, there may well be a subjective element in a sponsorship agreement that might not wholly be captured by a benchmarking exercise which

looks at comparable transactions or indeed there may be no such directly comparable transactions. This point was also recognised in the advice of Helen Davies KC: "The standard of 'evidently in excess of FMV' should ensure that it is only obviously abusive transactions that are prevented and thus that there is no unintended collateral adverse effect on competition."

287. We also have a concern about the concept of "Normal market conditions" as explained in the Guidance which states that this means typically a case in which revenues bear a reasonable relationship to any costs. While this might be a suitable test to assess the FMV of industrial products which have an easily identifiable cost of production, such an approach is more difficult in the case of sponsorship arrangement. As [redacted] said, a particular sponsorship agreement is often bespoke to the particular relationship between the sponsor and the club.

288. Turning to the context and objective, we accept that the Amended APT Rules are intended to refine the workings of the PSR in the light of the experience in the operation of the APT Rules. However, having regard to the evidence of [redacted] and [redacted], we consider that the Amended APT Rules remove an important part of the previous buffer which was intended to reduce the risk of false positives. The removal of this buffer is liable to increase the risk of a distortion of competition and to do so materially. In our view, it is important that the method chosen for determining the FMV of an APT is sufficiently robust to, if not eliminate, at least reduce the risk of false positives. We are not persuaded by the evidence of Mr. Herbert that these changes are either necessary or proportionate to the ensuring of the effectiveness of the PSR. His evidence does not grapple with the possible bespoke nature of sponsorship agreements.

289. Accordingly, we conclude that these changes are a restriction a competition by object.

Timing changes

290. Experience of the operation of Rule E.64 under the APT Rules has shown that a FMV determination is a more complex and often a lengthier process than originally

envisaged. Time is required by the PL to give proper and fair consideration to the club's representations and evidence, which can often be voluminous.

291. Having regard to the test laid down in *ESL*, namely the content of the amended Rule E.64, its economic and legal context, and its objective, we conclude that it is not an object restriction. So far as the change from 10 days to 30 days and stopping the clock when further information is required, we conclude that it is justified in the light of the experience the PL had gained in operating the APT Rules since 2021.

ISSUE 2: DO THE APT RULES AND AMENDED APT RULES HAVE THE EFFECT OF PREVENTING, DISTORTING OR RESTRICTING COMPETITON?

The test for an effects restriction

292. The effects test has also been set out in *ESL* as follows:

"*Categorisation of the existence of conduct having as its 'effect' the prevention, restriction or distortion of competition*

168 The concept of conduct having an anticompetitive 'effect', for its part, comprises any conduct which cannot be regarded as having an anticompetitive 'object', provided that it is demonstrated that that conduct has as its actual or potential effect the prevention, restriction or distortion of competition, which must be appreciable (see, to that effect, judgments of 28 May 1998, Deere v Commission, C-7/95 P, EU:C:1998:256, paragraph 77, and of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 117).

169 To that end, it is necessary to assess the way the competition would operate within the actual context in which it would take place in the absence of the agreement, decision by an association of undertakings or concerted practice in question (judgments of 30 June 1966, LTM, 56/65, EU:C:1966:38, page 250, and of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 118), by defining the market(s) in which that conduct is liable to produce its effects, then by identifying those effects, whether they are actual or potential. That assessment itself entails that all relevant facts must be taken into account."

293. In *Contas* the CJEU said that a court has to determine whether the contested conduct "has had or is likely to have harmful effects on competition" [72].

294. Thus, for an effect analysis, one needs to identify:

a) the way competition would operate in the absence of the agreement. This is called the counter-factual,

b) the affected markets. These are known as the relevant markets,

c) the actual or potential likely effects on competition, and

d) that the effects on competition are appreciable.

Application of the test: the counter-factual

295. It is common ground between the parties that the counter-factual here is the RPT Rules. It is those rules against which the APT Rules and the Amended APT Rules are to be judged.

Application of the test: the relevant markets

296. As the European Commission Notice on the definition of the relevant market for the purposes of Union competition law ("the Market Definition Notice") (OJ C/202471645) states:

> *"Market definition is a tool that the Commission uses to identify and define the boundaries of competition between undertakings. The main purpose of market definition is to identify in a systematic way the effective and immediate competitive constraints faced by the undertakings involved when they offer particular products in a particular area. Market definition leads to the identification of the relevant competitors of the undertaking(s) involved when they offer those products, as well as the relevant customers. Only products that exert effective and immediate competitive constraints within the relevant timeframe form part of the same relevant market as those of the undertaking(s) involved, while other less effective, or merely potential, constraints are considered as part of the competitive assessment." [6].*

It goes on to state that:

> *"…, market definition allows for a distinction between competitive constraints from within and from outside the market, by including only the effective and immediate competitive constraints in the relevant market. However, the Commission takes into account all competitive constraints (whether effective and immediate or not) in the competitive assessment, bearing in mind that out-of-market constraints are more*

remote constraints on the undertaking(s) involved." [17].

It has not been suggested by either party that the role of market definition is different under the 1998 Act.

297. The Market Definition Notice indicates that market definition is not an end in itself but a tool to identify competitive constraints on the relevant undertakings and, in doing so, draws a distinction between competitive constraints from within and from outside the market, by including only the effective and immediate competitive constraints in the relevant market.

298. Three relevant markets are put forward by MCFC for the purpose of assessing the effect on competition of the APT Rules and the Amended APT Rules. They are the market for the global sponsorship of football organised by the PL, the market for football player services and the market for shares in football clubs.

299. The first relevant product market is said to be the market for the global sponsorship of football organised by the PL, including sponsorship of the PL itself. This is contested by the PL so it is necessary for the Tribunal to determine this issue.

300. [redacted] explained that the formal tool for market definition is the hypothetical monopolist test ("HMT") which in essence seeks to identify what markets would be worth monopolising such as it would be profitable for hypothetical monopolist of that market to raise prices above competitive levels. However he then went on to explain that it is not clear how one would apply the HMT to competing multi- sided platforms as it requires estimating the impact of a hypothetical price rise on all dimensions of competition. Instead he sought to examine the potential for distortion of competition directly by considering the implications for the clubs' incentive to compete and the direct impact this may have on consumer welfare. In broad summary, he concluded that there is substantial evidence that, while sponsors may wish to advertise or sponsor in other leagues, other sports and indeed in non-sports related settings, the unique qualities of the PL in terms of global viewership and supporter engagement means that other markets are likely not to be a substitute for PL sponsorship. Those limits on substitution suggested the relevant product market

as specifically the market for sponsorship of football organised by the PL. He added that this definition was in line with decisions by competition authorities which define the relevant product market as the market for sponsorship related to a particular sport.

301. As part of this evidence he pointed to the fact that the PL is the most watched football league in the world averaging over 600 million viewers per match compared to around 7.5 million viewers for La Liga, the second most viewed league. In the 2019/20 season the PL had a cumulative global audience of 3.16 billion, nearly double that of the next two most watched leagues in Europe, the Bundesliga and La Liga. The PL has a uniquely global fan base. In the 2019/20 season, 42 of the top 50 global audiences for European domestic league matches were for PL matches with the PL reaching the largest audiences in China, India, and the US. This international appeal is reflected in the fact that the PL's overseas broadcast rights have consistently exceeded the combined total of the other five big European leagues.

302. [redacted], the economist retained on behalf of the PL, considered that [redacted] relevant market for the global sponsorship of football organised by the PL was too narrow. He made two preliminary points. First, the mere existence of differences in product characteristics does not preclude such products being in the same market. Secondly, when defining the relevant market one should not focus only on the most direct instances of substitution since a market definition assessment should consider all types of constraints including constraints that arise from the possibility of switching to a combination of alternatives.

303. He accepted that there was some competitive constraint exerted on the PL clubs by the PL, but he considered that if sponsorship of the PL competition itself was considered to be in the same relevant market as that of sponsorship of the clubs, the clubs would be likely to be much closer competitors to one another than the PL competition is to any of them. In reaching his conclusion that the relevant market was wider than that put forward by [redacted]

[redacted] (original emphasis). He also considered further evidence from the PL which suggested that the PL benchmarks itself primarily against other football competitions, especially other European leagues, but also non-football sporting competitions. He also undertook what he called "desk research" and relied on a number of examples which "Although evidently not comprehensive, […] suggest [...] that at least some sponsors consider a range of options beyond football organised by the [..] PL and are prepared to shift spend across different alternatives over time. This is consistent with a broader market in my view."

304. On this basis, he concluded that the market for sponsorship was broader than the one put forward by [redacted]. Such a broader market would likely contain at least other high-profile European football clubs, other high-profile football competitions, and other high profile non-football sports teams and competitions.

305. The Tribunal prefers the opinion of [redacted] to that of [redacted] that the relevant product market is confined to the market for the global sponsorship of football organised by the PL. It does so for the following reasons.

306. First, the issue here is whether the APT Rules adopted by the PL, in its regulatory capacity, have an anticompetitive effect by distorting competition in sponsorship between the clubs that are members of the PL. The APT Rules were intended to bring to an end what the PL considered was a significant distortion of competition between PL clubs in the market for sponsorship. There is no evidence that the PL was constrained by competition from other major European football clubs or tournaments or indeed non football tournaments when it chose to adopt the APT Rules. We consider that this undermines the argument of [redacted] that, in order to assess the effect of the APT Rules, one must not look at competition within the PL but look at competition within a much broader product market that encompasses both football and indeed other sports outside the PL.

307. The Market Definition Notice reinforces this point. It observes that market definition is not an end in itself but a tool to identify the competitive constraints on the relevant undertakings. The natural starting place for identifying such competitive constraints is competition between such clubs. It has not been suggested that it is artificial to examine this effect by reference to such competition between those clubs. Indeed [redacted] accepted the clubs are their own closest competitors.

308. Secondly, as [redacted] fairly and properly accepts, the evidence he relies on for a broader relevant market is not comprehensive and goes no further than suggesting at least some sponsors consider a range of options beyond football organised by the PL and are prepared to shift spending across different alternatives over time. Apart from the inconclusive nature of such evidence, [redacted] conclusion does not, in our view, reflect the point made in the Market Definition Notice that one should only include the effective and immediate competitive constraints within the relevant market.

309. In respect of the two other product markets put forward by MCFC, namely the market for football player services and the market for shares in football clubs, there was broad agreement. We were not asked to determine the precise boundaries of those markets in order to decide whether the FMV rules have an appreciable effect on competition.

310. There is no dispute as to the relevant geographical market for any of the three markets.

Application of the test to the APT Rules: the actual or potential appreciable effects on competition

The market for the global sponsorship of football organised by the PL

311. In its Statement of Claim MCFC relies on a number of distortions of competition which are pleaded as restrictions of competition by object or in the alternative by effect, without distinguishing between the two. In its skeleton argument MCFC indicates that its primary position is that the FMV rules were a restriction by object

but that, in the alternative, those rules have the actual or potential effects identified in the skeleton. We will look at those identified effects as well as whether they are appreciable.

312. As already indicated, the counter factual relied on by MCFC were the PSR in force before the APT Rules.

Alleged revenue shortfall and delay

313. In its skeleton MCFC relies on three alleged actual effects. The first is a revenue shortfall suffered by MCFC and by other clubs; the second is the loss of two major sponsorship deals for [redacted] as a result of the moratorium on APTs and the introduction of the FMV Rules; and the third is the effect of the APT Rules on [redacted].

314. In support of the first alleged effect, MCFC relies on the evidence of [redacted]. In a subsequent email to the Tribunal it also referred to the evidence of [redacted] and [redacted].

315. [redacted] gave evidence of a revenue shortfall to MCFC caused by the restatement of the EAG transaction of around [redacted] over the first year of the EAG transaction and [redacted] over the full [redacted] contract. The skeleton states. "It is self-evident that, if the Club is forced to reduce the value of the EAG transaction by [redacted] over the course of the [redacted], this outcome will materially impact on the club's ability to invest and compete."

316. The Tribunal is, however, unable to accept that this is evidence of an actual appreciable effect on competition in any of the three relevant markets.

317. The revenue reduction argument proceeds on the assumption that the undistorted market price of the EAG transaction was [redacted] over [redacted], as agreed between MCFC and EAG, and the FMV determination has reduced this price by about [redacted]. Its case is that this downward reduction means there is appreciably less money to invest. However the object of the APT Rules is to ensure that the value of APTs is

not over-stated so as, in effect, to subsidise the club in an unfair manner to the detriment of its competitors and thereby distort competition. If the FMV assessment of the EAG transaction is correct, then the revenue shortfall relied on in the skeleton argument is based on an over-stated figure. In that situation, the figure of [redacted] cannot be the correct counterfactual.

318. In its challenge to the reasonableness of the PL Board's FMV assessment in the case of the EAG transaction (which is Issue 11, considered at [505-550] below) MCFC relied both before the PL Board and before this Tribunal on a number of pieces of evidence, including competing offers, the value of [redacted] rights, [redacted] and [redacted] rights in support of its argument that the FMV assessment was unreasonable. The Tribunal's conclusion is that the Board's FMV assessment was not unreasonable (see [550] below).

319. It is true that [redacted] gave evidence that "there *may* not be such a thing as an objective "fair" market value for sponsorship deals" (our emphasis), as did [redacted]. [redacted] concluded that as a result the FMV rules "*will* distort competition between clubs with a larger network of APs and those without" and indeed between the clubs and PL (again our emphasis).

320. Although we have accepted the evidence of [redacted] that the value of a specific sponsor deal depends on factors that may be unique to a particular sponsor and its relationship with the person or club that it wishes to sponsor, we have not accepted his evidence that a FMV assessment is inherently flawed (see [210] above). It does not therefore follow that the Tribunal should assume, for the purpose of an effects analysis, that the price put on a sponsorship deal in an APT is an undistorted price and that any reduction following an FMV determination is inherently distortive.. That would go to the other extreme of accepting whatever figure is in an APT is non-inflated and an undistorted price. Such an approach would mean that no regulatory body, such as the PL or UEFA, could not restate the price in an APT. We do not accept such approach.

321. We also note that MCFC accepted as the counter-factual the PSR. But this, just like

the APT Rules, enabled the PL to restate the price of an RPT, albeit on an *ex post* rather than *ex ante* basis. So had the EAG transaction been concluded at a time when the RPT rules were in force, one could not proceed on the assumption that the price in the EAG agreement was the undistorted price.

322. Rather, in our view, the real issue is how the PL determine what is an undistorted price. The methodology used by the PL is that set out in section D of Appendix 18. We have found that methodology reduces the risk of false positives (see [213-218 above) and, also applying that methodology, the FMV determination of the PL Board of the EAG transaction was not unreasonable.

323. In those circumstances the Tribunal cannot proceed on the basis that the difference between the EAG transaction figure and the restated FMV price is evidence of an adverse and appreciable effect on competition.

324. We will consider the evidence of [redacted] at [328-9] below.

325. The evidence of [redacted] relates to an APT between [redacted] and [redacted]. The thrust of that evidence is that it took a long time (165 days) for the PL to conclude that the transaction was not evidently above FMV and it required [redacted] to renegotiate aspects of that agreement. For the reasons that we have just stated in respect of the EAG transaction, we do not regard the PL's price intervention into the [redacted] transaction as *ipso facto* evidence of an anti-competitive effect. We deal with the issue of delay below, commencing at [330].

326. [redacted] essentially deals with the impact of the APT Rules on the market for club equity and on multi club ownership. However, his evidence also proceeds on the unstated, but in our view erroneous, assumption that any interference in the price on an APT transaction is anti-competitive. We have already explained at [316-320] above why we cannot accept that assumption.

327. The second actual effect relied on is the loss of two sponsorship agreements by [redacted]. [redacted] gave evidence that she had been negotiating a sponsorship agreement between [redacted] and [redacted]

[redacted] but that both those negotiations came to a halt when the PL imposed the moratorium on RPTs. When the moratorium was lifted, neither potential sponsor was interested in resuming the negotiations. That evidence shows that the moratorium stopped further negotiation on those two potential deals but does not, in our view, demonstrate, on a balance of probabilities, that the APT Rules themselves had a chilling effect in driving away these two potential sponsors. We do not know the reasons why the negotiations were not resumed after the moratorium was lifted. We would add that no documents relating to these proposed transactions were disclosed by the club, a point made by PL when it resisted the serving of this evidence. In an interlocutory ruling the Tribunal decided to allow this evidence in but noted that the absence of internal documents would be a relevant factor in determining the weight to be given to this evidence.

328. We now turn to the final actual effect relied on, namely the effect of the APT Rules on [redacted]. The evidence relied on here is that of [redacted]. It is to be recalled that he gave evidence in respect of three APTs (see [197] above). The first was the loan of the player [redacted] from [redacted] to [redacted], [redacted], and the complaint is that the PL Board did not accept the FMV of that player by reference to market data and instead relied upon amortisation cost. [redacted] did not challenge that approach before a Tribunal and in the absence of any detailed analysis of whether an amortisation rather than market value is appropriate, the Tribunal is unable to conclude that the approach taken by the PL Board had any anti-competitive effect, let alone that any effect was appreciable. The same goes, *mutatis mutandis*, for the two other APT transactions mentioned by [redacted], namely the [redacted] and the [redacted].

329. [redacted]'s evidence also dealt with the issue of alleged delay. In an email sent to the Tribunal after the hearing, MCFC identified under the Heading "**Do the PLF MV rules restrict competition by effect?**" (original emphasis) the evidence it relied on in support of its argument that one of the anti-competitive effects of the APT Rules was *"Delay and uncertainty"* (original emphasis). It is not clear whether MCFC is relying on this evidence of both actual and potential effects but the

Tribunal will look at both aspects.

330. In looking at the issue of the effect of the alleged delays, we remind ourselves that the competition challenge is to the APT Rules themselves (and the Amended APT Rules) and not to the individual FMV assessments that are challenged in these proceedings (including the EP transaction where there was a challenge which has been withdrawn as a result of the PL Board making a new determination). What we need to consider is whether the operation of Rule E.64 had the effect of appreciably restricting competition in any of the three identified markets.

331. As we understand it, the evidence relied upon by MCFC can be categorised as follows:

(i) the actual delays said to have been suffered by MCFC in respect of the EAG, FAB, and EP transactions,

(ii) the actual delays said to have been suffered by [redacted] and [redacted], and

(iii) the alleged general potential chilling effect on APTs in the future.

332. Looking first at the alleged actual delays said to have been suffered by MCFC in respect of the EAG, FAB, and EP transactions, we deal with the reasonableness and lawfulness of these delays under Issues 12, 19, 20 respectively (see respectively [551, 577 and 585] below). In relation to the EAG transaction, we conclude that the period of five months between the request for an FMV assessment and the final determination was not unreasonable. That is based not only on the complexity of the transaction but also the volume of material that had to be considered by the PL. In the case of the FAB and EP transactions, we conclude that, overall, there were unreasonable delays of about 3 months in respect of the FAB Transaction and about 2 months in respect of the EP transaction.

333. Turning to the case of [redacted] the period between submission of the APT and the Provisional Determination was 150 working days ([redacted] transaction), 142 working days ([redacted]), and 128 working days ([redacted]). In

the case of [redacted], [redacted] gave evidence of the [redacted] transaction which was approved by the PL on [redacted], 165 days after submission following a renegotiation prompted by the PL's investigation of the FMV of that transaction.

334. The evidence relied on by MCFC of the alleged general potential chilling effect on APTs is that of [redacted] who, in essence, stated that delays in reaching an FMV assessment create a huge amount of uncertainty for the club and are a deterrent to potential sponsors.

335. The evidence relied on by the PL was given by Ms. Blake and [redacted] which has been summarised at [197] and [199] above.

336. Looking at the totality of this evidence, we see a mixed picture. The evidence of [redacted] shows that in over 75% of APTs (41 out of 52), the determination was made within 25 days. We do not regard such a period of time as evidence of an anti-competitive effect arising from the *ex ante* APT Rules. That leaves a number of APTs where the time taken has been longer, in some cases very significantly longer. But in determining whether that time period is such as to give rise to an appreciable effect on competition, we consider that. as in the object analysis, we are entitled to have regard to the need to conduct a process that is fair both to the club and the PL. We consider that, at least in some of these determinations that took longer than 25 days, in particular the three transactions involving MCFC about which we had most evidence, most of the extra period of time was justified by the complexity of the APT in question. Nevertheless we recognise, and indeed the PL in effect admitted, that in some cases the period of time taken was too long. The principal cause for this, again recognised by the PL, was the lack of resources within the PL regulatory team and also within Nielsen.

337. Regrettable though some of these individual delays have been, there was no evidence that one or more clubs actually lost an APT due to the time taken for a determination. We therefore conclude that the evidence is not sufficiently compelling for us to make a finding that, viewed in the context of the relevant market and , the time taken by the PL under Rule E.64 was such as to give rise to an actual and appreciable effect on

competition.

338. As regards the potential effect of future delays, since the APT Rules have now been amended, we consider this issue by reference to those Rules at [359-362] below.

339. We now turn to consider the other alleged potential anti-competitive effects of the APT Rules on which MCFC relies. We look first at alleged distortions in the PL sponsorship market. (We note that in this respect the APT Rules and the Amended APT Rules are the same.)

340. The first submission can be summarised as follows. The *ex ante* regulation of APTs is likely to have a chilling effect, within the PL sponsorship market, on the clubs' negotiations with potential sponsors, undermining potential strategic partnerships and reduces the ability of clubs to compete on the basis of their own comparative advantages, including clubs which have a large network of Associated Parties who wish to enter sponsorship agreements.

341. In terms of evidence of chilling effects, MCFC relied on the evidence of [redacted]. He accepted that no existing Associated Party has walked away from MCFC as a result of the APT Rules but was concerned about brands that would not offer sponsorship to a club (sponsors that the club would not see) because of the chilling effect of those Rules. The Rules would, in his view, dissuade them from coming forward to sponsor a club that is an AP. We regard this evidence as speculative and certainly not significant enough to show the necessary appreciable effect on competition.

342. Indeed we have seen no evidence in the three years that the APT Rules have been in operation of any Associated Party walking away from a deal with an AP club as result of those rules. We have already found that the evidence in relation to [redacted] concerned the moratorium on RPTs not the new APTs (see [327] above).

343. Accordingly, we do not find any distortion of competition, let alone any appreciable distortion, arising from an alleged chilling effect of the APT Rules.

344. The second alleged potential effect is that the APT Rules will distort competition between those clubs which have, and those which do not have, a large network of Associated Parties. MCFC relies on [redacted] conclusion in this respect. We are unable to accept this. First, the APT Rules are designed precisely to ensure that competition is not distorted between clubs that use Associated Parties and those that do not. Where the transaction is not between a club and an Associated Party there is no reason to investigate the price agreed between two parties to see whether it is inflated. Secondly, we have already rejected the argument (see [341-342] above) that APT Rules have a chilling effect on APT transactions.

345. We turn now to the argument that the alleged absence of precise criteria and effective of right of review is a restriction by effect. We have already rejected this argument in respect of the object case (see [227-240] above). For the same reasons we reject this argument as showing a restriction by effect. Likewise the reasons that we have given for rejecting what we have termed "Other Points" (see [271-273] above) apply equally insofar as MCFC has suggested that they give rise to restrictions by effect.

346. We have already found that the shareholder loan exclusion is a restriction of competition by object, see [241-263] above. We do not therefore need to consider the question of effect.

347. For the reasons given at [265-270] above, we also consider that the APT Rules do not have the effect of restricting competition between the clubs and the PL. We would add that we do not regard the evidence of [redacted] about the alleged loss by MCFC of one proposed sponsorship agreement with [redacted], some three years before the APT Rules came into effect as proving that the APT Rules are likely to give rise to an appreciable distortion of competition between the PL and the clubs.

348. Nor was any evidence put forward to prove that the "Other Points" raised in relation to an object restriction (see [271-273] above) have either the actual or potential effect of appreciably restricting competition in this market.

Effect on consumer welfare

349. At the end of its skeleton argument on effects MCFC has alleged that the APT rules are "liable" to cause harm to consumers in terms of i) higher prices for tickets and merchandise, ii) lower quality of players thereby reducing the PL's clubs ability to compete successfully in the Champions' League and other UEFA competitions, and iii) restricting innovation by limiting the clubs' ability to engage in dynamic competition on the merits, such as through extensive multi- club models.

350. Although MCFC does not state in its skeleton argument in which of the three above markets these effects are liable to occur, it would appear from [redacted] report, to which the skeleton refers, that the relevant market is that for global sponsorship of football organised by the PL. But as this argument is based on the difference between the stated transaction price in an APT and the FMV determination, it proceeds again on the unproven premise that the APT price is the correct competitive price and not over (or under) inflated, see [316] to [320] above. If the APT price in a multi- club transaction is under or inflated, competition between clubs that rely on the multi- club model and other clubs is distorted. So we cannot accept this argument. Nor do we accept any chilling effect as the basis for this alleged restriction of competition, see our conclusions at [340] to [343] above which apply *mutatis mutandis* to the allegation under this head.

351. As regards any alleged adverse effect on innovation, again we reach the same conclusion. The innovation argument is also premised on the assumption that the price in an APT is at FMV.

352. Finally we do not accept that there is an inconsistency, as MCFC suggested at the end of this section of its skeleton, between the PL's objective in introducing the APT Rules (to have the ability to restate, on an *ex ante* basis, APTs that are evidently above FMV so as to ensure the effectiveness of the PSR) and the PL's argument that those Rules give rise to no appreciable effect on competition. This alleged inconsistency again proceeds on the unproven premise that the price in an APT is an undistorted price and that, as a consequence, any restatement of that price is *ipso facto* a distortion of competition. We have already explained at [316] to [320] above

that we cannot accept that argument.

353. Thus we conclude that MCFC has not demonstrated that the APT Rules have had an appreciable actual or potential effect on (undistorted) competition in any of three relevant markets.

The player services market

354. Here it is argued by MCFC that the APT Rules have the potential to distort competition by interfering with multi-club entities' ability to compete with non-multi club entities and directly restricting the ability of clubs with a larger networks of Associated Parties to compete with clubs without such networks. This is said to be because multi-club entities can utilise player development opportunities by transferring or loaning players amongst affiliated clubs, while increasing their clubs' operational flexibility in terms of squad management. However this flexibility is adversely affected by delays in the FMV determination process which have the consequence of making long term investment plans more uncertain. This, in turn, may have a negative impact on on-field performance, affecting other sponsorship opportunities.

355. This point is essentially the same as that regarding the alleged distortion of competition between clubs with and without a larger network of Associated Parties. Again we have seen no evidence of actual or potential anti-competitive effect, let alone an appreciable effect, on multi-club entities. Further any transfer of a player within a multi-club entity is not frozen pending an FMV assessment. For these reasons we reject this argument.

The club equity market

356. MCFC alleges that there is a potential for distortion in this market by reason of the fact that the APT Rules do not apply to shareholder loans and will therefore incentivise shareholders to make loans as opposed to purchasing new equity, which favours clubs with better access to loans from shareholders. Those incentives could result in a material distortion, given that £1.5b out of £4b total borrowings (some

37%) are made to clubs by shareholders, including all of Arsenal's borrowing and almost all of Brighton's borrowing.

357. We have already concluded that the exclusion of shareholder loans from APT Rules is a restriction of competition by object. It is therefore unnecessary to say anything about this submission.

Application of the test to the Amended APT Rules: the actual or potential appreciable effects on competition

358. Since the Tribunal has found that the pricing changes in the Amended APT Rules are a restriction of competition by object, there is no need to consider the question of effect of those rules. We pass therefore on to the timing changes.

359. The new timing provisions in Rules E.65-E.66 were introduced since the iterative nature of APT assessments and resource constraints had led to longer time periods than the 10 day default period. At the same time the PL executive took steps to increase its own internal team and requested Nielsen to increase the size of its ring-fenced team.

360. These changes essentially provide the PL with a longer backstop of 30 days rather than 10 days for making a Determination where further information is required or there are exceptional circumstances. This reflects the PL's experience of operating the APT Rules. In terms of actual operation of the rules on the time to make an FMV assessment,, the evidence is that the PL has not only increased the resources of its Regulatory Team but also asked Nielsen to do the same in respect of its team with a view to shortening the time taken for a FMV assessment.

361. We anticipate that the increase in resources should reduce the overall time taken to conclude a FMV determination to what we would consider to be a more reasonable time. That is to say in a non-exceptional case, such as the FAB or EP transactions, we would expect to see a FMV determination completed usually in no more than 2-3 months. In an exceptional case, such as the EAG transaction, we would expect the time taken to complete such a determination to be, usually, no more than 4-5 months.

On the assumption that the time for a FMV assessment taken falls within these time frames we think that it is unlikely that any club will lose a potential sponsorship deal on account of delay. We have seen no evidence that this has been case in the past nor do we think that it is likely to be the case in the future when there are additional resources now available.

362. On this basis, and given that we have seen no evidence of actual loss of APTs to clubs under the operation of the APT Rules, we conclude that the timing changes set out in Rules E.65 and E.66 are not likely to delay APTs sufficiently so as to have the potential and appreciable effect of restricting competition.

ISSUE 3: IF THE FMV RULES (AND/OR THE AMENDED FMV RULES) DO HAVE THE EFFECT OF PREVENTING, DISTORTING, RESTRICTING COMPETITION, DOES THE "ANCILLARY RESTRAINT" DOCTRINE APPLY, SUCH THAT THEY NEVERTHELESS DO NOT INFRINGE COMPETITION LAW?

363. It is common ground that in the light of *ESL* (see [183] to [188] of *ESL* cited at [161] above) a restriction on object cannot benefit from the 'ancillary restraint' doctrine. This issue arises only in respect of those provisions of the APT Rules and the Amended Rules that we have found to have an appreciable effect on competition

364. Since we have not found any provisions of the APT Rules and the Amended Rules to have an appreciable effect on competition this issue does not arise.

ISSUE 4: IF THE FMV RULES (AND/OR THE AMENDED FMV RULES) DO HAVE THE OBJECT OR EFFECT OF PREVENTING, DISTORTING OR RESTRICTING COMPETITION, AND THRE ANCILLARY RESTRIANT DOCTRINE DOES NOT APPLY, DO THEY MEET THE CRITERIA FOR EXEMPTION UNDER S.9 OF THE 1998 ACT?

365. Section 9 of the 1998 Act provides:

"Exempt agreements

(1) An agreement is exempt from the Chapter I prohibition if it—

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

366. Accordingly, a party relying on an exemption bears the burden of proving that all four conditions of the exemption (which are cumulative) are met.

367. Perhaps understandably in the light of time constraints, neither party addressed us orally on this issue. But we can deal with this quite shortly.

368. The issue of exemption arises only in respect of the shareholder loan exclusion, which we have found to be an object restriction (see [262] above) and the pricing changes in the Amended APT Rules which we have found also to be an object restriction (see [289] above).

369. [redacted], on behalf of the PL, does not deal with the exemption criteria. The PL's case on exemption is set out in its Statement of Defence. The principal point made there is that the APT Rules give rise to a number of efficiencies. In terms of indispensability, the third condition for an exemption, the Statement of Defence relies on the need to attain the objective of improving the efficiency of enforcement of the PSR as justification for introducing the APT Rules. We have already accepted that justification, see [189] above.

370. However, we have not accepted the justification advanced for introducing the shareholder loan exclusion in the APT Rules nor the pricing changes in the Amended APT Rules. Looking at the exemption criteria, we have not found any evidence to show that either the shareholder loan exclusion in the APT Rules or the pricing changes in the Amended APT Rules were indispensable to the attainment of the objectives of the PSR. Accordingly, the PL's exemption case must fail.

ISSUES 5 AND 6: DO THE FMV RULES (AND/OR THE AMENDED FMV RULES) GIVE RISE TO AN ABUSE OF A DOMINANT POSITION BY THE RESPONDENT? IF THE FMV RULES (AND/OR THE AMENDED FMV RULES) DO GIVE RISE TO A PRIMA FACIE CASE OF A DOMINANT POSITION BY THE RESPONDENT, ARE THEY NEVERTHELESS JUSTIFIED BY OBJECTIVE NECESSITY?

371. Section 18 of the 1998 Act (the Chapter II Prohibition) provides, so far as is material, as follows:

> "(3) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom
>
> (4) …….
>
> (5) In this section-
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "The United Kingdom" means the United Kingdom or part of it.
>
> ……"

372. Perhaps not surprisingly both parties concentrated their competition law arguments on the Chapter I prohibition and said very little about the Chapter II prohibition as there was a considerable overlap in both arguments and in the analysis of the equivalent EU provisions in the CJEU's judgment in *ESL*. The question whether the PL held a dominant position in a relevant market was, however, canvassed in oral argument.

Dominance

373. MCFC's main case, as set out in its Statement of Claim, is that the PL is dominant in the market for the organisation, promotion, and commercialisation of the PL on which it enjoys a *de facto* monopoly position and in any event it faces no effective competition. Pursuant to the rules, as determined by shareholder vote, the PL is substantially in control of, *inter alia*, the organisation of its competition, commercial deal-making, distribution of its commercial revenues between club members, the financial arrangements of clubs and transfer rules. MCFC goes on to state that, since a majority of 14 clubs is able to change the rules, the majority is able to exert "a tyranny of the majority" including to the competitive detriment of minority clubs. Thus, rule changes implemented by the PL can be seen as the expression of the collective dominance of the clubs of voting in favour of them.

374. By contrast, the PL submits that the PL cannot be in a dominant position on that market as it is controlled by the clubs. It adds that the MCFC has not developed its case on alleged collective dominance which is a distinct doctrine from individual dominance.

375. In oral argument, MCFC concentrated on the argument that the PL is dominant in the market for the organisation and provision of PL services because it is a monopolist in that market. MCFC's retort to the argument that the PL is not dominant because it is controlled by the clubs, was that the PL was able to act independently of a minority of its club shareholders as illustrated by the adoption of both the APT and Amended APT Rules.

376. Both competition experts agree, in their Joint Expert Report, that, as regards this aspect of the case, the relevant market is the organisation, promotion, and commercialization of the PL. There is no dispute that the PL engages in economic activity and that it is an undertaking for the purpose of the competition rules. The sole disagreement between the parties is therefore whether the PL holds a dominant position on that market.

377. It is instructive once again to begin with *ESL*. In the context of the arguments advanced by the parties on the Chapter II Prohibition, it is worth explaining briefly

the factual background to the dispute in *ESL*. ESL was established on the initiative of a group of well known European football clubs who wished to set up a new international professional football competition project known as Super League. Those clubs needed to obtain the authorization of both FIFA and UEFA for them to participate in Super League "*without that affecting their membership of or participation in the national football associations, professional leagues or international competitions in which they had been hitherto involved. To that effect, that agreement provided inter alia that FIFA and UEFA were to be informed of the Super League project.*" [27] of *ESL.*

378. In its reference to the CJEU, the Commercial Court in Madrid asked the CJEU a number of questions on the interpretation of Articles 101 and 102 TFEU.

379. The questions on Article 102 related to the issue of abuse as the Commercial Court had already found that FIFA and UEFA had a dominant position. That finding is recorded by the CJEU in the following terms:

> "*36. In that regard, it observes, first of all, that the dominant position enjoyed by FIFA and UEFA affects not only undertakings that may wish to compete with them by organising other international football competitions but also, through their member national football associations, all of the other stakeholders in football, such as professional football clubs or players, a situation already noted by the General Court (judgment of 26 January 2005, Piau v Commission, T-193/02, EU:T:2005:22). Next, it observes that the dominant position of FIFA and UEFA on the market at issue in the main proceedings is based not only on an economic and commercial monopoly but also, ultimately and especially, on the regulatory, control and decision-making powers, and the power to impose sanctions, which enable FIFA and UEFA, in a mandatory and complete manner, to set the framework for the conditions in which all the other stakeholders present on that market may pursue an economic activity there. Lastly, it states that the combination of all of those factors in practice gives rise to a barrier to entry that is almost impossible for potential competitors of FIFA and UEFA to overcome."*

380. Having recorded that finding, the CJEU went on to consider whether the rules on the prior approval of competing football competitions were an abuse and stated the following:

> *"139 In the present case, it is apparent from the referring court's statements that FIFA and UEFA both carry on economic activity consisting in the organisation and marketing of international football competitions and the exploitation of the various*

rights related to those competitions. Thus, in so far as they do so, those associations are both undertakings. They both also hold a dominant position, or even a monopoly, on the relevant market.

140 Next, it is apparent from the statements in the order for reference that the rules about which that court has made a reference to the Court are contained in the statutes adopted by FIFA and UEFA in their capacity as associations and by virtue of the regulatory and control powers that they have granted to themselves, and that those rules confer on those two entities not only the power to authorise the setting up and organisation, by a third-party undertaking, of a new interclub football competition on European Union territory, but also the power to control the participation of professional football clubs and players in such a competition, on pain of sanctions.

141 ....

142 In that regard, it follows from the case-law cited in paragraph 75 of the present judgment that associations which are responsible for a sporting discipline, such as FIFA and UEFA, are able to adopt, implement and ensure compliance with rules relating not only generally to the organisation and conduct of international competitions in that discipline, in this case professional football, but also, more specifically, prior approval and participation by professional football clubs and players therein."

381. It is clear from the above that the CJEU endorsed the finding of the Commercial Court in Madrid that both FIFA and UEFA held a dominant position in, *inter alia*, the market for the organisation and marketing of international football competitions. The reasoning of the CJEU can be summarised as follows:

(i) FIFA/UEFA are both to be regarded as undertakings that carry on economic activity in the organisation of football competition tournaments, a market on which they hold a dominant or indeed a monopoly position, and

(ii) the challenged rules are contained in the statutes adopted by FIFA and UEFA in their capacity as associations and by virtue of the regulatory and control powers that they have granted to themselves which enable them to control the participation of professional football clubs in competing tournaments by way of sanctions.

382. In reaching its conclusion that FIFA/UEFA were in a dominant position the Commercial Court in Madrid relied on the judgment of the General Court in *Piau* (see

[379] above). *Piau* was the subject of argument in *CAA Base* where the issue was whether the FA had a dominant position in the market for football agent services in England as an emanation of the clubs. The FA argued that it could not be dominant because professional clubs were the minority of the members of the FA (it had a large constituency of other stakeholders). The Tribunal rejected that argument on the basis that the conclusion in *Piau* did not depend on whether FIFA was under the control of the clubs.

383. Although the abusive conduct in *Piau, CAA Base,* and *ESL* concerned conduct of football associations towards third parties, we do not think that distinction precludes PL having a dominant position vis-à-vis its own members. As is apparent from our analysis of *ESL* (at [164] above), the reason why ESL needed an authorisation from FIFA/UEFA was because otherwise the clubs and players would no longer be able to play in tournaments organised by FIFA/UEFA or indeed national football associations of which the football club members of ESL were members. So the economic power of those associations derived from their power over their own members.

384. In the present case, although the PL needs a two-thirds majority of clubs to change its rules, once those rules are adopted they are made contractually binding on all clubs, regardless of whether the clubs voted in favour of them. Every club, big or small, is bound to comply with the rules which the PL has power to enforce and sanction. In the case of the APT Rules the PL has been granted a very considerable power to restate the price in an APT freely negotiated between a club and an Associated Party. That power is exercised independently of the wishes of the club and the Associated Party. If a club wishes to play in the PL. it has no option but to comply with the APT Rules.

385. Further, the power is exercised in respect not only against the member club but also the Associated Party so we do not accept the PL's argument that there is a factual distinction between this case (power exercised against the member) and *ESL* (power exercised against a third party).

386. We therefore conclude that the PL is dominant in the market for the organisation, promotion, and commercialisation of the PL.

Abuse

387. This can be dealt with more shortly.

388. With regard to the shareholder loan exclusion and the pricing changes to the FMV determination in the Amended APT Rules which we find to infringe Chapter I, we see no basis for saying that such reasoning should not also lead to a finding that those provisions infringe Chapter II. Nor did the PL argue to the contrary. Accordingly, we find those provisions also infringe the Chapter II prohibition.

389. With regard to the APT Rules which we have held do not infringe Chapter I, we do not understand MCFC to contend that, if we so hold, these rules nonetheless infringe Chapter II. Accordingly, we conclude that there is no Chapter II infringement in respect of those APT Rules.

V. PROCEDURAL FAIRNESS

ISSUE 7

390. Issue 7 concerns the question whether the Rules are procedurally fair. MCFC contends that they are unfair in four respects, as set out in Issue 7(a)-(d).

Principles

391. It is common ground that (i) PL owes a duty to act in a procedurally fair manner in relation to the assessment of FMV; (ii) this is because PL is a sports regulatory body to which standards of review should be applied which are analogous to those applicable to a public authority on a judicial review (see *Enderby Town Football Club v Football Association Ltd.* [1971] CH 591 and *Bradley v The Jockey Club* [2005] EWCA Civ 1056) and (iii) it is therefore apt to consider public law cases on procedural fairness. We do not understand it to be in dispute that if a rule is

procedurally unfair it can be declared to be invalid. It is also common ground that when deciding whether a rule is procedurally unfair regard must be had to the context, which in this case includes the circumstance that the rules are part of a contract. However, it is also not in dispute that, whilst weight can properly be given to what has been agreed by the PL and the member clubs of the PL, albeit by a majority, it is ultimately for this Tribunal to consider what constitutes a fair process.

392. It is helpful to start with the statement of principle in *R v Secretary of State ex p. Doody* [1994] AC 531 at p. 560 by Lord Mustill. This statement was made in a statutory context (the release on licence of those sentenced to life imprisonment for murder) but it explains how the question of procedural fairness should be approached.

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

393. This statement of principle has been considered and applied by the Competition Appeal Tribunal in at least three cases. In *Group Eurotunnel SA v The Competition Commission* [2013] CAT 30 the CAT (Chairman Marcus Smith QC) reviewed the authorities and summarised their effect as follows:

> *"167. We consider the following propositions to emerge from these authorities:*

(a) There is a general duty on administrative bodies to act in a procedurally fair way.

(b) What is "fair" is something that is not immutable: it may develop over time in order to adapt to or take account of changing circumstances. It is certainly context sensitive. Above all else, it is a standard that is flexible. By this, we do not mean that the standard of fairness can be sacrificed: in that respect, the rule is much closer to an absolute. However, what is, or is not, "fair" in a given case depends on all of the circumstances. What can be said with confidence is that one standard does not fit all cases.

(c) The standard of fairness has many aspects, one of which – and this is the aspect with which we are principally concerned at the moment – is that a person affected by a decision is entitled to have an opportunity to make representations. That, in turn, means that such a person must know the case against him or her.

(d) As, no doubt, is the case with all aspects of natural justice, this right to make representations is coloured by many factors. These, without seeking to be exclusive, include:

> *(i) The statutory framework within which the tribunal operates. Of course, some tribunals (albeit not the Commission) do not operate within a statutory framework at all, and are governed only by the common law. However, the important point to note is that statutory frameworks can be supplemented, and are to be read in the light of, the common law. As was noted in Lloyd v McMahon [1987] 1 AC 625 at 702-703, "it is well- established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".*
>
> *(ii) Other aspects of context, including in particular the nature of the investigation.*
>
> *(iii) The significance of any individual item of information in the context of the investigation.*

168. There remains the question of how issues of procedural fairness are to be determined. What constitutes a fair process is one for the court (or, here, the Tribunal) as a matter of law. That said, the process taken by the administrative tribunal is entitled to great weight. It is the administrative decision-maker, and not the reviewing court, that stands in the front line when assessing what is procedurally fair, and (to descend to the specific) the Tribunal should be slow to second-guess decisions of the Commission in terms of what needs to be shown to an affected party, how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in R v Panel on Take-Overs and Mergers, ex parte Guinness plc [1990] 1 QB 146 at

184:

> *"Mr. Buckley argued that the correct test is Wednesbury unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."*

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight". We consider this is reflected in the case-law, which repeatedly emphasises that, when considering what is procedurally fair, one size does not fit all."

394. In *BMI Healthcare v Competition Commission* [2013] CAT 24 the CAT (Chairman Marcus Smith QC) gave another summary of the relevant principles which included the following:

> *"(6) Moreover, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in R v Panel on Take-Overs and Mergers, ex parte Guinness plc [1990] 1 QB 146 at 184:*
>
> ……
>
> *In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight".*
>
> *(7) Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the "gist" of the case which he has to answer, what constitutes the "gist" of a case is acutely context-sensitive. Indeed, "gist" is a*

peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the "gist" of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process. This point is well-illustrated by the approach taken by the Court of Appeal in R (Eisai Limited) v National Institute for Health and Clinical Excellence [2008] EWCA Civ 438, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless procedural fairness required the release of still more material – in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49]).

395. An example of a case where it was concluded that a party had been provided with the gist of the case which it was required to answer and was able to make "worthwhile representations" in answer to the case it had to meet, notwithstanding that certain material was not provided to it, is *Ryanair v Competition Commission* [2014] CAT at paragraphs 115-117 and 139-144 (Hodge Malek QC Chairman). Another example is *Tobii AB v Competition and Markets Authority* [2020] CAT 1 at paragraphs 141-146 (Hodge Malek QC Chairman).

396. Counsel for the PL submitted that the Tribunal should be slow to substitute its own views as to the substantive fairness of a system which comprises a set of contractually agreed terms in the form of the PL Rules. Reference was made to three cases. The first *was R v Panel on Take-Overs and Mergers ex p. Guinness* [1990] 1 QB 149 at p.184. However, we were not referred to any part of the judgment which showed that this was a contract case. The second case was *R (on the application of Gallaher Group) v Competition and Markets Authority* [2019] AC 96 but that also does not appear to be a contract case. The third case, *The New Saints FC v the FA for Wales* [2020] EWHC 1838 (Ch) was a contract case but, although the argument advanced by one of the parties laid great stress on the relevant contractual provisions and that this approach was regarded by Marcus Smith J. as the "framework" which enabled him to decide the case (see paragraphs 39 and 40), we were not referred to

any further analysis of the contractual context. Nevertheless, we accept that where the rules in question are contractual in nature, that is a necessary part of the context to which due weight must be given. We did not understand the PL to argue that the contractual rules in this case, the result of a majority decision, were determinative of the question of fairness. Rather, they were said to be matters to which great weight should be given and which the Tribunal should be slow to say were unfair.

397. It is also well-established that where there is an appeals process that is capable of rendering what would otherwise be an unfair process fair, though it may not do so; see *Calvin v Carr* [1980] 1 AC 574 at pp. 591 H – 593 H and *Cronin v The Greyhound Board of Great Britain* [2013] EWCA Civ 688 at paragraphs 17-18.

ISSUE 7(A): ARE THE RULES PROCEDURALLY UNFAIR BECAUSE A CLUB IS NOT PROVIDED WITH THE DATABANK MATERIAL CONSIDERED BY THE BOARD PRIOR TO THE BOARD'S ASSESSMENT OF IT?

398. It is necessary to recall what the Rules provide:

(i) Comparable evidence of the value of similar transactions is one of the three categories of evidence to be considered when the Board makes an assessment of FMV; see the definition of FMV Assessment in Rule A.1.95.

(ii) The Databank in which transactions are stored is used to assist the Board with the process of FMV Assessment by providing the comparable evidence referred to in Rule A.1.95; see Rule E.74.2.

(iii) Only the Regulatory Team may access the Databank for that purpose; see the Databank Protocol, clause 5(b). But a club may see its own transactions in the Databank.

(iv) Where there is a challenge to an FMV Assessment the club pursuing the challenge may have access to the comparable transaction data relied on by the Board ; see Rule E.71.2, but subject to the restrictions

in Rule E.71.3 which are designed to protect the confidentiality of the data. In particular access will be restricted to legal advisers and independent external advisers.

(v) Pursuant to Rule E.71.4 (where there is a challenge to an FMV Assessment) the single arbitrator or chairman of the Tribunal may, in exceptional circumstances where a party is able to demonstrate that disclosure to a representative of the club is necessary to remedy or avoid unfairness, order such disclosure.

399. Thus the Databank Protocol does not permit a club to have access to the Databank material before the Board makes its assessment and, once there is an FMV Dispute, the Rules only permit disclosure to the Club (as opposed to its advisers) in exceptional circumstances.

400. The submission made on behalf of MCFC was that this was unfair because a club has no proper opportunity to make informed representations on the comparable transactions relied on by the Board before it makes its FMV Assessment. That fairness requires disclosure of the comparable transactions is shown by the rule that permits disclosure of such material in the event that there is a challenge to the FMV Assessment. It was said that there can be no principled reason why such disclosure could not take place (subject to the same confidentiality terms) prior to the FMV Assessment so that informed representations could then be made.

401. The PL's response to this submission is twofold. First, the Rules seek to strike a balance between (i) procedural fairness, (ii) the confidential nature of the comparable transactions, (iii) the need to encourage the participation of member clubs in the FMV process by ensuring the secrecy of the information which they provide and (iv) the need to prevent any prospect of allegations of anti-competitive information exchange. Second, there is no unfairness because the gist of the comparable transactions is provided with the Provisional Determination. Further, the comparable transaction data is provided in the event of a challenge and the process should be considered as a whole, which includes any challenge by way of arbitration.

402. The force of the argument advanced on behalf of MCFC stems from the circumstance that the comparable transaction data is one of the three categories of evidence on which the FMV Assessment is based. Thus, in order for a club to make effective representations, it needs to have access to the comparable transaction data.

403. Counsel for MCFC submitted that in the circumstances of this case where the Rules expressly allow for disclosure of the comparable transaction data in the event of a challenge it makes no sense to say that the provision of only the "gist" with the Provisional Determination can suffice. The Tribunal accepts this submission. The fact that the Rules provide for the disclosure of the comparable transaction data in the event of a challenge shows a recognition that in order to make effective representations a club needs to see the comparable transaction data, albeit in a form and in a manner which preserves the confidentiality of the data. The Tribunal also accepts the related submission that if confidentiality can be preserved in the event of a challenge, there is no reason why it cannot be preserved if disclosure is given earlier before the Board makes its assessment.

404. It was suggested by the PL that any assessment of fairness must take account of the fact that the scheme in the Rules provides for a challenge. That is true, but the point is of limited assistance in the present case where the Rules do not provide for an appeal on the merits.

405. What remains is the PL's submission that the Rules seek to strike a balance between fairness, confidentiality, the need for secrecy to encourage clubs to provide transaction data and the need to prevent an allegation of an anti-competitive information exchange.

406. The Tribunal accepts that the Rules have been carefully designed. Indeed, it is clear that the question of access to the comparable transaction data was a matter of concern to the clubs (including MCFC). The Tribunal also accepts that it may properly give weight to the balance which has been struck by the PL and the clubs and that the Tribunal should exercise caution before upsetting that balance.

407. However, the PL and the clubs have agreed that, subject to the confidentiality

requirements of Rule E.71.3, the comparable transaction may be disclosed when there is a challenge to an assessment without harming confidentiality, the need for secrecy or the need to prevent allegations of an unlawful information exchange. The Tribunal can, therefore, see no reason for preventing such disclosure of such important data subject to the confidentiality provisions of Rule E.71.3 before the Board reaches its decision. Counsel for the PL did not identify any such reason.

408. It may be said that in this context Rule E.71.4 cures the suggested unfairness because it provides the chairman with a discretion, in exceptional circumstances, to allow disclosure to a representative of a club, subject to the confidentiality provisions of Rule E.71.3, where it can be demonstrated that it is necessary to avoid unfairness. However, this only applies in the context of a challenge. It does not apply in the course of the procedure leading up to the Board's determination. In any event, we see real practical difficulty in this rule. If the club is not permitted access to the comparable transactions relied upon by the Board, its ability to "demonstrate" that in the absence of disclosure there would be unfairness would be restricted. The club could of course say that, as a matter of general principle, a person affected by a decision should be entitled to see the material relied upon by the decision maker. But those would not be "exceptional circumstances".

409. It was not clear from the submissions made on behalf of the PL that the agreement in Rule E.71.2 that "non-disclosure of the Databank shall not prevent the clubs from having a fair and reasonable opportunity to present their case" was relied upon with regard to Issue 7(a). It was clearly relied upon with regard to Issue 7(b); cf para 232(3) of the Defence with paragraph 240 of the Defence and compare paragraphs 181-183 of the PL's Skeleton Argument with paragraphs 184-185 of the PL's Skeleton Argument.

410. But if it is relied upon in the context of Issue 7(a) we do not consider that it assists the PL. The question of construction is whether the agreement, which relates to "non-disclosure of the Databank" in the context of an FMV Dispute, i.e. when there is a challenge to the Board's Determination, applies to the Databank Protocol (see [71] above) which restricts access to the Databank prior to the Board's Determination.

411. The agreement in E.71.2 must be construed in accordance with its terms. Since it expressly applies to the inability of a club to obtain disclosure once there is an FMV Dispute, it cannot properly be construed as applying to the restriction on access to the Databank before any FMV Dispute has arisen.

412. Therefore, the Tribunal considers that the Rules are procedurally unfair for the reasons given above.

ISSUE 7(B): ARE THE RULES PROCEDURALLY UNFAIR BECAUSE A CLUB HAS NO ACCESS TO THE DATABANK AND CANNOT ASSESS WHETHER THERE IS ANY ADDITIONAL MATERIAL NOT IDENTIFIED BY THE REGULATORY TEAM WHICH WOULD ASSIST IN RELATION TO THE BOARD'S ASSESSMENT OF FMV?

413. The Rules do not permit access to the Databank, with the "sole exception" of information concerning specific transactions considered by the Board where there is a challenge to the FMV Assessment. Indeed, as already stated "all parties to these Rules agree that the non-disclosure of the Databank shall not prevent them having a fair and reasonable opportunity to present their case (or deal with that of their opponent) in the context of an FMV Dispute" (see Rule E71.2).

414. Counsel for MCFC submitted that fairness requires that the Club's external expert adviser should have access to the Databank so that the Club can, by that adviser, make informed representations on what comparable transaction data from the Databank assist the Club. In support of this submission attention was drawn to the lack of expertise of the Regulatory Team and the absence of effective controls to prevent errors by the Regulatory Team. It was also said that the Regulatory Team lacked independence.

415. Counsel for MCFC accepted that weight can properly be given to the agreement stated in Rule E.71.2 that non-disclosure of the Databank shall not prevent the clubs from having a fair and reasonable opportunity to present their case or deal with that of their opponent. Counsel stressed, however, that the decision as to what was fair is for the

Tribunal. We asked counsel whether there was an example of a case where a court or tribunal had set aside an agreement such as that found in Rule E.71.2. The Tribunal was referred to *Lloyd v McMahon* [1987] 1AC 625 and to the observation of Lord Bridge at p.703. But that passage was concerned with *implying* additional procedural safeguards to attain fairness, not with *setting aside* an agreement by the parties as to what was not unfair. It appears to the Tribunal that whilst a court or tribunal may disregard such an agreement if it is judged to be unfair the Tribunal ought to be slow to reach such a conclusion.

416. The Databank Protocol states clearly that only the Regulatory Team may have access to the Databank. It is likely that this was regarded as of great importance by the member clubs as a means of protecting confidentiality. The Tribunal is entitled to give weight to that circumstance.

417. The Regulatory Team are lawyers, not experts in the field of football club sponsorships. But as lawyers they can be expected to carry out the search of the Databank carefully and conscientiously. The evidence with regard to the FAB and EAG Transactions suggests that they did in fact do so; see above paragraphs 76 and 119.

418. [redacted]

[redacted]

419. We had considerable evidence from Mr. Herbert and Ms. Blake of the Regulatory Team. We, [redacted], are satisfied that the Regulatory Team can be relied upon to conduct searches of the Databank competently and fairly without any perception of bias.

420. For that reason the Tribunal considers that the scheme of the Rules and the Databank Protocol which does not permit access to the Databank is fair.

421. We have already held that the agreement in Rule E 71.2 that the non-disclosure of the Databank shall not prevent the clubs from having a fair and reasonable opportunity to present their case (or deal with that of their opponent) does not apply before there is an FMV Dispute. If, contrary to our decision, it does apply before there is an FMV Dispute, the Tribunal is not persuaded that the agreement is unfair. It is likely that the clubs were prepared to make that agreement because they considered that the Regulatory Team could be relied upon to conduct searches of the Databank. That is, as we have said, also the Tribunal's view and so there is no unfairness.

422. We therefore reject the submission that the Rules were unfair in the manner suggested in Issue 7(b).

ISSUE 7(C): ARE THE RULES PROCEDURALLY UNFAIR BECAUSE PRIOR TO THE BOARD'S PROVISONAL OR FINAL ASSESSMENT OF FMV, A CLUB

IS NOT PROVIDED WITH A COPY OF THE REPORT SENT BY THE REGULATORY TEAM TO THE BOARD?

423. Whilst Appendix 18 to the Rules provides that the Regulatory Team will provide a report to the Board, the Appendix is silent as to whether the report should be made available to a club whose transactions are being assessed under the FMV Rules.

424. What the Appendix does state is that the Board will provide its Provisional Determination in writing and the Guidance to Rule E.65 states, as one would expect, that the Provisional Determination will be accompanied by reasons.

425. The submission made on behalf of MCFC was that the Regulatory Team's report to the Board is an important document (as Ms. Fyfield accepted) and therefore ought to be provided to the club before the Board makes its final determination.

426. The submission made on behalf of the PL was that so long as the substance of the Board's reasoning is provided to the club with its Provisional Determination the club will have a fair opportunity to respond to such reasoning prior to the Final Determination. There is thus no need for the Regulatory Team's report to the Board to be disclosed. It was observed that no suggestion was made that the Board's reasoning failed to include significant parts of any reasoning recommended by the Regulatory Team to the Board and on which the Board relied.

427. In circumstances where the Board's Provisional Determination will include its reasons, as the Rules indicate will happen and as the experience of this case illustrates, we do not consider that in order to make effective or worthwhile representations in response to the Board's reasoning the club needs access to the Regulatory Team's report to the Board. Were it the case that the Board's Provisional or Final Determination did not contain the substance of the reasoning contained in the Regulatory Team's report the position may be different. But, although MCFC has now been provided with the Regulatory Team's reports in the FAB, EP and EAG Transactions, that has not been suggested.

428. We are therefore not persuaded that the Rules are unfair in the manner suggested in

Issue 7(c).

ISSUE 7(D): ARE THE RULES PROCEDURALLY UNFAIR BECAUSE THE CLUB HAS NO ACCESS TO THE INEPENDNENT ASSESSOR'S OWN REPOSITORY OF COMPARABLE TRANSACTION?

429. The Independent Assessor, Nielsen, has its own repository or database of sponsorship transactions. Nielsen does not provide the Regulatory Team or the Board with access to that database.

430. The submission made on behalf of MCFC was that it is unfair that the club has no opportunity to make representations on the relevance or weight of the data from the repository or database which Nielsen uses when making its assessment.

431. In response the PL submitted that the assessment of ATPs by the independent assessor was an integral part of the FMV Assessment process, that the appointment of Nielsen, a market leading company, to that role was agreed between the PL and the member clubs and that they should be taken to have agreed and understood that Nielsen would use its data and expertise in preparing its report and that member clubs would not be provided with that underlying data.

432. In reply counsel for MCFC said that the clubs did not agree to the Rules being applied unfairly in this manner and that in any event it was for the Tribunal to decide whether the procedure was fair.

433. The evidence revealed that Nielsen has a very high profile in the field of football club sponsorship deals. Indeed, MCFC has itself instructed Nielsen to provide advice on valuation. It must also have been known to the clubs that Nielsen had a confidential proprietary database. The evidence revealed that it is called SponsorGlobe and that clubs may, by the payment of a fee, obtain access to SponsorGlobe, as MCFC apparently did.

434. It may be inferred that the clubs appreciated that Nielsen would use its database when asked to prepare a report on FMV and would not usually reveal the detail of those transactions which it considered in preparing its report. There was, however,

no evidence that the clubs considered whether or not the details of those transactions should in fairness be available to the clubs. There is certainly no agreement in the Rules, as there was with the PL's Databank, that non-disclosure of Nielsen's database will not prevent the clubs from having a fair and reasonable opportunity to present their case or deal with that of their opponent.

435. MCFC has a cogent argument that in circumstances where Nielsen has relied upon a number of transactions in its database to form a view as to FMV then a club cannot make meaningful or effective representations because it does not know what transactions have been relied upon and therefore cannot begin to consider whether those transactions were relevant or whether the use made of them by Nielsen was appropriate.

436. But there is also a cogent argument that the process as a whole is fair in circumstances where

(a) the club will have submitted its own evidence in support of the transaction in question being at FMV (see Appendix 18 paragraph 5(c)),

(b) Nielsen is independent and a jointly chosen expert who can be relied upon to use its expertise to identify relevant transactions in its database,

(c) the club will have received a copy of Nielsen's report with the Board's Provisional Determination,

(d) the report will have contained an explanation of Nielsen's FMV assessment having taken account of and weighed the FMV assessment factors (see Appendix 18 of the Rules, paragraphs 8-10),

(e) the club will be able to comment upon the report before the Board issues its Final Determination (see Appendix 18 paragraph 13) and

(f) the information on Nielsen's databank is not within the possession of the PL but is owned by Nielsen so that the PL is unable to disclose it.

This is because, notwithstanding that the club does not know the details of the

transactions from Nielsen's database which have been relied upon, the club cannot have had any realistic expectation that it would have access to those transactions, because it would know that they are part of a confidential and proprietary database held by Nielsen, not the PL. Fairness depends upon context; one size does not fit all.

437. We are persuaded that the system as a whole is fair. In particular the club will have received a copy of Nielsen's report with the Board's Provisional Determination and have had an opportunity to comment on it. Thus, in the particular circumstances of this case, it is not unfair that a club is deprived of access to, and therefore the ability to comment upon, the detail of the transactions assessed by Nielsen to be relevant and comparable.

438. This is a complex and carefully drafted scheme which is the product of detailed negotiations and involves the use of an independent assessor selected for its expertise and independence. To devise a scheme which commanded the support of a majority of the clubs and which was workable, in circumstances where the independent assessor had its own confidential and proprietary database, would inevitably involve weighing up different interests. The requirements of fairness are context specific.

439. The Tribunal is therefore not persuaded that the Rules were unfair in the manner suggested in Issue 7(d).

440. Of course, notwithstanding that conclusion as to the Rules, the Board may nevertheless act with procedural unfairness in its application of the Rules. We shall shortly turn to those issues which raise that question.

ISSUE 7A

441. Before leaving Issue 7 it is necessary to mention the question asked as to whether the principle of transparency adds anything to the common law principle of procedural fairness; see Issue 7A. Counsel for MCFC said that it did because transparency or openness engenders confidence in the system. However, counsel for the PL referred us to *R (Manchester Airports Holdings Ltd) v Transport Secretary* [2021] 1 WLR 6190 at paragraphs 39-45 where Lewis LJ and Swift J said that any need for

transparency did not give rise to a discrete, enforceable obligation in addition to what is required by the principle of fairness. We adopt and apply what was said by Lewis LJ and Swift J. If there is a principle of transparency, in the context of the issues raised by Issue 7, it adds nothing to the principle of procedural fairness.

THE EAG TRANSACTION CHALLENGE

ISSUES 8 AND 9

442. Issues 8 and 9 ask the following questions (which appear to be aspects of the same issue):

> 8. Did the Board misdirect itself in its interpretation and application of the PL Rules, in terms of the test to be applied to the FMV Assessment of the EAG Transaction?
>
> 9. Did the Board misdirect itself by asking whether the Nielsen valuation was a reasonable one and not by asking whether one or more of the valuations submitted by the Club was, of itself, reasonable?

443. The case of MCFC in respect of these two issues is set out at some length in its skeleton argument between paragraphs 126 and 133. However, in his closing submissions counsel for MCFC put the case more shortly (and more clearly) with reference to the Board's Final Determination.

444. Counsel submitted that the Board focused on the Nielsen report and asked itself whether other evidence, and in particular other valuation reports, demonstrated errors in that report. Instead, it was submitted that the Board ought to have considered whether other valuation reports were alternative but reasonable assessments of FMV. That would give effect to the words "could" and "evidently" in the Rules. The issue before the Board was not a binary one.

445. Reliance was placed on paragraphs 15,16, 23 and 24 of the Board's Final Determination. It is sufficient to quote paragraph 23 as an indication of what MCFC says is a flawed approach to the Board's FMC Assessment:

> "23. Having regard to all of the material before it, including, in particular, MCFC's

> Submissions, the IFA's Supplementary Report, the IFA's Revised Report, the IFA's Further Responses, and the Board Report, the Board is satisfied that the criticisms identified by MCFC have been satisfactorily addressed. The Board is confident that it is appropriate to rely on the assessment provided in the IFA Revised Report when concluding its Fair Market Value Assessment of the Transaction."

446. However, counsel for the PL submitted that the Board applied its mind to the correct question ("could" and "evidently"). Referring to the part of the Final Determination which specifically dealt with the other valuations, paragraphs 25-28, Counsel submitted that paragraph 28 evidenced a correct approach to the assessment of FMV in circumstances where other valuations had been relied upon by MCFC which differed from Nielsen's valuation:

> "28. Having regard to all of the material before it, including, in particular, MCFC's Submissions, the IFA's Supplementary Report, the IFA's Revised Report, the Benchmarking Analysis, the [redacted] Memo and the Board Report, the Board considers that little weight should be given to the [redacted] Supplementary Valuation, Alternative Valuations and [redacted] Report, such that the valuations do not impact on the Board's overall assessment as to the Fair Market Value of the Transaction."

447. Counsel for MCFC also referred to the evidence of Ms. Fyfield, one of the two Board members who made the FMV Assessments. Counsel for MCFC noted that in her witness statement she had said:

> "The question for us was instead whether there was anything in the [redacted] report which significantly undermined Nielsen's analysis."

448. However, Ms. Fyfield was well aware of the importance of the word "could" in the definition of FMV. It was because of that awareness that she had challenged the assessment of the FMV of the FAB Transaction [redacted]. Bearing that in mind, it is unlikely that the above statement betrayed a failure to appreciate that she was required to find the price at which the rights in the EAG Transaction "could" be sold.

449. In the course of her cross-examination it was suggested to her that she was not saying that the [redacted] valuation was an unreasonable assessment of FMV. She replied that she was saying that. It was suggested to her that different valuers could come up with different but reasonable assessments of FMV. She replied that that is why :

> "……you have to anchor this around market data, which is why, all the way through this, we looked at valuations, but we also looked at whether those valuations were consistent with observed market data, to try and make it objective."

450. She said that the market data she had in mind was reflected in the comparable transactions in the Databank, estimates of [redacted] deals and [redacted]'s benchmarking analysis. It was put to her that assessment of market data was highly subjective and she replied that it was not objective, by which we understood her to mean that a question of judgment was involved.

451. Whether her judgment was right or wrong is not a matter for this Tribunal. (There is no appeal on the merits.) What matters is whether Ms. Fyfield considered whether any of the other valuations which were put to her were reasonable. We accept her evidence that she thought they were not reasonable because she did not consider that they were consistent with market data.

452. Counsel for MCFC said that she did not say that in the Board's Final Determination which was the contemporaneous record of its decision. That is true but we do not consider that her evidence should be rejected on that account, for several reasons. First, Ms. Fyfield was a good witness. She was candid and engaged with the cross-examiner. She had a very good recall of the issues which confronted her when assessing the FMV of the EAG Transaction. She was giving evidence in June 2024 about events at the end of April 2024. Usually, the gap between the material events and when a witness gives evidence about them is much longer than that. Second, as we have already said, she was clearly aware of the significance of the word "could" in the definition. Third, paragraphs 15 and 16 of the Final Determination decision (which were highlighted by counsel) were written in response to a criticism that the Board had failed to consider all the evidence before it and paragraphs 23 and 24 (which were also highlighted by counsel) were written in response, in part, to a large number of criticisms of the Nielsen report. Bearing that context in mind, caution should be exercised before concluding that the Board had misunderstood the task on which it was engaged. Fourth, given the fact that Nielsen was the agreed independent valuer, it is unremarkable that the Final Determination was focused on the Nielsen report. Fifth, when considering the other valuations, the Board noted in paragraph

27 that the Benchmarking Analysis supported Nielsen's views of the other valuations. That is consistent with the importance placed on market data by Ms. Fyfield in her oral evidence. Sixth, the Board's conclusion in paragraph 28 that the other valuations should be accorded "little weight" is consistent with her oral evidence.

453. Our conclusion therefore is that the Board did not misdirect itself in the manner suggested in issues 8 and 9.

ISSUE10(A): WAS IT PROCEDURALLY UNFAIR THAT MCFC DID NOT HAVE AN OPPORTUNITY TO RESPOND TO THE [redacted] MEMORANDUM AND/OR THE [redacted] BENCHMARKING ANALYSIS PRIOR TO THE BOARD'S DECISION AND, IF SO, CAN IT BE SAID THAT IT WOULD HAVE MADE NO DIFFERENCE?

454. The [redacted] Memorandum and [redacted] Benchmarking Analysis which were sought on or about 18 April 2024 and considered by the Board on or about 25 April were not provided to MCFC before the Board made its Final Determination. Both were relied upon by the Board when reaching its Final Determination. In its reasons the Board said:

> "27. In the Board's view, the Benchmarking Analysis, and in particular the fact that each of the valuations provided by MCFC and EAG are materially in excess of the assessment provided in the Benchmarking Analysis, provides support for the conclusions reached by the IFA in respect of the [redacted] Supplementary Valuation, Alternative Valuations and [redacted] Report. The [redacted] Memo also sets out observations on the [redacted] Supplementary Valuation, Alternative Valuations and [redacted] Report and identifies a number of significant flaws in each of these valuations, which, in the Board's view, provides further support for the conclusions reached by the IFA."

455. In her evidence Ms. Fyfield accepted that the Benchmarking Analysis was "highly significant", indeed "crucial" and that the Memorandum had "some importance". She also accepted that if the Benchmarking Analysis had been provided at an earlier stage it would have been appropriate to let MCFC see it and comment on it before the Board made its Final Determination. She did not accept the same with regard to the [redacted] Memorandum which she said was helpful but that it made points that she could have figured out for herself.

456. The question which arises for decision is whether the [redacted] Benchmarking Analysis and Memorandum ought to have been put to MCFC before the Board made its Final Determination.

457. The Benchmarking Analysis was dated 23 April 2024 and was prepared by [redacted], the valuation expert called by the PL. He set out his "current FMV Assessment of the EAG Transaction". He described it as "current" because there was, potentially, further work to do. He relied on information from publicly available online sources. In a 53 page report (plus appendices) [redacted] explained how he reached his assessment. He also explained its limitations and how his assessed FMV might be too low. The Benchmarking Analysis was very different in nature from the source material that had hitherto been relied on, namely confidential material taken from actual comparable transactions.

458. The Memorandum was also dated 23 April 2024. Its purpose was to provide observations which might assist the PL Board in assessing the information before it in order to issue its Final Determination of the FMV of the EAG Transaction. The focus of the Memorandum was described as being to assist the PL Board in its understanding of the Alternative Valuations with which it had been provided. [redacted] provided its comments on those valuations over 44 pages.

459. The Benchmarking Analysis was a further FMV Assessment. We accept that in principle fairness required that it be shown to MCFC so that it could have the opportunity of making worthwhile representations about it before the Board reached its decision. MCFC was not provided with either the Analysis or its gist. MCFC made no comments on it because it was not aware of its existence.

460. The Memorandum is of a different character from the Benchmarking Analysis. Its focus was to assist the Board in understanding the Alternative Valuations which MCFC had provided to the PL. As Ms. Fyfield said in her evidence "what [redacted] were doing was helping us absorb and understand the alternative valuations." Later she explained that the Memorandum was "really like a road map. It's a helpful document to try and absorb a lot of information quickly. It – it kind of just points out things that

I could have figured out for myself."

461. We deal first with the Benchmarking Analysis. Counsel for the PL relied upon this statement of principle by Lord Neuberger in *Bank Mellat v HM Treasury* (No.2) [2013] UKSC 39 at paragraph 179:

> "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

462. Although this statement of principle was made in the context of a statutory power, we accept that by analogy, it applies in the present context.

463. Counsel for the PL submitted that it was impractical to give MCFC the opportunity to make representations about the Benchmarking Analysis. In the PL's pleaded defence to the EAG Claim this point had been put in strong terms at paragraph 68(4):

> "Accordingly, the fact that that there was insufficient time for MCFC to respond to the [redacted] Memorandum and [redacted] Benchmarking Analysis is unsurprising and a result of MCFC's own conduct in (i) deciding to deploy its Additional Valuations in reply rather than upon original submission of the EAG Transaction and then (ii) insisting on a final determination being given in a timeframe which made it impossible for such a response to be provided or considered."

464. This submission was supported by the evidence of Ms. Fyfield and Ms. Blake.

465. Counsel relied upon the context in which the Alternative Valuations had been provided by MCFC to the PL. He submitted that Appendix 18 to the Rules, paragraph 5(c), obliged MCFC to submit the Alternative Valuations when it first required the PL to make an assessment of the EAG Transaction. It does indeed appear to be the case that the "process" envisaged by Appendix 18 would have obliged MCFC to produce the valuations when it first presented its evidence, assuming that it had them at that time. However, when MCFC requested an

assessment of FMV in November 2023, it did not have the Alternative Valuations (save perhaps for the [redacted] report which we were told was dated November 2023) so that it could not have submitted reports which it did not have. They were in fact submitted to the PL on 23 March 2024. We were not, we think, given the dates on which MCFC first received the Alternative Valuations but counsel for the PL told the Tribunal that the appropriate instructions had been given between 18 December 2023 and 27 February 2024. That was not contradicted by counsel for MCFC in his reply. It thus appears that MCFC may well have been able to submit them to the PL earlier than it did in fact do so. However, they were submitted as part of MCFC's "response" pursuant to paragraph 13 of Appendix 18 (although only "submissions" were contemplated by the Guidance to Rule E.65) but counsel put to Ms. Fyfield, and she accepted, that the Board and Nielsen had had time to consider the Alternative Valuations.

466. There is no doubt that the provision of the Alternative Valuations on 23 March 2024 caused considerable difficulty to the PL. They were unexpected and substantial. In consequence the PL had to seek from the Tribunal two extensions of the date by which the Board was to issue its final determination. Both applications were opposed by MCFC.

467. It was suggested by MCFC that the Regulatory Team had delayed in seeking assistance from [redacted] until 18 April 2024. That was indeed the date of [redacted] instructions and was almost 4 weeks after the Alternative Valuations had been provided by MCFC. However, the work involved in considering the Alternative Valuations and accompanying submissions is indicated by the circumstance that the PL made no less than 96 requests for further information between 28 March and 12 April. Further, the responses had to be awaited and considered. Whilst it is possible that [redacted] could have been instructed earlier than 18 April 2024 we are reluctant to criticise the PL in this regard. The criticism was put to Ms. Fyfield but she was not involved in the instructions to [redacted]. Ms. Blake was involved and the criticism was not put to her.

468. The Benchmarking Analysis was received on or about 23 April 2024 and was

provided to the Board late that evening. In the early hours of 25 April 2024 the revised Nielsen Report was provided to the Board. Ms. Fyfield was up at 4 am to read it. By the end of that day the Board had made its Final Determination. The Tribunal had ordered that the Board provide its Final Determination by 25 April 2024.

469. There is no evidence that consideration was given by the Regulatory Team or the Board between 23 and 25 April to providing a copy of the Benchmarking Analysis to MCFC. Ms. Fyfield was asked about this and could not recall whether consideration was given to doing so. Had it been considered, there would have to have been an urgent application to the Tribunal for a further short delay in making the final determination. The basis of any such application would have been different from the earlier two applications. They had been based on the volume of work required to respond to, inter alia, the Alternative Valuations. A further application would have been based upon the need, in fairness to MCFC, to give MCFC an opportunity to comment on the Benchmarking Analysis.

470. The question is whether it was impractical for the PL to give MCFC an opportunity to comment on the Benchmarking Analysis. The argument that it was impractical must, in the words of Lord Neuberger, be "very closely examined".

471. The correspondence between the parties shows that important communications were sometimes sent very late at night and sometimes in the early morning. On occasion the Tribunal had to respond very quickly to urgent applications. Thus, the second application for an extension of time was made by the PL at 4.31 pm on 18 April, responded to by MCFC at 11.15 pm on 18 April and the Tribunal gave its ruling at 11.11 am on 19 April 2024.

472. The Regulatory Team forwarded the Benchmarking Analysis to the Board late on 23 April. An application to the Tribunal could have been made, if not late on 23 April, then in the morning of 24 April, seeking a short adjournment of the 25 April deadline in the interest of fairness. It was not impractical to make that application.

473. The Tribunal has reminded itself that in its ruling of 19 April it had said that time

was limited and that it was reluctant to extend time. But since such an application would have been very different in character from the two previous applications and based on fairness to MCFC it is probable that the Tribunal would have granted a short further extension, not least because the Benchmarking Analysis was a highly significant new document.

474. The Tribunal has therefore concluded that it was not impractical for the PL to provide a copy of the Benchmarking Analysis to MCFC before the Board reached its Final Determination.

475. The next question is whether providing a copy would have been pointless. Counsel for the PL accepted that the PL had to show that it was "highly likely" that the decision of the Board would have been the same had MCFC been given an opportunity to comment upon the Benchmarking Analysis. In *R (Plan B Earth) v Secretary of State for Transport [2020] PTSR 1446* the test was put higher by the Court of Appeal at paragraph 267:

> *"It was established by Purchas LJ in Simplex GE (Holdings) Ltd v Secretary of State for the Environment [2017] that it is not necessary for the claimant to show that a public authority would—or even probably would—have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the minister "necessarily" would still have made the same decision. The Simplex test, as it has become known, therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred."*

476. The reference to "highly likely" comes from a statute. In cases of judicial review, the test has been changed by statute to "highly likely that the decision would not have been substantially different." The Court of Appeal observed at paragraph 273 that:

> *"It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making*

process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old Simplex test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in R (Public and Commercial Services Union) v Minister for the Cabinet Office [2018] ICR 269, para 89)."

477. The PL sought to satisfy the test, whether the Simplex or the statutory test, by showing that the 10 issues identified in Annex A to MCFC's pleading in respect of the EAG Transaction as being the points which MCFC would have wished to make with regard to the Benchmarking Analysis had in fact been considered by the Board, so that disclosure of the Benchmarking Analysis would have made no difference. That was also the view of Ms. Fyfield when cross-examined, as counsel for the PL pointed out in his closing submissions. The Board had considered the issues because the author of the Benchmarking Analysis had himself identified the limitations in his analysis which had also been raised in Annex A. This submission was said to be supported by the acceptance by [redacted], MCFC's expert on the valuation of the EAG Transaction, when being cross-examined, that the issues raised in Annex A had been considered by the Board. Counsel for the PL provided the Tribunal with a schedule noting the expert's acceptance that the 10 points had been considered by the Board. Counsel said that this was a "rare case" where there was incontrovertible evidence from Ms. Fyfield and the PL's expert to enable the PL to get over "the high hurdle" placed before it.

478. MCFC's response to this argument was that Annex A identified the topics on which MCFC would have made submissions but not the detail of those submissions. Since the Board could not know the detail of the submissions which would have been made by MCFC, it does not assist to show that the topics had been addressed by the Board. It was also said that the Tribunal could not say that the test was satisfied without entering into the "forbidden territory" of the merits of the FMV Assessment.

479. Paragraph 90 of MCFC's Case with regard to the EAG Transaction refers to Annex A as containing the "points" which MCFC would have wished to make. Annex A

states at paragraph 7 that:

> "The PL should not have placed any weight on [redacted]'s analysis and it was unfair and unprincipled of the PL's Board Report to refer to it."

480. Ten "points" were then made. Most appear to be high-level points which might well be regarded as topics, rather than detailed submissions. The PL itself described the points as "general and disparate" in its Defence to the EAG Case at paragraph 68(5). Although we have in mind that it was not suggested to Ms. Fyfield in cross-examination that there were in fact new points which would have been made and would have made a difference, we consider it likely that more detailed points would have been made had MCFC been given the opportunity to respond to the Benchmarking Analysis before the Board made its Final Determination. Further, there appears to be force in the submission that to be able to say that the points would have made no difference to the Board's decision would involve the Tribunal in addressing to some extent the merits of the FMV Assessment of the EAG Transaction.

481. We have concluded that, whether the high test to be satisfied is the Simplex test or the statutory test, the PL cannot establish that it would have been pointless to show the [redacted] Benchmarking Analysis to MCFC before the Board made its final determination.

482. It follows that the Tribunal must conclude that the PL, although under pressure to provide the Board's Final Determination by the date ordered by the Tribunal, acted in a procedurally unfair manner by not providing MCFC with an opportunity to respond to the [redacted] Benchmarking Analysis.

483. We now deal with the Memorandum. We are not persuaded that fairness required that the Memorandum be shown to MCFC before the Board reached its decision. MCFC had put the Alternative Valuations before the Board and had had the opportunity to comment upon them. The Board then had to consider and understand the Alternative Valuations. The Board asked Nielsen to assist in that regard and it also asked [redacted] to do so. Whilst counsel for MCFC was clear in his submission that the Benchmarking Analysis ought to have been put to MCFC, he accepted that his

submission was "less forceful" in the context in the context of the Memorandum. In our judgment the point lacked any force with regard to the Memorandum. Fairness did not require that the Memorandum be put to MCFC before it reached its final decision. Its role was simply to assist the PL in understanding the Alternative Valuations put to it by MCFC.

ISSUE 10(B): DID THE BOARD FAIL TO ACT WITH PROCEDURAL FAIRNESS IN THAT MCFC WAS NOT PROVIDED WITH THE UNDERLYING DATA IN THE DATABANK IN RELATION TO THE EXCLUDED COMPOUND GROWTH RATE ("CAGR") AND, IF SO, CAN IT BE SAID THAT IT WOULD HAVE MADE NO DIFFERENCE?

484. In the report sent to the Board by the Regulatory Team on 9 March 2004 it was noted that one transaction found in the Databank referred to a CAGR of [redacted]. However, it was also said that the context of this transaction enabled it to be distinguished from the EAG Transaction and so provided no reason to disagree with the Nielsen assessment that a CAGR of [redacted] was appropriate.

485. The particular transaction was discussed by Ms. Fyfield and Nielsen prior to the issue of the Final Determination; see paragraph 40 of Ms. Fyfield's second witness statement.

486. The allegation that it was unfair that MCFC was not provided with the underlying data in relation to the excluded CAGR of [redacted] must, we think, succeed for the reasons given for our conclusion on issue 7(a). If it is appropriate to give MCFC the detail of the transactions considered by the Board in the event of a challenge there can be no principled objection to giving MCFC that detail before the Board reaches its determination.

487. We therefore conclude that the first part of Issue 10(b) is to be answered in the affirmative.

488. The second part of Issue 10(b) is to be answered in the negative because the high test cannot be satisfied. Indeed, counsel for the PL did not suggest how the high test

could be satisfied.

ISSUE 10(C): DID THE BOARD FAIL TO ACT WITH PROCEDURAL FAIRNESS IN THAT MCFC WAS NOT PROVIDED WITH THE UNDERLYING CAGRS RELEVANT TO NIELSEN'S CALCULATIONS OF THE [redacted] CAGR USED AND, IF SO, CAN IT BE SAID THAT IT WOULD HAVE MADE NO DIFFERENCE?

489. The EAG Transaction provided for a CAGR of [redacted] per annum. Nielsen advised that a CAGR of [redacted] was appropriate. If the CAGR ought fairly to have been assessed at a figure in excess of [redacted] it would have had a substantial effect on the assessment of FMV, bearing in mind that the duration of the EAG Transaction was [redacted].

490. The Board's Provisional Determination of the FMV of the EAG Transaction dated 15 March 2024 included discussion of the appropriate CAGR. At paragraph 16(c) the Board stated:

> "In light of the [redacted] the Transaction, the Independent FMV Assessor considered that a knowledgeable and willing party in an arm's length transaction could apply a CAGR of [redacted] to the valuation of the fees in [redacted] to take account of factors specific to MCFC [redacted]."

491. Further comments were made on the subject of CAGR when discussing the [redacted] Report. Thus, at paragraph 31(c)(ii) it was stated:

> "on average, clubs achieve an average uplift of [redacted]. However, Premier League Clubs experience a much lower average annual uplift (being [redacted]);"

492. Enclosed with the Provisional Determination was Nielsen's Report of March 2024 which dealt with CAGR at slide 62 showing in general terms how the CAGR of [redacted] had been assessed. It had been assessed by reference to a number of factors. Also enclosed was additional contextual analysis relevant to Nielsen's assessment of the appropriate CAGR, the CAGR report. This had been produced as

a result of questions asked by Ms. Fyfield. In addition to showing slide 62 from the main report it included 3 further slides. [redacted]

493. At paragraph 3 of MCFC's comments on the Provisional Determination provided on 22 March 2024, it was said that the PL had failed to provide the Club with material evidence on which the Board and Nielsen relied when making their respective FMV assessments, that is, material in the PL's Databank, as well as information held by Nielsen including data specifically used by Nielsen as part of its methodology, which MCFC said had been requested (but not provided by the PL) before the filing of those comments.

494. At paragraphs 70-72 of its comments MCFC raised questions concerning CAGR. It is to be noted that eight points were made, the sixth of which concerned "serious deficiencies" in Nielsen's CAGR analysis. There was no suggestion that MCFC was unable to make meaningful representations about CAGR or about Nielsen's explanation of its assessment of CAGR by reason of not having access to the transactions in the Nielsen database.

495. Nielsen responded to those questions and criticisms in a Supplementary Report dated 25 April 2024 and in a covering email. The Board's Final Determination referred to the question of CAGR at paragraph 22(a) in these terms:

> "CAGR: The IFA summarised four reasons why, in the IFA's opinion, it does not consider that a [redacted] increase each year for [redacted] is something which could be achieved between knowledgeable and willing arm's length parties in this particular Transaction. [redacted]

[redacted]

496. The complaint made by MCFC is that on this important question of CAGR it "was prevented from making representations that Nielsen's calculation was in error as a result of the PL's unwillingness to give MCFC access to the calculation underlying the CAGR rate"; see paragraph 205 of MCFC's Skeleton Argument. As put by MCFC's counsel in his oral submissions, the complaint was that "the material on which Nielsen relied in forming their assessment, and on which the Board relied, in making their judgment is not disclosed." Whilst these submissions may not be inconsistent with paragraph 3 of MCFC's comments on 22 March 2024 they sit uneasily alongside the forthright comments in paragraphs 70-72.

497. As we have noted above, an explanation of how Nielsen reached its assessment of CAGR was given in the materials enclosed with the Board's Provisional Determination. The question therefore is whether sufficient of the "gist" of Nielsen's work had been given to enable MCFC to make effective or worthwhile submissions concerning Nielsen's assessed CAGR [redacted].

498. On the one hand it can be said that the answer to that question is given by the two valuation experts who considered the FMV of the EAG Transaction. At paragraph 4.6 of their Joint Report [redacted] and [redacted] agreed that

> "…….Nielsen has [redacted] in its CAGR calculation, but neither Expert: (i) [redacted] (ii) [redacted]; or (iii) [redacted]."

499. On the other hand it can be said that MCFC's own comments of 22 March 2024 at paragraphs 70-72 show that despite not knowing the detail of the transactions on which Nielsen had acted, MCFC was able to make effective or meaningful representations as to Nielsen's assessment of CAGR.

500. We have not found this question easy. We have in mind our conclusion in response to Issue 7(d) that the Rules are not unfair by reason of a club having no access to Nielsen's own repository of comparable transactions. But we have also in mind that the assessment of the appropriate CAGR in this case is very important because the EAG Transaction is [redacted]. When cross-examined Ms. Fyfield accepted that CAGR was "absolutely vital. It affects millions of pounds, many millions." It was suggested that if the underlying data could not be provided, then the PL ought not have relied upon the assessment of CAGR based upon it. That, however, would undermine the scheme by which the Board, who were not experts in valuation, were to be provided with a report on the issue of FMV from the agreed independent expert.

501. We have concluded that the circumstance that MCFC was not provided with the underlying transaction data relied upon by Nielsen does not mean that the Board acted with procedural unfairness. The Nielsen Report and the further CAGR Report were provided to MCFC. They summarised the data on which Nielsen relied and set it in context. MCFC made a number of meaningful comments on Nielsen's approach. It is not for us to say whether we agree with the Board's conclusion that MCFC's comments were unpersuasive. What matters is whether the Board acted in an unfair manner by not providing the underlying Nielsen data to MCFC, something which, it must be remembered, they had no power to do. We have concluded that the Board did not act unfairly in that regard.

502. [redacted]

503. [redacted]

504. We have therefore concluded that the Board did not fail to act in accordance with procedural fairness in the manner suggested in Issue 10 (c).

ISSUE 11: DID THE BOARD ACT UNREASONABLY (AS DEFINED IN RULE X.5.2) IN ITS FMV ASSESSMENT OF THE EAG TRANSACTION IN RESPECT OF ITS TREATMENT OR CONSIDERATION OF: (A) THE OFFERS FROM [redacted] AND [redacted]; (B) NIELSEN'S [redacted] VALUATION; (C) NIELSEN'S [redacted] RIGHTS VALUATION; (D) NIELSEN'S VALUATION OF [redacted] RIGHTS; (E) NIELSEN'S CALCULATION OF A CAGR; (F) THE [redacted] BENCHMARKING ANALYSIS AND/OR THE [redacted] MEMORANDUM; AND/OR (G) THE [redacted] REPORT?

505. In advancing the allegation that the Board acted unreasonably in any of these respects, MCFC must establish that the Board's decision could not have been reached by any reasonable Board which had applied its mind properly to the issues to be decided. Thus it is not enough to show that a different decision might have been reached. It must be shown that the Board's decision was one which it could not reasonably have reached.

506. By contrast counsel for the PL said that all the points taken under this Issue 11 are merely "points of disagreement", that is, that MCFC is seeking to re-argue the merits of the particular points. If so, that cannot assist MCFC because there is no challenge or appeal on the merits.

The offers from [redacted] and [redacted]

507. MCFC provided to the PL evidence of offers from non-APs who were established sponsors of the club in support of its case that the EAG Transaction was at FMV. One was from [redacted]. The other was from [redacted]. The evidence from [redacted] was what was described by [redacted] as a legally binding offer. The evidence from [redacted] was an email confirming that board approval had been requested for the submission of a bid. This evidence was considered by the Board. In its Provisional Determination the Board said:

> "[redacted]
>
> The offer received from [redacted] was for [redacted] for season 2024/25, increasing by [redacted], for the sponsorship rights contained in the existing EAG sponsorship agreement. Whilst the value of this offer is similar to the consideration MCFC shall receive under the Transaction, the Board considers that the information provided in respect of this offer is such that it does not provide a cogent basis upon which the Board could disregard the Independent FMV Assessor's conclusions in reaching its Fair Market Value Assessment of the Transaction because of a combination of the following reasons:
>
> a. there is no evidence indicating that [redacted] is in a position to enter into the transaction, such as any indication of a diligence process undertaken in respect of the offer or evidence of funds supporting the offer;
>
> b. the offer does not appear to be a result of a competitive process;
>
> c. while the offer is described as 'legally binding' it is nonetheless expressed as being subject to 'finalizing the long form contract' such that it is unclear how it was, in fact, legally binding; and
>
> d. the timing of the offer, given engagement with [redacted] did not take place until 16-17 September 2023, and [redacted]'s offer was received shortly thereafter on 18 September 2023 (being significantly later than initial conversations with EAG, after MCFC and EAG had reached agreement on fees on 30 May 2023 and after EAG and MCFC had negotiated a near-final version of the Contract).
>
> [redacted]

> The offer received from [redacted] was for fees of [redacted] per year, consisting of: i) [redacted] rights, to which [redacted] per year was attributed; ii) [redacted] rights, to which [redacted] per year was attributed; iii) [redacted] rights, to which [redacted] per year was attributed; and iv) [redacted] rights, to which [redacted] per year was attributed. The Board considers that the information provided in respect of this offer is such that it does not provide a cogent basis upon which the Board could disregard the Independent FMV Assessor's conclusions in reaching its Fair Market Value Assessment of the Transaction. This is because of a combination of the following factors:
>
> a. the timing of the [redacted] offer suggests that it did not arise from a competitive process;
>
> b. the offer lacks detail in respect of core terms of the transaction, for example as to the scope of the rights to be granted, the proposed term of the contract and any increase in fees over that term;
>
> c. on its face, the offer is informal and imprecise;
>
> d. there is no evidence indicating that [redacted] is able to enter into the transaction, such as any indication of a diligence process undertaken in respect of the offer or evidence of funds supporting the offer; and
>
> e. the offer is not expressed to be legally binding and was said to be made subject to the approval of the [redacted] board.
>
> Further to the above, neither the [redacted] offer nor the [redacted] offer makes any reference to bonus payments."

508. MCFC, when replying to this Provisional Determination, provided further evidence and argument.

509. In its Final Determination the Board said:

> "The [redacted] and [redacted] offers are addressed at §§34-39 of the League's provisional determination letter. The Board has reviewed the additional material provided by MCFC in response to the concerns raised in that letter. The Board has also considered the Regulatory team's view set out at §§131-136 of the Board Report, and the observations made by [redacted] and the IFA. The Board agrees with the reasoning set out at §§131-136. In particular, the Board considers that the additional material provided in respect of the offers does not provide sufficient evidence that there is a high likelihood or probability that the offers could be concluded either on the same terms as the transaction before them, and/or in particular, for the consideration amounts respectively offered in the submitted materials. In the Board's view given the level of detail included in the offers and the limited discussions about the offer between the parties there is a significant risk that there is an insufficient meeting of the minds in respect of the proposals being made, and consequently, a material risk

that the offer terms could change as discussions between the parties continue such that, based on the information available, they are neither indicative or demonstrative of the Fair Market Value of the Transaction. In addition, in the Board's view, in order for an offer of this scale and duration to be concluded on their terms (by way of example only): (i) internal corporate governance and approvals processes would need to be obtained and (ii) evidence of sufficiency of funds or financial security or guarantees would normally need to be agreed. MCFC has not provided evidence that such internal governance processes were obtained prior to the offers be made or that the offers contemplated the provision of financial security or guarantees.

For these reasons, the Board is of the view that the [redacted] and [redacted] offers are not a reliable indicator of the Fair Market Value of the Transaction."

510. In its Skeleton Argument MCFC disagreed with the Board's assessment of the value of the evidence put before it. It was further submitted that the Board's assessment proceeded from the premise that the offers merited no weight at all unless a series of unrealistic and disproportionate hurdles were surmounted. In oral closing submissions counsel said:

> "…….this was important, real world, evidence which was completely disregarded. It was given no weight.....it is the extremity of the approach which we say makes it unreasonable, because the offer was valuable evidence which was capable of making a material difference in the round. It was a significant item of evidence."

511. However, the Tribunal does not accept that that is a fair description of the Board's approach. Rather, the Board carefully considered in its Provisional Determination that, for the reasons stated, the offers were not a "cogent" basis for disregarding Nielsen's assessment of FMV. In its Final Determination the Board concluded, for the reasons stated, that the additional material provided in respect of the offers did not provide "sufficient evidence that there is a high likelihood or probability that the offers could be concluded either on the same terms as the transaction before them, and/or in particular, for the consideration amounts respectively offered in the submitted materials". The offers were said to be "neither indicative or demonstrative of the Fair Market Value of the Transaction."

512. In circumstances where the probative value of the offers was carefully considered it cannot properly be said that the offers were "completely disregarded" or given "no weight". MCFC disagrees with the Board's assessment of the value of the offers (as

argued in paragraphs 151-155 of its Skeleton) but the Tribunal has no doubt that the Board's assessment of the value of the offers was one which a reasonable Board could make, having applied its mind properly to the issues to be decided.

513. We therefore accept the submission by counsel for the PL that in reality MCFC simply disagreed with the Board's assessment of the weight to be given to the offers when assessing the FMV of the EAG Transaction. That cannot found a successful challenge.

514. We would add that the more the [redacted] offer was explored in evidence with Ms. Fyfield the less credible became MCFC's reliance on the offer as evidence of market value. She did not think it was evidence of market value. Rather, it was evidence of what [redacted] was "prepared to pay to get in to the room". There was then much negotiation to take place.

> "…..but exactly what they were asking for and would need to receive in order to pay the price set out here, I think is TBD. Because it's — I mean, it's — in the contract those things are 40 pages. Here it's a page. There's clearly some detail to be worked through."

It was put to her that whatever deal was done would reflect the "fundamentals of the offer". She disagreed. Her evidence carried conviction. As counsel for MCFC accepted, Ms. Fyfield was experienced in business and had experience of "big deals".

515. Counsel submitted in closing that the factors relied upon by Ms. Fyfield showed that she was not focusing upon the value of the offers as evidence of market value but on whether it was likely that a deal would be done at the price proposed without further negotiation. We see no error in Ms. Fyfield's approach. Whether it was likely that a deal would be done at the price proposed was of obvious relevance in assessing the value of the offers as evidence of market value.

[redacted]

516. MCFC disagrees with Nielsen's valuation of [redacted]; see the EAG Claim at Annex B paragraphs 1-5. In support of its argument MCFC drew attention to advice which

it had previously received from Nielsen.

517. The criticisms advanced by MCFC in response to the Board's Provisional Determination were taken up with Nielsen. The Regulatory Team's report summarises Nielsen's response at paragraphs 34-36 of its Report to the Board dated 25 April 2024. As part of that response Nielsen increased its FMV assessment.

518. Ms. Fyfield gave evidence about this particular issue. She said:

> "While this was addressed in the Supplementary Report, given the importance of the point I wanted to hear Nielsen's explanation of its response to the criticism. Accordingly, I raised this point with Nielsen to establish why the valuation had changed between the 2021 valuation and the First FMV Report. During the call, Nielsen explained that the 2021 [redacted] valuation was performed on a different basis and, crucially, for a different purpose. In 2021 Nielsen undertook a hypothetical analysis to show a theoretical [redacted] value. However, Nielsen was clear that no partner is ever able to [redacted] value and that in any event this would not be used, and has never been used by Nielsen, in an FMV context such that it was not relevant to the EAG Transaction."

519. [redacted] of MCFC gave evidence about the 2021 valuation in which she was involved at the time. She said that Nielsen gave a substantial figure for the [redacted] in 2021 and a very much reduced figure for those rights when providing a FMV assessment of the EAG Transaction. Although she accepted when cross-examined that the 2021 valuation did not purport to be an assessment of fair market value, she said when re-examined and having been referred to the relevant "slides" in both exercises that the method adopted in the 2021 valuation was the same as the method adopted when conducting the FMV Assessment of the EAG Transaction.

520. Ms. Fyfield was cross-examined about what she had been told by Nielsen and accepted that the content of Nielsen's report was different from what she had been told by Nielsen. However, Ms. Fyfield was clear in her evidence that she was told by Nielsen that the work in 2021 and the FMV assessment were distinguishable. She said:

"I think they tried to clarify the context. In their mind, they were really clear that doing fair market value it would be wrong -- I would go so far as wrong -- not to apply a [redacted]. And in their mind the purpose -- the two things were distinguishable. Now, it's hard for me to -- like I wasn't there, but I talked to them about it. I asked them a lot of questions about it. And they were clear that they were distinguishable and in this context it was appropriate to apply [redacted]. But I accept some of the words on the page are a little different from that. I completely accept that. I took what they said to me directly."

521. In its Final Determination the Board did not refer specifically to the valuation of [redacted] but at paragraph 21 referred to the several criticisms made by MCFC of Nielsen's valuation, which included the matter of [redacted].

"MCFC has then raised a large number of criticisms in relation to the IFA Report. These are set out at Response §§35-84. A number of additional criticisms are identified in the Alternative Valuations. The Board ensured that all of these criticisms were put to and carefully considered by the IFA. The IFA has responded to the criticisms in the IFA's Supplementary Report. The Board has carefully considered both the criticisms that have been made, and the IFA's response to the criticisms. The Board notes the high level of scrutiny that the IFA has applied to the Alternative Valuations and the criticisms advanced within them, and considers that the IFA has dealt with each of those criticisms in a detailed, robust and candid way. It is clear to the Board, that the IFA has approached the task with an open-mind, and, where it has considered criticisms to be valid, it has acknowledged them and made the necessary adjustments to its assessment. Similarly, where a criticism is not accepted, the IFA has provided the Board with detailed reasons, which the Board has considered in full. The IFA's changes to its assessment as a result of its consideration of the Alternative Valuations are all reflected in the IFA's Revised Report."

522. The submission made by counsel for MCFC in closing was that:

"the Board either unreasonably accepted Nielsen's explanation because it couldn't

be reconciled with the documents,..... Or it did not apply its mind to the matter. But, either way, on the evidence before the Board, there was no proper basis on which it could conclude that the rights could not be valued in this way, given Nielsen's own position in 2021."

523. The Tribunal considers that this submission underplays the position in which Ms. Fyfield found herself. She had well in mind MCFC's criticism of Nielsen's approach based upon what it had advised MCFC in 2021 and raised it with Nielsen. She emphasised in her evidence that she had not been there (in 2021) and took (that is, accepted) what Nielsen said to her. It may be that what she was told can now be seen, after the detail of the Nielsen "slides" was examined in cross-examination, to be inconsistent with the Nielsen report. But it does not follow that her decision to accept what Nielsen told her was a decision which no reasonable Board could have reached in circumstances where (a) she was not the expert, and Nielsen was and (b) she had not been there in 2021 and Nielsen had been. Ms. Fyfield plainly applied her mind to the criticism advanced by MCFC. Whether she reached the right or the wrong answer is not relevant to a challenge within upon Rule X.5.2.

524. As with the issue concerning the offers, the reality of MCFC's stance on [redacted] is that MCFC simply disagrees with Nielsen's and the Board's approach to the valuation of [redacted]. But that cannot found a successful challenge.

[redacted] *rights*

525. This issue concerns MCFC's [redacted] and how it creates [redacted] value for EAG. In the course of cross-examination the issue was simplified (compared with MCFC's skeleton argument at paragraphs 162- 166) so that it concerned, in particular, the method of valuing [redacted]. There appeared to be different methods of valuing such [redacted] and Ms. Fyfield's evidence was that, having raised the different methods with Nielsen, she was advised that their method was correct. This exchange took place at the end of her cross-examination on this topic:

"A. ..... what they said was they had designed their data method to make sure they only included things that they thought was valuable. I accept it is an expert judgment on their part, but that is what they said to me.

Q. So, just to be completely clear, they are not giving you any reasons why the other valuers are capturing things that are not valuable?

A. No, they're saying, in their expert view, those things are not valuable …….

THE CHAIR: And that's –– that's because they are [redacted]?

A. Yes. So their view is if you [redacted], it 's –– it's not valuable. And if you [redacted] –– so their –– in terms of what gets counted, they would say: if you [redacted] then that's not valuable. So they set their kind of what do you include, what gets added up, they set their threshold to make sure you can [redacted]. But I accept that it's an expert view. There's no reasoning beyond that. I completely accept that."

526. MCFC has to say that by accepting that expert opinion the Board, in the person of Ms. Fyfield, was doing something which the Board could not reasonably do, having applied its mind properly to the issues to be decided. As with the valuation of [redacted] the Tribunal considers that it cannot fairly be said that Ms. Fyfield was acting unreasonably in taking the advice of the independent expert. The argument has to be that she was not applying her mind to the right question because, if there were other ways of valuing [redacted] rights which put a higher value on them, then, having regard to the word "could", the higher value should have been adopted. But, as we have already found, Ms. Fyfield was well aware of the importance of the word "could". Moreover, she had noted that Nielsen had said in their supplementary report that the methods of valuing [redacted] rights used by other valuers were unreasonable and that was the reason that she wished to speak to Nielsen about the issue.

"Q. And, again, you asked Nielsen to consider the reasons why their results were different from the other valuers, didn't you?

A. Just to clarify , two things. Firstly, all the reports were given to Nielsen and they were asked to consider the critique that they'd not included everything and actually to consider the reports of [redacted] and [redacted]. They provided a supplemental report that set out their reasoning. I considered it ; and then I also spoke to them about it, having seen their supplemental report; so seen the

reasons that they favoured the way they did it and didn't think the way others had done it was reasonable. So I talked to them after that. I just wanted to be clear that I talked to them after I'd read the report."

527. It is therefore most unlikely that Ms. Fyfield made the error which MCFC must suggest she made.

[redacted] *rights*

528. [redacted] whose valuation was one of four submitted by MCFC on 22 March 2024, valued the [redacted] rights at [redacted]. This was more than Nielsen's valuation, which [redacted] said was between [redacted] and [redacted]. Whilst there appears to be some doubt as to whether Nielsen's valuation was the figure suggested by [redacted] (it was not accepted by Ms. Fyfield), there does not appear to be any dispute that Nielsen's valuation was less than that of [redacted], for [redacted] valuation of the [redacted] rights was put to Nielsen by the Regulatory Team. In its report to the Board the Regulatory team said:

"60. MCFC submits that the IFA significantly undervalues the [redacted] rights under the Transaction in part due to the benchmarks it has relied on. MCFC states that the [redacted] Report values [redacted] rights value at [redacted] on an asset-by-asset basis and that, once this figure is subjected to statistical benchmark averaging, it rises to [redacted]. The Regulatory team notes that the [redacted] Report is benchmarked against [redacted] rights deals and [redacted] rights deals.

61. The Regulatory team has raised this with the IFA. The Regulatory team notes that the IFA's Report (and the IFA's Revised Report) sets out its rationale as to the valuation of [redacted] rights. [redacted]. In addition, and as explained above and in the IFA's Supplementary Report, the [redacted] rights market is distinct to that of the [redacted] market. The IFA's view is corroborated by the Benchmarking Analysis which states that [redacted] rights in [redacted] right as they do not generally have [redacted] sponsors.

62. The IFA has accordingly not adjusted its valuation of this right in the IFA's Revised Report."

529. There is a dispute as to whether [redacted] relied upon US data (see MCFC's Skeleton

Argument at paragraph 171) but it cannot be said that in relying upon the Regulatory Team's report the Board acted in a manner in which a reasonable Board could not have acted.

530. Counsel for MCFC raised the further point that [redacted] in the Benchmarking Analysis had valued [redacted] rights at [redacted]. Ms. Fyfield was asked about this. She accepted that he had done so but she said he had included certain other rights such as [redacted] rights. She said his valuation was therefore in the range of [redacted]. It was put to her that a reasonable figure for [redacted] rights would therefore be the figure which he identified. She did not agree. She said that she used [redacted] report with care, as a check and a balance, rather than providing the answer. She explained that [redacted] Benchmarking Analysis was used to give an "aggregate comparison".

531. It may be that another and higher figure is appropriate for [redacted] rights, based upon [redacted] analysis, notwithstanding Ms. Fyfield's reluctance to use that analysis as providing a "precise answer", but that is not the question before this Tribunal. The question is whether the figure adopted by the Board, stemming from Nielsen's view, is one which a Board could reasonably adopt. It plainly is.

CAGR

532. MCFC's case on this topic was that the Board had failed to address the applicable test ("could") and that its assessment fails the unreasonableness standard; see paragraph 186 of MCFC's Skeleton Argument. Ms. Fyfield was cross-examined about this at some length. We mention two matters with regard to MCFC's case and her evidence.

533. First, she emphasised that she and Nielsen had well in mind the applicable test, the "could" point. She accepted that a sensible number to take for CAGR was the top of the range of the growth rates that could be agreed:

> "Yes, that's the task they'd been set. They [Nielsen] fully understand the task that they've been [set]. We spent enough time talking to them about "could". They're under no –– there's no way that they don't understand that. They've come up with

this in that context."

534. Later, when it was put to her that the Board's account of Nielsen's reasons in the Board's Final Determination first used the word "could" but ended up using the word "would" she said:

> "…..it says "would", but having spoken to them multiple times about the CAGR, they definitely address themselves to what could be agreed or, in their view, what could be agreed."

535. It was suggested to her (a suggestion repeated in counsel's closing submissions) that an average figure for CAGR was the wrong figure to take because a higher figure "could" be achieved. However, with regard to the figure of [redacted] Ms. Fyfield did not accept that suggestion because it was not the average of actual CAGRs but the average of a number of matters which could be taken into account when assessing CAGR. She said that to take the highest of them in isolation would not be right. Her answer is consistent with the manner in which the figure of [redacted] was explained on the relevant Nielsen "slide".

536. We accept her evidence and do not accept the suggestion that she and Nielsen applied the wrong test.

537. Second, the suggestion that the Board's decision was one which no reasonable board could make sits uneasily with the care Ms. Fyfield took to examine the CAGR question. She was most careful to investigate whether the figure she had been provided with by Nielsen, [redacted], was supported by market data. She asked for that and in response Nielsen provided evidence which suggested an estimated figure for PL clubs of [redacted]. She used this to assess the reliability of the [redacted] figure for CAGR. She was asked why she did not take the [redacted] figure estimated for European clubs and she replied that she thought that the figure for PL clubs was a "more reasonable proxy".

538. As explained in counsel's closing submissions, MCFC's case that the Board's decision failed the unreasonableness standard was that Nielsen had no "evidential basis" on which to reach a conclusion as to CAGR and that by contrast there was "plenty of evidence that a term providing for a [redacted] growth rate was in principle

unexceptional."

539. The suggestion that Nielsen had no evidential basis is a bold submission to make in the face of their assessment of CAGR and their benchmarking analysis as shown in their "slides". To describe this is as speculation because they had no experience of a contract such as the EAG Transaction goes too far.

540. The evidence put before the Board as to other MCFC transactions was considered by Nielsen. With regard to this Ms. Fyfeld said:

> "I think what they're saying is they didn't find this evidence persuasive because they were [redacted], they didn't have the same [redacted], in terms of, I think — you've got this — if it's a [redacted] contract for a [redacted] then [redacted]. So they were saying that the evidence that the Club had presented didn't persuade them that higher escalator was appropriate."

541. We have already set out the relevant part of the Board's Final Determination but it bears repetition:

> "CAGR: The IFA summarised four reasons why, in the IFA's opinion, it does not consider that a [redacted] increase each year for [redacted] is something which could be achieved between knowledgeable and willing arm's length parties in this particular Transaction. [redacted]"

542. Although MCFC's submission was in effect that the Board had no alternative but to accept MCFC's submission that [redacted] was the only reasonable CAGR, Ms. Fyfield's answers in cross-examination confirm our conclusion that the Board's view on CAGR was one which a reasonable Board could take.

543. This is emphasised by the following exchange at the end of the cross-examination on CAGR.

> "We've dealt with three issues where you sought Nielsen's views: [redacted], [redacted]

[redacted] and the CAGR. And the case I've put to you is that each –– in each of these three examples, Nielsen haven't given you good reasons why the Club's position or that the position of the alternative valuers couldn't represent the value of the contracts. They just stuck to their guns and expressed their opinion. That's what happened in each of these examples, isn't it?

A. No, I don't agree with that. They provided –– they set out their reasons. I read their reasons. I thought they were reasonable. And, as I said last week, we then subsequently looked at each of the alternative valuations on their own terms and decided to give them limited weight. So it 's both. We did both."

The [redacted] Benchmarking Analysis

544. The Tribunal has held that the PL acted in a procedurally unfair manner by not providing MCFC with an opportunity to respond to the [redacted] Benchmarking Analysis (see [482] above).

545. Accordingly, this issue does not arise.

The [redacted] Report

546. The submission made on behalf of MCFC was that the [redacted] Report shows that [redacted]; see MCFC's Skeleton at paragraph 188 and the EAG Claim at paragraphs 13-16. In closing submissions it was suggested that the PL had no answer to this point because the [redacted] Report was regarded as just another valuation.

547. But the issue was raised with Ms. Fyfield in cross-examination. She noted that the value put on the EAG Transaction by [redacted]. It was put to her that EAG must have reasonably believed it was getting good value for its money. Her reply was:

"I do think the context of the advice is important and the timing. I mean, there are two ways –– I mean, I've done this myself. There are two ways in which you might use a piece of advice like that. One would be: can you tell me what I should negotiate for? Early on in the process. And another was: well, we're just about to sign. Can you give me something that says that this is okay."?

548. She said she did not know which was the context in which this advice was provided.

549. In those circumstances the Board's decision to give little weight to the [redacted] Report cannot be said to be one which was not open to a reasonable board.

Conclusion on Issue 11

550. Having reviewed the Board's treatment of the matters identified in Issue 11 the Tribunal has concluded that the Board did not act unreasonably (as defined in Rule X.5.2) in its FMV Assessment.

ISSUE 12: AS REGARDS THE DURATION OF THE FMV ASSESSMENT OF THE EAG TRANSACTION, DID THE BOARD FAIL TO COMPLY WITH RULE E.64 OF THE FMV RULES IN RELATION TO THE EAG TRANSACTION AND/OR OTHERWISE ACT UNREASONABLY AND/OR UNLAWFULLY?

551. We remind ourselves of Rule E.64 of the APT Rules.

> "Where the Board is required to conduct a Fair Market Value Assessment in accordance with these Rules, it will conclude that Fair Market Value Assessment (and communicate its findings, including whether the Board approves the relevant Transaction, to the Club) within 10 clear working days of either receipt of the Associated Party Transaction in accordance with Rule E.55, or its determination in accordance with Rule E.63, as applicable, save where further time is required due to exceptional circumstances or the requirement for further information from the Club in order to reach a conclusive decision."

552. The 10 clear working days run from either the receipt of an APT or the Board's determination that a transaction is an APT. The obligation to conclude the FMV Assessment within 10 clear working days does not apply where further time is required due to exceptional circumstances or further information is required from the club in question. If further time is required then, on the true construction of the rule, it must be reasonable.

553. Ms. Blake of the Regulatory Team said this of the 10 day limit:

> "Based on my experience of numerous APTs, it would be highly challenging for the Board to ensure that it has conducted a robust and thorough assessment of complex APTs (and, where necessary, restate them) in line with the framework set out in the Rules – including testing Nielsen's report, requesting clarification from

the member club and allowing it to provide further submissions, and engaging with the Board's rigorous testing and questions – within 10 days. For less complex APTs, however, the PL has been able to issue its FMV determination within the 10-day period on 44 occasions.

554. She said where the Board concludes that an APT is at FMV the average time taken is 14 days. Where the APT is complex the average time taken to reach a Provisional Determination that it is not at FMV is 65 days and there is an average of a further 87 days to reach a Final Determination. The average time taken for the whole process is 126 days. However, in our view it does not follow that the PL is responsible for the whole of the time taken. The PL may need further information, a club may take time to provide that information and a club may seek an extension of time in which to submit its response to the Provisional Determination.

555. In the case of the EAG Transaction, the start date was either 17 or 22 November 2023, the latter being the date when MCFC requested an FMV Assessment.

556. However, there can be no doubt that the duration and scope of the EAG Transaction amounted to "exceptional circumstances" for the purposes of Rule E.64. [redacted]

557. By 28 November 2023 the PL had already made 16 requests for information from MCFC and on 1 December 2023 the PL fairly stated that it would not be able to provide its response within the 10 day working day limit.

558. By 10 January 2024 the PL had received further information from MCFC and by 16 January 2024 Nielsen had provided a draft report to the PL. On 23 January 2024 the PL correctly stated that there were exceptional circumstances such that the 10 working day limit did not apply.

559. Before the CMC on 26 February 2024, there had been further discussions with Nielsen, Nielsen had been provided with the [redacted] valuation (in a redacted form), revised reports had been issued by Nielsen and yet further discussions had taken place with Nielsen.

560. The Tribunal is not persuaded that there had been any unreasonable delay (or delay

contrary to Rule E.64) by this stage in the PL's consideration of the EAG Transaction. Whilst specific delays with regard to the FAB Transaction were put to Ms. Blake none were suggested to her with regard to the EAG Transaction. Counsel for MCFC did not attempt to explain how the work required of the PL could have been done earlier than it was. Doubtless the time taken was disappointing to MCFC but the EAG Transaction was a very large and exceptional transaction to assess.

561. Following the CMC the Tribunal ordered that the PL issue its Provisional Decision by 15 March 2024. After Nielsen produced its report on 9 March 2024 and the Board had considered it with Nielsen, in particular the issue of CAGR, the Board issued its Provisional Decision on 15 March 2024.

562. The Tribunal also ordered that the Final Determination be issued by 5 April 2024. However, following the extensive and new material provided on 23 March 2024, and the considerable number of requests for further information generated by that material, the PL sought extensions of time until 22 and then 25 April 2024. The Board issued its Final Determination on 25 April 2024 as directed by the Tribunal.

563. Although the Final Determination was issued about 5 months after the request for an FMV Assessment of the EAG Transaction, there had been no unreasonable delay by the PL or any delay in breach of Rule E.64.

FAB TRANSACTION CHALLENGE

564. We can deal with this challenge much more shortly. During the hearing very little attention was given to the FAB Transaction, probably for two reasons; first, there was not enough time and, second, the FAB Transaction was in financial terms of much less importance to MCFC than the EAG Transaction.

ISSUES 13 AND 14

565. Issues 13 and 14 ask the following questions (which appear to be aspects of the same issue):

13. Did the Board misdirect itself in its interpretation and application of the

PL Rules, in terms of the test to be applied to the FMV Assessment of the FAB Transaction ?

14. Did the Board misdirect itself by asking whether the Nielsen valuation was a reasonable one and not by asking whether one or more of the valuations submitted by the Club was, of itself, reasonable?

566. These are the same questions which were asked in Issues 8 and 9 in respect of the EAG Transaction. No counsel made any separate oral submissions with regard to the FAB Transaction. The Tribunal's understanding is that the same arguments are advanced in respect of Issues 13 and 14 as were advanced in respect of Issues 8 and 9. As with Issues 8 and 9, the Tribunal answers Issues 13 and 14 in the negative and for the same reasons.

ISSUE 15: DID THE BOARD FAIL TO ACT IN ACCORDANCE WITH PROCEDURAL FAIRNESS IN ITS APPLICATION OF THE FMV RULES IN ITS DETERMINATION OF THE FAB TRANSACTION? SPECIFICALLY, WAS IT PROCEDURALLY UNFAIR THAT THE CLUB WAS NOT PROVIDED, PRIOR TO THE FINAL DETERMINATION, WITH THE [redacted] DATABANK TRANSACTIONS ENTERED INTO BY OTHER CLUBS, WHICH THE BOARD REFERRED TO IN ITS FINAL DETERMINATION AND, IF SO, CAN IT BE SAID THAT IT WOULD HAVE MADE NO DIFFERENCE?

567. For the reasons given in response to Issue 7(a) the Tribunal considers that it was procedurally unfair that the [redacted] Databank transactions entered into by other clubs which the Board referred to in its final determination were not provided to MCFC prior to the Board's final determination.

568. Counsel for the PL did not seek to establish that it was highly likely or inevitable that the failure to provide those transactions would have made no difference (see the FAB Defence at paragraphs 270-275 and the PL's Skeleton Argument at paragraphs 231-232). Further, although MCFC's case with regard to the [redacted] Databank transactions entered into with other clubs does not appear to be particularly strong (see the FAB Claim at paragraph 303 and MCFC's Skeleton Argument at paragraph 218(a)) any attempt by the Tribunal to address the question whether the failure would have made any difference would impermissibly involve assessing the merits.

ISSUE 16: DID THE BOARD ACT UNREASONABLY (AS DEFINED IN RULE X.5.2) IN THE ENQUIRIES IT CONDUCTED IN RELATION TO POTENTIAL COMPARATOR TRANSACTIONS?

569. The enquiries initially conducted by the Regulatory Team before the Provisional Determination and the further enquiries conducted before the Final Determination are summarised at [76], [81], [84] and [119] above.

570. The Tribunal has considered MCFC's criticism of the PL's enquiries in relation to the FAB Transaction at paragraphs 299-308 of the Statement of Claim and the PL's response at paragraphs 272-275 of the PL's Defence. For the reasons given by the PL in its response, the Tribunal holds that the Board did not act unreasonably in the enquiries it conducted in relation to potential comparator transactions.

ISSUE 17: DID THE BOARD FAIL TO APPLY THE CORRECT TEST AND/OR ACT UNREASONABLY (AS DEFINED IN RULE X.5.2) IN FAILING TO GIVE PROPER CONSIDERATION TO THE SUBMISSIONS AND EVIDENCE PROVIDED BY THE CLUB, IN PARTICULAR, THE [redacted] VALUATION?

571. This issue was not developed in oral submissions. We have already noted, more than once, that Ms. Fyfield was aware of the correct test. Indeed, she demonstrated that in the context of the FAB Transaction with regard to [redacted] (see [79] above). With regard to the suggestion that she failed to give "proper consideration to the submissions and evidence" provided by MCFC, this is in reality an attempt to re-argue the merits which is not permissible. The PL in its Defence identifies at paragraph 266 the Board's seven concerns with the [redacted] valuation. MCFC in its Statement of Claim alleges at paragraph 280 that those concerns were "inadequate and unreasonable" and at paragraph 281 that they were "minor, immaterial and misplaced". MCFC may disagree with the lack of weight attributed to the [redacted] valuation by the Board but this does not establish that the Board's assessment of the [redacted] valuation was one which no reasonable board could make.

ISSUE 18: DID THE BOARD OTHERWISE ACT UNREASONABLY (AS

DEFINED IN RULE X.5.2) IN ITS FMV ASSESSMENT OF THE FAB ASSESSMENT IN RESPECT OF ITS TREATMENT OF CONSIDERATION OF: (A) [redacted], (B) [redacted] RIGHTS; AND (C) [redacted]?

572. MCFC's case with regard to [redacted] is to be found in paragraphs 286-288 of the Statement of Claim. In essence MCFC takes issue with Nielsen who advised the PL that it was not common practice to take [redacted] or [redacted] into account in a [redacted] contract. MCFC says that it is common practice. This is simply an attempt to re-argue a matter in respect of which Neilsen and MCFC disagree. That is not permissible in these proceedings. It was suggested to Ms. Fyfield that the [redacted] could have been discounted rather than not taken into account at all. She agreed. But it does not follow that the Board's decision, based upon Nielsen's advice, was unreasonable in the required sense. MCFC also relies on the circumstance that "developments likely to affect …fanbase in the future" are included in the list of FMV Assessment factors. That is true. But if it is not usual to do so in a [redacted] contract such as the FAB Transaction, we do not consider that it can be said that the Board acted unreasonably in the required sense in not taking it into account.

573. MCFC's case with regard to [redacted] rights is to be found in paragraph 289 of the Statement of Claim. It is another attempt to re-argue a matter in respect of which there was a disagreement between the Nielsen and MCFC. Ms. Fyfield's evidence on this issue was as follows:

> "[redacted] Rights. The Club considered Nielsen's valuation of these rights to be "wholly inaccurate" and argued that the [redacted] valuation was appropriate. The Sub-Committee remained of the view that there was no reason to question the credibility or reasonableness of Nielsen's expert analysis, considering that [redacted]. While the Club disagreed with our approach, it had not actually provided any new factual information. Accordingly, there was no reason for the Sub-Committee to change our view."

574. There was cross-examination of Ms. Fyfield about this but we do not consider that

it established that the Board reached a decision which, on the evidence before it at the time, it could not reasonably reach. Ms. Fyfield emphasised that [redacted] rights and their market value were things she knew about.

575. So far as [redacted] is concerned, MCFC challenged the Board's acceptance of Nielsen's advice that an [redacted] was the minimum which would be acceptable to a sponsor. The Tribunal's outline of the events deals with [redacted] at [79] above. MCFC disagrees with Nielsen's approach but that does not render the Board's decision one which was not open to a reasonable Board to reach.

576. With regard to both Issues 17 and 18 MCFC adduced evidence from [redacted], an expert accountant. Whilst his report commented upon and criticised the approach of the Board in a number of respects, it is not clear to the Tribunal in what way his evidence could assist it in circumstances where, as he accepted in cross-examination, he was not competent to value football sponsorship rights. Although he considered himself competent to cross-check what was done by the PL with regard to the FAB Transaction, it was not obvious to the Tribunal why that was so and no oral submissions were made on behalf of MCFC explaining what assistance the Tribunal could get from his evidence with regard to issues 17 and 18.

ISSUE 19: AS REGARDS THE DURATION OF THE FMV ASSESSMENT OF THE FAB TRANSACTION, DID THE BOARD FAIL TO COMPLY WITH RULE E.64 OF THE FMV RULES IN RELATION TO THE FAB TRANSACTION AND/OR OTHERWISE ACT UNREASONABLY AND/OR UNLAWFULLY?

577. The 10 working day period permitted by the Rules commenced on 4 May 2023 when MCFC confirmed that it did not wish to make submissions as to whether, as determined by the PL, the FAB Transaction was an APT. That period expired on or about 19 May 2023. By that date Nielsen had provided an assessment to the PL. The Regulatory Team provided its report to the Board on 23 May 2023. After the Board had raised questions concerning, in particular, [redacted], the Board issued its Provisional Determination on 31 May 2023.

578. In response on 7 June 2023 MCFC requested certain documentation and information

to which the PL replied on 27 June 2023. Further submissions were not made by MCFC until 2 August 2023. On 15 September 2023 the Regulatory Team sent a further report to the Board. After a call with the Board on 18 September 2023 the Board resolved to approve the recommendation made by the Regulatory Team.

579. By this time 4 months had elapsed. This was at a time when the resources of both the Regulatory Team and Nielsen were under pressure and had to be increased.

580. It is likely that some part of the delay from May until September 2023 was caused by the Regulatory Team and Nielsen being under-resourced. Both Ms. Fyfield and Ms. Blake accepted that the PL and Nielsen were under-resourced at this time.

581. Thereafter, there was an unreasonable delay in issuing the Board's Final Determination which did not happen until 13 November 2023. This delay was due to an oversight. The Final Determination ought to have been issued by 19 or 20 September 2023. So there was an unreasonable delay of 8 weeks.

582. MCFC in the Statement of Claim said that it promptly responded to all requests for further information and alleged that the FMV Assessment was issued six months later than the required date; see paragraph 264(a). However, this submission ignored the fact that on 7 June 2023 MCFC requested further documentation and information to which the PL responded on 27 June. It was then not until 2 August 2023 that MCFC responded with their further submissions. So the delay of about 8 weeks between June and August 2023 were caused by requests and delays of MCFC.

583. The PL in its Defence alleges that there were exceptional circumstances; see paragraph 250(2). It is unclear what is relied upon save the suggestion that the "nature and detail of the analysis required was such that it required more than 10 working days to undertake"; see paragraph 250(2)(a). It is further alleged that there was a "significant spike in the number and complexity of APTs submitted by the clubs which has had an impact on both internal and resource and resource within Nielsen;" see paragraph 250(3). The Tribunal is not satisfied that these were exceptional circumstances. Rather, it appears that the PL had underestimated the number of APTs that there might be with the result that both the PL and Nielsen were

under-resourced. But it must also be borne in mind that the requests by the MCFC for further information and documentation and its delay in responding to the Provisional Determination probably led to the PL spending more time responding thereafter than would otherwise have been the case.

584. It is difficult to make an accurate assessment of how much delay was caused by the PL being under-resourced together with the oversight in September. If a finding is required, we find that a delay of about 3 months was so caused.

THE EP TRANSACTION

ISSUE 20: AS REGARDS THE DURATION OF THE FMV ASSESSMENT OF THE EP TRANSACTION, DID THE BOARD FAIL TO COMPLY WITH RULE E.64 OF THE FMV RULES IN RELATION TO THE EP TRANSACTIONFAB ASSESSMENT AND/OR OTHERWISE ACT UNREASONABLY AND/OR UNLAWFULLY?

585. The 10 working day period commenced from 7 June 2023 when MCFC indicated that it would not make any submissions to the effect that the EP Transaction was not an APT as the PL had determined to be the case.

586. Thus the 10 working day period expired on or about 21 June 2023. However, certain matters were clarified between 13 and 19 June 2023 and so some extra time would be required to assess such matters.

587. The PL has claimed (see the Defence at paragraph 251(2)) that there were exceptional circumstances having regard to the size and value of the transaction. Whilst the EAG Transaction was exceptional, the same cannot be said of the EP Transaction. It was probably "complex" but the Tribunal is not persuaded that it was "exceptional". Rather, as with the FAB Transaction, some delay was caused by the PL and Nielsen being under-resourced.

588. It was not until 14 August 2023 that the Board issued its Provisional Determination. It would appear that a delay of about one and half months was caused by the PL and Nielsen being under-resourced.

589. However, thereafter delay was caused by MCFC's own requests for more time to respond (and for more information) from 21 August 2023 until 5 January 2024. By taking so long to respond to the Provisional Determination, MCFC must have caused some further delay to the PL responding to MCFC's submissions in response to the Provisional Determination.

590. The Board issued its Final Determination on 1 March 2024. This would appear to be an unduly long period of time to respond, given the need for a swift response as contemplated by Rule E.64.

591. Again, if it is necessary to assess how much delay was caused by the PL being under-resourced and by undue delay after 5 January we find that there was a delay of about two months.

VI OVERALL CONCLUSIONS

The challenge to the APT Rules and the Amended APT Rules

592. MCFC challenges the APT Rules and the Amended APT Rules as being restrictive of competition in several respects contrary to the Chapter I and II prohibitions of the 1998 Act. We hold that (i) the exclusion of shareholder loans from the APT Rules and Amended APT Rules and (ii) the pricing changes in Appendix 18 of the Amended APT Rules are unlawful as they infringe the Chapter I and II prohibitions but all other challenges fail.

593. MCFC also challenges the APT Rules and the Amended APT Rules as being procedurally unfair in several respects. We hold that MCFC's inability to comment upon the comparable transaction data relied upon by the PL before the PL determines whether a transaction is at FMV is procedurally unfair but all other challenges fail.

The challenge to the PL's decision with regard to the EAG Transaction

594. MCFC challenges the PL's decision that the EAG Transaction was evidently not at FMV alleging that the PL misdirected itself in its interpretation and application of

the APT Rules. That challenge has failed.

595. MCFC also challenges that decision on the basis that, in several respects, it was reached in a procedurally unfair manner. That challenge has failed, save in two respects, namely, that the PL did not give MCFC an opportunity to respond to the [redacted] Benchmarking Analysis prior to reaching its decision and MCFC was not provided with the underlying data in the Databank in relation to the excluded CAGR.

596. MCFC also challenges that decision on the basis that the PL's decision was unreasonable in a number of respects. That challenge has failed.

597. Finally, MCFC alleges that there had been unreasonable delay and/or delay contrary to Rule E.64 by the PL in reaching its decision. That allegation has failed.

The challenge to the PL's decision with regard to the FAB Transaction

598. MCFC challenges the PL's decision that the FAB Transaction was evidently not at FMV, alleging that the PL misdirected itself in its interpretation and application of the APT Rules. That challenge has failed.

599. MCFC also challenges that decision on the basis that it was reached in a procedurally unfair manner in that the PL did not provide MCFC, prior to its Final Determination, with the [redacted] Databank transactions entered into by other clubs, which the Board referred to in its Final Determination. That challenge has been upheld.

600. MCFC also challenges that decision on the basis that the PL acted unreasonably in a number of respects. That challenge has failed.

601. Finally, MCFC alleges that there was an unreasonable delay of many months and/or delay contrary to Rule E.64 by the PL in reaching its decision. We have held that there was an unreasonable delay of about 3 months and thereby a breach of Rule E.64.

The challenge to the time taken by the PL to reach a decision with regard to the EP Transaction

602. MCFC alleges that there was an unreasonable delay of many months and/or delay contrary to Rule E.64 by the PL in reaching its decision. We have held that there was an unreasonable delay of about 2 months and thereby a breach of Rule E.64.

Remedies

603. We give declaratory relief which reflects the above conclusions.

604. Injunctive relief and damages are also sought. We reserve our jurisdiction to grant such relief. We do not so in this Award because we heard no submissions as to such relief and in any event we consider that the Parties should have the opportunity to consider what, if any, further relief is appropriate in the light of our conclusions.

605. We also reserve all questions of costs.

FOR THE ABOVE REASONS WE, SIR NIGEL TEARE, CHRISTOPHER VAJDA KC AND LORD DYSON HEREBY AWARD ABD DECLARE:

(i) that the APT Rules are unlawful on account of being in breach of sections 2 and 18 of the Competition Act 1998 because they exclude from their scope shareholder loans and for no other reason;

(ii) that the Amended APT Rules are unlawful on account of being in breach of sections 2 and 18 of the Competition Act 1998 as they exclude from their scope shareholder loans and because of the pricing changes in Appendix 18 of the Amended APT Rules and for no other reason;

(iii) that APT Rules and the Amended APT Rules are unlawful on account of being procedurally unfair because a club is unable to comment upon the comparable transaction data relied upon by the PL before the PL determines whether a transaction is not at FMV and for no other reason;

(iv) that the PL's decision with regard to the EAG Transaction was reached in a procedurally unfair manner and must be set aside because the PL did not give MCFC an opportunity to respond to the [redacted] Benchmarking Analysis prior to reaching its decision and for no other reason;

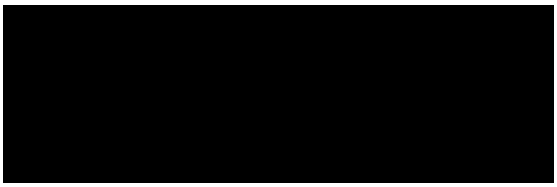
(v) that the PL's decision with regard to the FAB Transaction was reached in a procedurally unfair manner and must be set aside because the PL did not provide MCFC, prior to the PL's Final Determination, with the [redacted] Databank transactions entered into by other clubs, which the Board referred to in its Final Determination and for no other reason;

(vi) that in making its decision with regard to the FAB Transaction there was an unreasonable delay of about 3 months and thereby a breach of Rule E.64;

(vii) that in making its decision with regard to the EP Transaction there was an unreasonable delay of about 2 months and thereby a breach of Rule E.64.

Dated 25 September 2024, London

Sir Nigel Teare



Christopher Vajda KC

Lord Dyson

Appendix to Award

List of witnesses

Witnesses of fact called by the Claimant:

[redacted]

[redacted]

[redacted]

[redacted] at Chelsea Football Club

[redacted] Newcastle United Football Club

[redacted] of Everton Football Club

[redacted]

Witnesses of fact called by the Respondent

[redacted] of Brighton & Hove Albion Football Club

Jamie Herbert, the Respondent's Director of Governance who leads the Respondent's Regulatory Team

Thomas Brass, Chief Commercial Officer of the Respondent

Ms. Mai Fyfield, Independent Non-Executive Director of the Respondent

Ms. Helena Blake, a Senior Regulatory Solicitor at the Respondent

Expert witnesses called by the Claimant

[redacted]

[redacted]

[redacted]

Expert witnesses called by the Respondent

[redacted]

[redacted]

Written statements put in evidence by the Claimant

[redacted] of Newcastle United Football Club

Written statements put in evidence by the Respondent

[redacted] of West Ham United Football Club Limited

[redacted] of Manchester United Football Club

[redacted] of The Liverpool Football Club & Athletic Grounds Limited

[redacted] of Tottenham Hotspur Football & Athletic Co. Limited

[redacted] of the Arsenal Football Club

The PL Rules

Rule A1.23

An "Associated Party" is a Person that is associated with the Club. In considering each possible Associated Party relationship, the League will direct its attention to the substance of the relationship and not merely the legal form.

1. A Person is associated with a Club if that Person or, where that Person is an individual, a close member of that individual's family (i.e. those family members who may be expected to influence, or be influenced by, that individual in his dealings with the entity, including that individual's parents, children, siblings and spouse or domestic partner, children of that individual's spouse or domestic partner, and dependents of that individual or that individual's spouse or domestic partner):

(a) has Control or joint control over the Club;

(b) holds a Holding in excess of 5% of Shares;

(c) holds a loan interest or other debt or security interest of any kind in the Club or an entity in the same group of companies as the Club, with the exception of any such interest held: (i) as part of regulated banking services provided by a Financial Institution; (ii) in the form of bonds, notes or other securities held by professional investors; or (iii) pursuant to a debenture providing the holder with access to tickets to events at the Club's Stadium;

(d) has Material Influence over the Club or an entity in the same group of companies as the Club; or

(e) is a Director or member of the key management personnel of the Club or of a Parent Undertaking of the Club.

2 A Person is also associated with a Club if any of the following conditions apply:

(a) the Person and the Club are members of the same group of companies;

(b) the Person and the Club are directly or indirectly controlled, jointly controlled, or Materially Influenced by the same government, public or state-funded body or by the same party;

(c) the Person (or a Director or member of the key management personnel of the Person) has Material Influence over the Club (or vice versa);

(d) the Person is an associate or joint venture of the Club (or an associate or joint venture of a member of a group of companies of which the Club is a member) (or vice versa);

(e) both the Person and Club are joint ventures in which the same third party is a shareholder;

(f) the Person is a joint venture in which a third party is a shareholder and the Club is an associate of the third party (or vice versa);

(g) the Person is controlled or jointly controlled by a Person identified in paragraph 1;

(h) an individual identified in paragraph l(a) has Material Influence over the Person or is a member of the key management personnel of the Person (or of a parent of the Person); or

(i) the Person, or any member of a group of which it is a part, provides key management personnel services to the Club;

Rule A1 24

“Associated Party Transaction” means, in respect of any Club, a Transaction that is, whether directly or indirectly, between:

(a) a Club and an Associated Party;

(b) a Player registered to the Club and an Associated Party of that Club; or

(c) a Manager or Senior Official of the Club and an Associated Party of that Club, with the exception of any Transaction pursuant to which the Club, Player, Manager or any Senior Official of the Club is exclusively a purchaser of goods or services (and does not receive any payment, fee or monetary equivalent) and the total value of any consideration either paid or to be paid by the Club or individual (as applicable), when added to any consideration paid or to be paid by the Club or individual (as applicable) in respect of other Transactions with the same party agreed in the preceding three years, is less than £500,000 (and subject to Rules E.67 to E.69).

In considering whether a Transaction is an Associated Party Transaction, the League will direct its attention to the substance of the Transaction and not merely the legal form;

Guidance

For the avoidance of doubt, where by entering into a new Transaction, the total value of the consideration either paid or to be paid by the Club or individual in respect of all Transactions with the same party in the preceding three years exceeds £500,000, that Transaction (and any preceding and subsequent Transactions with the same party) will constitute an Associated Party Transaction and must be submitted to the Boord pursuant to Rule E.55.

Appendix 18 to the Rules

A. Application

1. This Fair Market Value Assessment Protocol - Commercial Rights Agreements ("CRA Protocol") sets out the process by which the Board will conduct the Fair Market Value Assessment required by the Rules in relation to the following types of Associated Party Transactions and Threshold Transactions:

a. sponsorship or licensing agreements or agreements pursuant to which the counterparty is granted a right of association with the Club, any Player, its Manager or any Senior Official of the Club; and

b. agreements pursuant to which the counterparty advertises its brand, products or services in any way with the Club, whether in its Stadium, Training Ground, website or otherwise.

2. Capitalised terms not otherwise defined in this Protocol bear the meaning given to them in the Premier League Rules ("Rules").

B. Rules

3. Fair Market Value is defined as follows:

"Fair Market Value" means the amount for which an asset could be sold, licensed or exchanged, a liability settled or a service provided, between knowledgeable, willing parties in an arm's length transaction;

4. Fair Market Value Assessment is defined as follows:

“Fair Market Value Assessment" means an assessment as to whether the consideration either paid or received or to be paid or received by the Club, Player, Manager or Senior Official (as applicable) pursuant to a Transaction represents Fair Market Value. In conducting a Fair Market Value Assessment, the Board is required to:

(a) consider:

(i) an assessment of the value of the Transaction produced by an independent expert procured by the Board (save that the Board may elect not to obtain an assessment by an independent expert where the Transaction in question involves no consideration paid or to be paid to the Club, Player, Manager or Senior Official or involves the sale or loan of a Player's registration);

(ii) any relevant information provided by the Club (including any assessment of the value of the Transaction produced or procured by the Club); and

(iii) such comparable evidence of the values of similar Transactions as is appropriate, relevant and readily available to it at the time of the assessment; and

(b) comply with any protocols agreed by Clubs for that purpose (including the Fair Market Value Assessment Protocol- Commercial Rights Agreements). For the avoidance of doubt, where there is no such protocol in place applicable to a particular type of Transaction, the Board will conduct the Fair Market Value Assessment as it sees fit, in compliance with paragraph (a), above;

C. Process

5. Where a Club is required to submit a Transaction to the League pursuant to Section E of the Rules, it must submit the following to the League, via the Data bank referred to at Rule E.72:

a. all relevant information required to accurately complete the Databank submission form;

b. a copy of the documents recording in full the terms and conditions of the Transaction;

c. where the Transaction is an Associated Party Transaction any relevant information, evidence or submissions that the Club wishes to be considered by the Board as to the Fair Market Value of the Transaction, bearing in mind the FMV Assessment Factors set out below; and

d. where the Transaction is a Threshold Transaction that the Club does not consider to be an Associated Party Transaction, any information, evidence or submissions that the Club wishes to be considered by the Board as to whether the Transaction is at Arm's Length.

6. Where a Fair Market Value Assessment of the Transaction is required, the Board will procure an assessment by an independent assessor with suitable experience and expertise (“Independent FMV Assessor”). For that purpose, the Independent FMV Assessor will be:

a. provided with, to the extent applicable:

i. a copy of the documents recording in full the terms and conditions of the Transaction and information provided in the Databank submission form, with all

references to any specific fees or other consideration payable to the Club, Player, Manager or Senior Official redacted (with such redactions the responsibility of the Club);

ii. a summary of the fee structure (without any specific reference to the value of fees paid or payable), including payment schedule, the structure of any bonuses, royalties or contingent payments;

iii. a summary of any associated fees paid or payable by the Club (as a percentage of revenue to be derived from the Transaction); and

iv. a summary of other elements of value provision, including 'value-in-kind' and any services to be provided; and

b. required to provide to the Board an assessment of what constitutes Fair Market Value for the Transaction, based on the FMV Assessment Factors.

7. Where, at any point in the Fair Market Value Assessment process, the League considers that further information or documents from the Club is required in order to reach a conclusive decision as to the Fair Market Value of the Transaction, it may request such information or documents from the Club, Player, Manager or Senior Official, who/which must provide complete and prompt assistance in respect of any such request.

D. FMV Assessment Factors

8. In providing its assessment of what constitutes Fair Market Value of a Transaction, the Independent FMV Assessor must consider all information that is appropriate, relevant and readily available to it, bearing in mind the following non-exhaustive list of relevant factors (the “FMV Assessment Factors"):

• Fees derived from comparable Transactions in football (and, secondarily, comparable Transactions in other sports or industries of similar profiles, of which the Independent FMV Assessor is aware). For the avoidance of doubt it is likely that comparable football transactions will be most applicable

• Fees derived for any preceding Transaction entered into by the Club in the same category (if applicable)

• Term of the Transaction (including, in respect of renewals of existing Transactions, the ` remaining term of the arrangement)

• Industry sector of the counterparty brand and applicable product category

• Tier of the partnership

• Assets and rights delivered as part of the Transaction

• Media exposure of assets

• Products, services or value in kind provided by the counterparty

• Any renewal provisions or options granted to the relevant counterparty

• Any additional obligations to be performed by the Club as part of the Transaction

• Obligations on both parties

• Scarcity of assets (including the number of partners that the Club, Player, Manager or Senior Official already has and the extent to which relevant commercial rights have already been sold)

• Evidence of the existence or absence of other offers to engage in the Transaction, at a similar level for similar assets and rights

• Market trends

• In respect of Clubs:

- Fan base of the Club (including social media following, global audience and media footprint)

- Brand value of the Club

- Geographic spread of fanbase, including elements which may be of particular appeal to particular partners (such as demographic information)

- Club commercial strategy

- Playing success of the Club (both in domestic and international club competitions)

- The relevant Club's track record of achieving partnership/commercial deal values and delivering returns on partner investment

- Geographical location of Club

- Playing or coaching talent currently (or previously) employed by the Club

- Developments likely to affect the Club's performance or fanbase in the future

9. The weight attached to any individual FMV Assessment Factor shall be at the discretion of the Independent FMV Assessor, dependent on the particular Transaction being assessed.

10. Once it has conducted the assessment referred to in paragraph 8, above, the Independent Assessor will provide a written determination to the League's Regulatory Legal department setting out its decision as to what the Fair Market Value of the Transaction is (whether expressed as a single value or a range of values, as it deems appropriate) and an explanation of that decision.

E. Board Assessment

11. Once in receipt of the Independent FMV Assessor's written determination, the League's Regulatory Legal department will provide to the Board a written report including the following:

a. the information provided to the League by the Club, pursuant to paragraph 5, above;

b. the Independent FMV Assessor's written determination; and

c. such comparable evidence of the values of similar Transactions as is appropriate, relevant and readily available to it at the time of the assessment. In providing such evidence (whether it is taken from the Data bank referred to in Rule E.72 or otherwise) the identity of the Club, Player, Manager or Senior Official in each case will be redacted.

12. The Board will take such steps as are necessary to ensure no conflict of interest in respect of any Fair Market Value Assessment and that competitively sensitive information is kept appropriately confidential including, for example, by ensuring that no members of the Board involved in the marketing and sale of the League's rights in any product or service category are involved in the consideration of a Fair Market Value Assessment of a Transaction in that same category.

13. Where, having reviewed the report referred to in paragraph 11, above, the Board determines, in its reasonable opinion, that the Transaction is evidently not at Fair Market Value, it will inform the Club, Player, Manager or Senior Official of its provisional determination in writing. The Club Player, Manager or Senior Official will then be given seven days in which to respond to this provisional determination. Where following receipt and consideration of the response, the Board remains of the view that the Transaction is evidently not at Fair Market Value, it will confirm that decision in writing and Rule E.65 will apply.

14. Where, having completed a Fair Market Value Assessment, the Board determines that, in its reasonable opinion, the relevant Transaction does not fall to be restated to Fair Market Value, it will confirm the same to the Club and no further action will be required.

The Amended 2024 Rules (the material changes)

E.65. Where the Board is required to conduct a Fair Market Value Assessment in accordance with these Rules, it will conclude that Fair Market Value Assessment (and communicate its findings, including whether the Board approves the relevant Transaction, to the Club) within 10 clear working days of either receipt of the Associated Party Transaction in accordance with Rule E.55, or its determination in accordance with Rule E.64, as applicable, save where further time is required due to exceptional circumstances or the requirement for further information and/or documentation from the Club or additional analysis to be undertaken in order to reach a conclusive decision, in which case Rule E.66 will apply.

E.66. In circumstances where:

E.66.1. the Board reasonably requires further information and/or documentation from the Club or additional analysis to be undertaken to conclude its Fair Market Value Assessment; or

E.66.2. due to exceptional circumstances, further time is required for the Board to conclude its Fair Market Value Assessment, the 10 clear working day period referred to at Rule E.65 above will

cease to apply. Where further information requested of the Club is provided to the Board in a timely manner, the Board will conclude its Fair Market Value Assessment of standard transactions to which the Commercial Rights Agreement or Player Registrations Protocols apply within 30 days of either receipt of the Associated Party Transaction in accordance with Rule E.55, or its determination in accordance with Rule E.64, as applicable.

Appendix 18

……..

B. Rules

3. Fair Market Value is defined as follows:

"Fair Market Value" means the amount for which an asset, right or other subject matter of the Transaction would be sold, licensed or exchanged, a liability settled, or a service provided, between knowledgeable, willing parties engaging in an arm's length transaction in normal market conditions.

Guidance

'Normal market conditions' are typically those in which revenues bear a reasonable relationship to any costs incurred, taking into account the economic value of the product supplied or service provided.

Normal market conditions shall typically be assessed through benchmarking, i.e. in light of the terms under which comparable Transactions carried out by comparable Clubs have taken place in comparable circumstances.

……..

E. Board Assessment

12. The burden of proof is on the Club submitting the Transaction to demonstrate that it is at Fair Market Value.

……

16. Where, having reviewed the report referred to at paragraph 13, above, and having considered any other information available to it and the FMV Assessment Factors, the Board determines, in its reasonable opinion, it is not satisfied that the Transaction is at Fair Market Value, it will inform the Club, Player, Manager or Senior Official of its provisional determination as to the Fair Market Value of the Transaction in writing. The Club, Player, Manager or Senior Official will then be given seven days in which to respond to this provisional determination. Where following receipt and consideration of the response, the Board remains of the view that it is not satisfied that the

Transaction is at Fair Market Value, it will confirm that decision in writing and Rule E.67 will apply.