

Manchester City's CAS appeal – the big questions answered

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Manchester City's Court of Arbitration for Sport appeal against their Champions League ban was complicated even before the prospect of a hearing via video conference call was raised.

Having been found guilty by UEFA of artificially inflating sponsorship agreements and hit with a two-year ban and £25 million fine, City once again protested their innocence and vowed to clear their name.

City say they have a "comprehensive body of irrefutable evidence in support of its position", which will presumably be part of their appeal.

There are also a number of procedural complaints the club are likely to raise, such as the fact that UEFA's own statutes preclude them from investigating previously settled cases (City and UEFA agreed a prior punishment in 2014), and from prosecuting any breach that occurred more than five years prior (UEFA's investigation considered breaches from 2012 to 2016).

City have always maintained that the information UEFA used as part of their investigation came from internal emails hacked by "Football Leaks", and it has been suggested that evidence obtained illegally would not be admissible.

But is that really the case? When will the appeal be heard anyway? Will City's fate be determined before next season, whenever that is?

The Athletic spoke to legal experts with experience in Financial Fair Play appeals at CAS to discuss the logistics, and possible outcomes, of City's challenges.

Can City prove that UEFA'S investigation was flawed?

At a pre-emptive CAS appeal in November, which was dismissed because UEFA had not at that stage announced a decision that could be appealed against, City made a number of arguments they are likely to return to this summer. Among those is that UEFA's investigation process was beset by leaks, something that CAS admitted was "worrisome", even if they did not feel it fully undermined the process at that stage.

John Shea, who has advised Premier League clubs on FFP appeals at CAS for law firm Lewis Silkin, says: "City will try to claim that the UEFA adjudicatory chamber was not independent or impartial when determining the case, just to try to cast doubt in the CAS panel's mind regarding the decision.

"However, UEFA's Club Financial Control Body (CFCB, the panel that hands down punishments in such cases) is actually deliberately set up to be independent from UEFA administration, and the adjudicatory chamber does consist of very experienced and high ranking European lawyers.

"But what CAS will do is, despite City's various arguments, they will consider all the evidence and all the arguments from both parties 'de novo', or afresh, and reach its own decision based on those arguments and the evidence."

Aren't UEFA time barred from punishing breaches from over five years ago?

UEFA's statement announcing City's punishment cited breaches "in its accounts and in the break-even information submitted to UEFA between 2012 and 2016."

Christopher Flanagan, managing editor of the *International Sports Law Journal*, explains a potential problem with that: "UEFA and the CFCB, in administering FFP, have to follow FFP's own procedural rules, and within those is a statute of limitations-type provision, so prosecution is time-barred five years after breaches. There is a question as to whether the CFCB does have the jurisdiction to look back at those points."

The period also includes a previous settlement agreement that City reached with UEFA in 2014, when they were fined £49 million.

Shea adds: "These points were raised by City in the previous CAS case in November, where they argued that, essentially, UEFA is not entitled to allege any breaches in respect of the periods prior to the 2016-17 reporting period.

"This will undoubtedly be raised again by City in this appeal. On the other hand, what I'm sure UEFA will say is they will rely on the Football Leaks evidence and argue that this

proves the previous settlement agreement was concluded on false information, thus entitling it to reopen the case. This is one of one of City's main arguments which they raised in the previous CAS case in November."

Can hacked or stolen emails form a valid basis for punishment?

Shea: "It's possible that City will argue that the Football Leaks evidence, which obviously UEFA relied upon to charge City, is inadmissible as it was obtained by unlawful means. But there have been many previous cases where CAS have admitted evidence sourced by unlawful means. So City might raise the argument, but I would expect CAS to admit the evidence."

Flanagan concurs, adding: "UEFA does have broad rights to collect its own evidence anyway and subsidiarily to that, even if it's using the Football Leaks information, in line with prior CAS cases, it is likely to establish very broad rights to use the evidence that it has been able to acquire."

Can City argue that they have been treated unfairly?

Proportionality has been a big factor in previous CAS appeals against UEFA punishments, with certain clubs successfully arguing that others have been let off lightly in comparison.

Shea: "I fully expect City to argue that the sanction of a two-year ban is disproportionate.

"The problem I think for City in respect of proportionality is that the breaches here do appear to be more serious, especially given that it's alleged that they have deliberately overstated their income in order to get around the regulations. And also this is where I think the second breach for failing to cooperate with the investigation is likely to be an important factor when it comes to the question of proportionality of the sanction, because you can see how UEFA will say that both things justify a two-year ban."

Flanagan adds: "The facts are so idiosyncratic to this particular case, because it's not just that City have allegedly overspent and perhaps massaged the figures a bit, it is all the things that go around that; it's the alleged misleading of UEFA, it's the extent to which the figures are alleged to have been massaged. So I think it might be difficult for City to establish that they have been treated unfairly compared to clubs in similar situations. And then I guess in UEFA's favour, there is a general duty of co-operation for the clubs subject to FFP. So for example UEFA might say, 'OK, some of the points might have been time barred but nevertheless, there was a duty of co-operation which you failed to adhere to'."

Could City use PSG as an example?

Paris Saint-Germain avoided punishment from UEFA following an investigation which was sparked by material obtained by Football Leaks in 2018. Jose Narciso da Cunha Rodrigues, chairman of CFCB (Club Financial Control Body), was alarmed at the

investigatory chamber's decision not to sanction the French club, branding the process "manifestly erroneous". He had missed a 10-day cut-off point, however, and was unable to launch a review. Will City be able to argue unfair treatment by citing this example?

"I don't think they can refer to other decisions," Shea says. "I know they raised an issue regarding the PSG case but I'm not sure how they can argue that there was inconsistent action being taken against one club or another. From memory the PSG case was based on a very specific time limited issue. Overall I think it's difficult for City to refer to other cases when they don't have the full facts to show or prove that UEFA have taken consistent action compared to them. City can only point to their own case, rather than referring to other cases and trying to prove that UEFA have taken inconsistent action."

Flanagan says a reference to PSG's lack of punishment would be "tenuous" due to those aforementioned idiosyncrasies of City's own case, but does believe other clubs' dealings could be put under the microscope by City's legal team...

Can City shine a light on other clubs' dealings?

It is believed that City have been keeping a close eye on their European rivals' business dealings in recent years, and believe that sponsorship agreements between clubs and companies associated with those clubs' owners should be subject to the same scrutiny. But if so, is that likely to help at CAS?

Flanagan: "There is an obligation that sits on the CFCB and on UEFA to ensure the equal treatment of participants in UEFA competition, and that's reinforced in a rule found in the main club licencing and FFP regulations. If City can establish that (other clubs have been allowed to behave in the same way) then that is potentially a procedural breach by UEFA. If City can show, 'Well, you've vigorously pursued us in respect of this, you haven't pursued any other club...' that's probably disproportionate behaviour by UEFA. So that is not an unreasonable point to make."

Shea is less sure, however: "That wouldn't be grounds for appeal necessarily. The CAS panel can only look at this case in isolation, they can't say, 'Oh, well, PSG got off it,' or 'Juventus haven't been investigated', and that that would be grounds to annul this decision. I don't think in any event that's going to assist City; the CAS panel are only looking at this case in isolation and can only determine this case based on the evidence of this case."

Can City get FFP scrapped entirely?

There have been arguments that UEFA's FFP regulations restrict competition in the market, and therefore are in breach of European Law, and there have been several unsuccessful attempts over the years to argue that at different courts.

Flanagan does not believe City will be able to successfully prove that FFP is anti-competitive, as previous rulings have sided with UEFA, but he does expect them to make their case.

"If you look at the Galatasaray FFP case (in 2016)," he says, "the CAS panel mentioned that some of the evidence that was brought by Galatasaray was pretty lacking in respect of its ability to establish the economics of FFP as being anti-competitive. City, as a wealthier club, could well bring better or more detailed evidence that brings new facts to bear on competitive balance that is instituted by FFP. I do think that is pretty unlikely, but I imagine it's quite likely that they will at least have a pass at establishing that."

Shea also believes City may try to go further than Galatasaray: "It's possible that City might look at that judgment or look at that decision and decide to have a proper go, perhaps, at challenging the regulations further on the competition law basis."

City's 'irrefutable evidence'

In their statement in light of their punishment, City once again said that they can provide "irrefutable evidence" of their innocence. As yet, there is no indication what that includes.

Shea: "So notwithstanding all their arguments regarding procedural unfairness, competition law, disproportionate sanction etc, it's certainly possible that they will have evidence to prove that the sponsorship deals were actually not inflated, as UEFA allege, and therefore there's been no breach of the regulations."

"But obviously, I've not seen the evidence, so I obviously can't comment on whether City are likely to succeed with that argument or not, but reading between the lines in their statement, it's possible that they would deny overall that they have committed any breach of the regulations."

Who will decide City's fate?

Shea: "Sometimes you have a sole arbitrator, sometimes you have a panel. I would expect for there to be a panel of three arbitrators. The decision will be based on a majority. Of the three arbitrators, City will choose one, UEFA will choose another, and then there'll be a third who will be appointed by CAS."

Flanagan: "It's most common for more complicated disputes, and this is certainly a more complicated dispute, for there to be three arbitrators."

Will the appeal be heard by video call?

CAS have announced that no in-person appeals will be heard before May, and that video conference calls could go on into the summer. City are open to the possibility of a video conference call and believe it could take place in May or June.

CAS secretary general Matthieu Reeb recently suggested that cases without witnesses could be decided on the basis of written submissions alone.

But Shea and Flanagan believe City and UEFA will want a video hearing even if there are no witnesses, and that their request is likely to be granted.

Shea says: "I'm fairly certain that City and UEFA would want to have the opportunity to make oral submissions in front of the panel in order to back up their written submissions if you like. That can make a difference, rather than keeping things on paper."

When will the appeal be heard?

City's appeal is not yet among the CAS list of appeals to be heard in May and June, once cases are resumed following a delay enforced by the coronavirus lockdown measures, and the uncertainty facing everyday life also faces this case, with Shea and Flanagan offering different versions of how soon the appeal will be heard.

"Once the panel has been constituted, UEFA and City, will notify CAS they want the expedited procedure to apply," Shea says. "The panel will then issue directions regarding the management of the case and that will be the expedited direction, regarding written submissions, evidence etc, and the date for the hearing. So all those timings will be based on the expedited procedure. I can't see why UEFA and City won't consent, it's in both their interests for there to be an expedited procedure in this case."

But Flanagan says: "With every passing day, it looks less likely (that it will be expedited). And I wonder if a view might be taken at City or UEFA in light of current events as to whether it's actually necessary. Yes, both City and UEFA will want to get this resolved as soon as possible, but the aim is to resolve it before the next Champions League season, and I guess both of them will probably want the decision to be made concurrent with some decision about when the Champions League is going to resume, which nobody really knows at the moment whether that will commence before the 6-12 month time-frame a typical, non-expedited CAS case would take."

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