THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director
Gráinne de Burca, Director

Jean Monnet Working Paper 6/20

Symposium: Football Feminism – Global Governance Perspectives

Sarah Katharina Stein

Equality – FIFA's Gender Pay Gap in Football World Cups and Three Judicial Approaches to Equal Prize Money

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Sarah Katharina Stein 2020
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

Equality – FIFA's Gender Pay Gap in Football World Cups and Three Judicial Approaches to Equal Prize Money

Sarah Katharina Stein

FIFA pays disparate amounts of prize money in football World Cups to women and men. This practice stands in sharp contrast to FIFAs own assertions about gender equality, and could further violate international and European law. This paper examines three different possibilities to achieve equal prize money for female and male players by way of analyzing the positions of the European Court of Justice, the Court of Arbitration for Sport, and the European Court of Human Rights. While all judicial bodies are established in Europe, they are basing their awards and judgements on different laws, statutes and international treaties. The paper shows up the differences and similarities resulting from the particular applicable laws, various potential parties to the conflict and diverse positions within the tension of sport, law and power.

1. Introduction

Men's and women's football played literally and figuratively in different leagues for the longest period in the history of the sport. Although, over the past decades, women's teams emerged, and difference in perception diminished, the long-established narrative of the sport still does not allow for equal opportunity or prospects.[1] A quick look at the prize money paid by the Fédération Internationale de Football Association (FIFA) for winning the World Cup sets an excellent example. The French Football Federation received $38 million as the national association (NA) of the winning team in 2018, while the U.S. Soccer Federation earned $4 million for the fourth consecutive win of their women's team – a ratio of 7,5%. The male champions alone earned more than the entire women's budget ($30 million). The losing teams of the men's World Cup (place 17th – 32nd) took home $8 million, still doubling the prize money of the winning women's team. This is not about

[1] Dodd, *FIFA, football and women: why reform must specify inclusion and investment, submission to the Chair of FIFA Reform Committee* (2015), available at https://img.fifa.com/image/upload/i2berd89n7syxdjl5fhq.pdf.

to change soon. The upcoming World Cups prize money is budgeted with $440 million for the men's tournament and a proposed $60 million for the women's contest.

These factual findings are quite in disagreement with the self-proclaimed Women's Football Strategy.[2] According to the 2018 program, FIFA wants to undertake "concrete steps to address the historic shortfalls in resources and representation." The discordant amount of prize money stands in contrast to gender equality, a principle recognized not only by FIFA itself, but also in international law.

Sport is not operating in a legal vacuum.[3] Mostly, law has access to sport, if it is combined with an economic activity. Overall, the "private pursuit of sport" is neither free of regulations nor of traditional judicial approaches.[4] The so called *lex sportiva* combines the transnational entirety of laws and regulations, rules and norms governing sport.[5]

This paper explores different routes to create an obligation to pay the same amount of prize money in football World Cups, regardless of the sex[6] of the contestants. I examine three possible ways, all based on different jurisdictions. First, I look to the European Union (EU) – a major player in football through its extensive sport-related jurisprudence of the European Court of Justice (ECJ) and many high achieving football clubs.

Second, I look to the Court of Arbitration for Sport (CAS). Based in Lausanne, Switzerland, the CAS does not only share a national jurisdiction with FIFA (based in Zurich), but also expertise: the CAS is the most specialized tribunal for sport arbitration in the world. FIFA incorporates arbitral clauses referring to CAS in all their statutes and entry forms.

The third approach leads through the European Court of Human Rights (ECtHR). In contrast to EU law, the ECtHR has a clear and nearly exclusive focus on human rights,

---

[2] FIFA, *Women's Football Strategy* (2018), available at https://resources.fifa.com/image/upload/women-s-football-strategy.pdf?cloudid=z7w21ghir8jb9tguvbcq. See for an analysis from a (feminist) institutionalist perspective: Krech, 'Towards Equal Rights in the Global Game? FIFA's Strategy for Women's Football as a Tightly Bounded Institutional Innovation', 25 *Tilburg Law Journal* 12.
[3] R. Parrish, *Sports law and policy in the European Union* (2003), at 5.
[4] For a summary in the European Union context see C. Selecta, *Introduction to International and European Sports Law* (2012), at 67-94; Weatherill, 'Is There Such a Thing as EU Sports Law?', in R. Siekmann and J. Soek (eds), *Lex Sportiva: What is Sports Law?* (2012) 299.
[5] F. Latty, *La lex sportive – Recherche sur le droit transnational* (2007); Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport', 12 *German Law Journal* (2011) 1317, at 1317-1318.
[6] While the author acknowledges the difference of sex and gender and the non-binary form of it, football tournaments are separated by the sex of the contestants. Hence, the paper will refer to the binary form of sex.

and, in contrast to CAS, applies the same law, the European Convention on Human Rights (ECHR) in each case.

All three jurisdictions have similarities, differences and overlaps, and show different approaches to the tension of sport, law and power, which I will discuss in the last part of the paper.

2. European Court of Justice

A lawsuit about equal prize money would most possibly be heard in front of the ECJ via an EU member state court asking for a preliminary ruling, Article 267 TFEU.[7] Hence, precondition to a decision by the ECJ would be a lawsuit in a member state court.[8] This court must require an interpretation of EU law from the ECJ to rule on the case to open up the Article 267 TFEU proceedings.

A. *Parties*

The biggest challenges with the applicability of EU law will surface if individual players would try to sue FIFA in front of the ECJ. First, only players from member states NAs would be able to take legal actions, since players from non-EU-jurisdictions would lack a connection to EU law, excluding the jurisdiction of the ECJ. Second, even if member states players would take up the fight for equal prize money, FIFA is still a cooperation based in Switzerland, thus not bound by EU law. Only FIFAs operations within the EU could make EU law applicable. These actions could include the conduct of a World Cup – which will not happen at least until 2030 (men's) or 2027 (women's). Additionally, it seems unreasonable to wait for the factual conduct of a World Cup in Europe to establish equal prize money. It would open the way to avoiding the topic indefinitely by circumcising Europe as a playing field by FIFA. Furthermore, as will be discussed later, the specifics of the allocation of prize money and the execution mode of the World Cups may be an obstacle to applying equal pay norms directly and solely to FIFA.

---

[7] *See* for an example of a question referred in a preliminary ruling process involving FIFA as respondent: C-243/06, *SA Sporting du Pays de Charleroi and Groupement des clubs de football européens* (EU:C:2008:649).
[8] See regarding domestic litigation: Chaparro, Davila and Camilo Sanchez, 'The Role of Domestic Litigation in the Field for Women's Soccer in Columbia.'

As a second approach, NAs from European member states could sue FIFA for issuing different sums of prize money. Prize money is paid by FIFA to the NAs, which allocate the money between the 23 players of the national team, causes and initiatives according to their own rules. After handing over the money, FIFA cannot control its use. Nevertheless, a NA can just distribute the money it receives – if they receive more for a men's team, they lack resources to pay both genders equally.[9] However, this scenario is quite implausible. NAs are hardly likely to sue their mother organization FIFA. Repercussions would follow suit;[10] e.g. FIFA has the ability to sanction NAs, for their own conduct but also for non-compliance of their members with FIFAs regulations, Article 14(d) FIFA Statutes.[11] Thus, NAs are more receptible to FIFAs wants and wishes, than their own members.[12]

Third, individual players (or teams) could try to hold their NAs accountable for equal prize money. The *Canada-Turf*-case gives precedent for this approach. Individual players (unsuccessfully) claimed gender discrimination, because the women's World Cup in Canada 2015 was played on turf, not grass. They sued the Canadian Soccer Association *and* FIFA in front of the Ontario Human Rights Tribunal. Parallel arguments to the *Canada-Turf*-case can be made here.[13] NAs are per definition responsible for organizing

[9] The Norwegian Football Association made headlines in 2017 after deciding to reimburse male and female national players equally (Lewis, *Norway's footballers sign historic equal pay agreement*, 14 December 2017, available at https://edition.cnn.com/2017/12/14/football/norway-football-equal-pay-agreement/index.html). However, the agreement on equal pay for male and female players is applicable to fixed payments, not prize money. Prize money will be distributed equitably, but not equally: 25% of prize money for winning a World Cup will be distributed to the players. But with the huge gap in prize money handed down by FIFA, the discrepancy remains high (applied to the last World Cups, male players would receive $413.043 and women just 10.53% of that amount – $43.478).

[10] In the *Canada-Turf*-case, FIFA pressured NAs into suspending players who joined the class action, see *infra* and Tsui, 'FIFA, Feminism, and Forum: The US Women's National Team's Threat to FIFA's Sovereignty'.

[11] Other sanctions are possible through the disciplinary committee, Art. 53 FIFA Statutes, Art. 2, 3 (a) FIFA Disciplinary Code.

[12] Krech, *supra* note 2, at 17. A prime example is the case of *SA Sporting du Pays de Charleroi* (see *supra* note 7). After filing the complaint with the *Commercial Court of Charleroi*, which subsequently asked for a preliminary ruling of the ECJ, SA Sporting withdraw the complaint after a settlement with FIFA, which lead to a new allocation of the funds raised from international tournaments to clubs, see S. Weatherill, *Principles and Practices in EU Sports Law* (2017), 261-265.

[13] Players on National Teams Participating in the FIFA Women's World Cup Canada 2015 v. Canadian Soccer Association and Fédération Internationale de Football Association, [2015] (filed only), at 13-17; available at http://equalizersoccer.com/wp-content/uploads/2014/10/141001_2_Application-Sec-24-Schedule-A.pdf.

and supervising football in all its forms in their countries.[14] Organization includes conducting games, leagues, and facilitate the development of the sport.[15] NAs are responsible for naming international players, referees and are members of FIFAs congress. They are the ones receiving prize money and have the power to distribute it in observance of their own rules and liking. FIFA, on the other hand, is the international governing body of football and the coordinating organization of all World Cups, running them together with the host countries. FIFA is involved financially and logistically in all NAs, which are officially representing FIFA in their countries. Together, FIFA and the NAs are responsible for operating football globally, especially World Cups.[16] There is no global football without FIFA, its monopolistic and autonomous gatekeeper.[17] While FIFA decides upon the total sum of prize money and the distribution between the competing teams, the NA will spread the received money between people and causes.

If individual players argue against their NAs and FIFA as respondents in a member state court, the application of EU law faces the lowest obstacles. NAs are established under their national law, thus legal entities from EU member states, which mostly hold the same benefits and obligations by EU law as natural persons. FIFAs pivotal role in the allocation of prize money and entanglement into the NAs as well as into the World Cups makes conduct of the NAs and FIFA a culmination. In the exemplar *Canada-Turf*-case, FIFA contested jurisdiction of the Human Rights Tribunal on formalistic grounds, but not contested jurisdiction because they were not responsible or involved in the World Cup and the execution of all its elements.[18] Even if the class of potential plaintiffs is limited to member state citizens, the combination of parties to the suit is the most promising.

B. *Legal Basis*

EU law provides its beneficiaries with a strong equal pay rule: Article 157 TFEU. "Each Member State shall ensure that the principle of equal pay for male and female workers for

[14] Art. 11 (1) FIFA Statutes.
[15] K. Tallec Marston, C. Boillat and F. Roitman, *Governance Relationships in Football Between Management and Labour* (2017), at 11.
[16] FIFA, *Associations and Confederations*, available at https://www.fifa.com/associations/.
[17] CAS 2006/A/1181, *FC Metz v. FC Ferencvarosi*, award of 14 May 2007, at para. 10.
[18] FIFA contested to have received notice of the suit, which was dismissed by the court. See Gordon, *How FIFA Killed the Women's World Cup Lawsuit*, 3 February 2015, available at https://www.vice.com/en_us/article/3d9wgk/how-fifa-killed-the-womens-world-cup-lawsuit.

equal work or work of equal value is applied" is a fundamental principle of EU law.[19] It is directly applicable in cases in which men and women receive unequal pay for equal work, which is carried out in the same establishment or service within the EU,[20] no matter if private or public.[21]

1. *Nature of Prize Money and Employment Status*

Primarily, prize money needs to be a nature of reimbursement, which is covered by Article 157 TFEU. This is a question about the interpretation of "pay" and the activation of Article 157 TFEU for non-traditional employment situations. There is substantial jurisprudence of the ECJ on what constitutes a class of covered payment in terms of the norm, precisely a "wage", "salary" or "another consideration."[22] Unfortunately, prize money is neither enumerated, nor has been subject to a case. According to Article 157(2) TFEU, prize money is neither a wage nor a salary.[23] Still, the ECJ prefers a broad definition of payment/consideration in its jurisprudence[24] being receptible for development. Considering if another form of reimbursement was a kind of pay under Article 157 TFEU, the ECJ ruled consistently that "compensation" had one thing in common: a strong link between the employer and the employee.[25] The compensation has to be paid "in respect of the employment."[26] Thus, prize money mustn't only be classified as a form of pay, it must also be paid in an employment-like relationship to a "worker."

---

[19] C-43/75, *Defrenne II* (EU:C:1976:56).
[20] Tudor, 'Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States', 92 *North Dakota Law Review* (2017) 415, at 417, 424.
[21] C-43/75, *Defrenne II* (EU:C:1976:56), at para. 40.
[22] E.g. C-12/81, *Garland v. British Rail* (EU:C:1982:44); C-96/80, *Jenkins v. Kingsgate* (EU:C:1981:80); C-196/02, *Nikoloudi* (EU:C:2005:141); C-385/11, *Elbal Moreno* (EU:C:2012:746); C-256/01, *Allonby* (EU:C:2004:18); C-320/00, *Lawrence and Others* (EU:C:2002:498); C-109/88, *Danfoss* (EU:C:1989:383); C- 17/05, *Cadman* (EU:C:2006:633); C-171/88, *Rinner-Kühn* (EU:C:1989:328); C-267/06, *Maruko* (EU:C:2008:179); C-328/13, *Österreichischer Gewerkschaftsbund* (EU:C:2014:2197); C-342/93, *Gillespie and Others* (EU:C:1996:46); C-366/99, *Griesmar* (EU:C:2001:648); C-173/13, *Leone*, (EU:C:2014:2090).
[23] See regarding the meaning of pay: E. Ellis and P. Watson, *EU anti-discrimination law* (2005), at 121-158.
[24] Borelli, 'International and European Labour Law, Art. 157 TFEU', in E. Ales *et al.* (eds) *International and European Labour Law* 176, at para.12.
[25] See e.g. for special travel facilities for employees and their dependents C-12/81, *Garland v. British Rail* (EU:C:1982:44), at paras. 4ff.; for annual bonuses C-281/97, *Krüger* (EU:C;1999:396), at para. 26; for a widowers' pension C-109/91, *Ten Oever* (EU:C:1993:833); for maternity leave pay C-218/98, *Abdoulaye and Others* (EU:C:1999:24) at paras. 13, 14.
[26] C-109/91, *Ten Oever* (EU:C:1993:833), at para. 8; Borelli, *supra* note 24, at para. 13.

(a) Prize money as "pay"

Payments which are directly governed by legislation without any form of bargaining between the employer and employees are not based on an employment-relationship. Payments, which are based on considerations of social policy, facilitated by a statutory scheme or are obligatory are precluded from Article 157 TFEU. Irrelevant are factors such as the time of the payment, if the payment was done indirectly, or in cash or kind. Relevant is the origin of the money: If the public purse is not contributing to the payment, it is a sign of a "payment" under Article 157 TFEU, as is the stipulation of the consideration in the individual employment contract.[27]

Prize money is paid by FIFA to the NAs for their placement in an international tournament, who use it to their liking. The amount the individual players receive is either bargained for – e.g. by player`s unions or sport representatives – or decided unilaterally from the association.[28] The national legislature has no say in the amount each player receives nor is the money coming from the public purse. While the exact amount to be received cannot be known in advance of a World Cup – because it is dependent on the final placement – the percentage of money to be received in case of a payout to the NA is in the individual player's contract.[29] Thus, a lot speaks in favor prize money being "another consideration" being paid in regard to the (temporary) employment.

(b) Employment-link

"Worker" has an autonomous meaning within the EU[30] and the ECJ interprets it not restrictively. A worker is someone, who "for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."[31] The ECJ has decided, that professional and semi-professional football

[27] C-381/99, *Brunnhofer* (EU:C:2001:358), at para. 34.

[28] See e.g. Football Federation Australia, *CBA Fact Sheet*, available at https://www.ffa.com.au/sites/ffa/files/2019-11/PFA%20CBA%20Facts%20Sheet_v3.pdf?_ga=2.82998164.30319845.1596861298-21840925.1590391717.

[29] Schwab, '„When We Know Better, We Do Better." Embedding the Human Rights of Players as a Prerequisite to the Legitimacy of Lex Sportiva and Sport's Justice System', 32 *Maryland Journal of International Law* (2017) 4; see also *supra* note 9.

[30] C. O'Brien, E. Spaventa and J. De Coninck, *Comparative Report 2015. The concept of worker under Article 45 TFEU and certain non-standard forms of employment* (2016), at 12.

[31] C-256/01, *Allonby* (EU:C:2004:18), at paras. 66/67. Definition already used in C-66/85, *Lawrie-Blum* (EU:C:1986:284), at para. 17.

players are "workers" in the sense of Article 45 TFEU at the club stage.[32] While Article 45 TFEU is different than Article 157 TFEU, the jurisprudence of the ECJ to define "work" is transferable from one primary norm to another.

But who employs players who compete for their NA? The relationship between NA and players can be described more regulatory than employment-like.[33] However, football players competing for their national team are released by their clubs. According to the FIFA Transfer Regulations, clubs are obliged to release their players for international games, if the player was called upon by his/her association.[34] The release is mandatory. While FIFA is not providing any compensation, the NAs might be. The German Deutscher Fussball Bund (DFB) e.g. is paying the clubs of the highest leagues compensation for release of the German national players.[35] Other funds are transferred between FIFA and the specifically for this purpose established European Club Association (ECA) to make up their (potential) losses.[36] The NAs, as well as FIFA, have high stakes in this system: without the mandatory release, national competitions would lose attraction and competition between club-leagues and international matches would redistribute commercial interest. FIFA (and the NAs) use their regulatory power within sports governance to uphold this system, thus strengthening FIFAs business model on the expense of clubs.[37]

The legal nature of a release of a club player to the national team under organization of the NA is unclear and oftentimes controversial,[38] but comparable to labor leasing/temporary agency work. Under the labor leasing regime, the respective club transfers the decisional authority for the time of the release to the NA (which will be exercised by the head coach). Thus, the football player is a worker for the temporary

[32] C-415/93, *Bosman* (EU:C:1995:463); C-325/08, *Olympique Lyonnaise* (EU:C:2010:143), at paras. 28/29. See also Blackshaw, 'The Professional Athlete - Employee or Entrepreneur?', 6 *International Sports Law Journal* (*ISLJ*) (2006) 91.
[33] See Schwab, 'Embedding the human rights of players in world sport', 17 *The International Sports Law Journal (ISLJ)* (2018) 214, at 217-218.
[34] FIFA, *Regulations on the Status and Transfer of Players*, available at https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-june-2020.pdf?cloudid=ixztobdwje3tn2bztqcp, Annexe 1, Art. 1(1) and Art. 1bis(1).
[35] DFB, *Grundlagenvertrag*, available at https://www.dfb.de/fileadmin/user_upload/159366-15_DFB_DFL_Grundlagenvertrag.pdf, at §5(4).
[36] Weatherill, *supra* note 12.
[37] *Ibid.*, at 261.
[38] Schwab, *supra* note 29, at 39.

employer at least for the time of the transfer of decisional authority. Additionally, NAs are insuring the players during the international game windows. This is not mandated by FIFA, but done voluntarily.[39] Furthermore, the ECJ held that work can encompass flexible and atypical situations. Due to the extensive approach to work, part-time work,[40] on-demand-work,[41] internships,[42] seasonal employment and temporary agency work are ruled to be "work" in the sense of Article 45 TFEU.[43] Consequently, the finding of an employment-like relationship by the ECJ seems plausible.

2. Single Source

Some might argue that female and male players are not employed by the same employer, because they compete in different national teams. However, this argument needs reconsideration. First, even if the female and male squad are separated in their work and organization, they are both competing for the same NA, thus the same entity. Second, the ECJ acknowledged that pay of males and females could be compared, even if they are not working for the same employer, but the source of the pay can be traced to the same single source.[44] This matches FIFA perfectly, which is the source of the money. While exceeding this paper, it could even be argued to open up a route to compare prize money not only between male and female players intra-organization wise, but also inter-organizational. For now, it defuses the argument that the World Cups and the money originating from it cannot be compared because of the different locations of the World Cups and different NAs, which are paying it.

3. Timing

The time of the comparison is another factor to be taken into account. Women's and men's World Cups are never at the same time, but alternate in one-year intervals. Thus, one might argue, that the two cannot be compared under Article 157 TFEU because of the timing. Here again, the ECJ has taken up the time issue in his jurisprudence. A

[39] See e.g. DFB, *supra* note 35.
[40] C-53/81, *Levin v. Staatssecretaris van Justitie* (EU:C:1982:105), at paras. 12/16; C-139/85, *Kempf v. Staatssecretaris van Justitie* (EU:C:1986:223), at para. 14.
[41] C-357/89, *Raulin v. Minister van Onderwijs en Wetenschappen* (EU:C:1992:87), at para. 11.
[42] C-197/86, *Brown v. Secretary of State for Scotland* (EU:C:1988:323), at para. 23.
[43] Guibboni, 'Being a Worker in EU law', 9 *European Labour Law Journal* (2018) 223, at 227.
[44] C-320/00, *Lawrence and Others* (EU:C:2002:498) and C-256/01, *Allonby* (EU:C:2004:18), at para. 45.

comparison is naturally possible with colleagues working at the same time, but also with predecessors.[45] A comparison with successors, as well as a hypothetical comparison is not possible.[46] Consequently, female players competing in 2023 can compare their prize money with the male players from Qatar 2022, but not with the prize money to be paid in 2026.

4. Comparator

To activate Article 157 TFEU, there must be a difference in compensation despite the equal work or work of equal value of the players.

"Equal work" and "work of equal value" mirror "equal pay" and "pay equity". The notion of equal work is based on a comparison between two kinds of workers. The basic idea of non-discrimination and comparability states that equal treatment is required for relevantly alike situations.[47] The major analysis is centered around the question which features of persons or situations are relevantly alike or unlike,[48] the search for a comparator. Whereas equal pay looks if two individuals in the same job are getting the same salary, pay equity/work of equal value is more occupational than individual.[49] It assesses whether two occupations are of the same value, even if they are quite distinct from another, like a kindergarten teacher and an electrician. The question of value or equity is determined by analyzing the necessary level of skill required for the occupation, the responsibilities accompanying it and the work conditions involved. Thus, pay equity challenges horizontal segregation of jobs (and wages) provoked through feminized occupations.[50] "Women are paid less because they are in women job's, and women's jobs

[45] C-129/79, *Macarthys v. Smith* (EU:C:1980:103).
[46] *Ibid.*, at para. 15; C-69/80, *Worringham and Humphreys v. Lloyds Bank* (EU:C:1981:63), at para. 23; C-200/91, *Coloroll Pension Trustees* (EU:C:1994:348), at para. 103; C-256/01, *Allonby* (EU:C:2004:18), at para. 74.
[47] P.J. Neuvonen, 'From A 'Relative' to a 'Relational' Equality: Rethinking Comparability in the Light of Relational Accounts of Social Justice', in D. Cuypers and J. Vrielink (eds), *Equal is not Enough* (2016) 135, at 136-37.
[48] Knight, 'Describing Equality', 28 *Law and Philosophy* (2009) 327, 331.
[49] England and Dunn, 'Evaluating Work and Comparable Worth', 14 *Annual Review of Sociology* (1988) 227, 228.
[50] Raday, 'Art. 11 CEDAW', in M.A. Freeman, C. Chinkin and B. Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (2012) 279, at 292-293; C.W. Chen, *Compliance and Compromise: The Jurisprudence of Gender Equity* (2011), at 22-23.

are paid less because they are done by women"[51] sums up the problem. Occupational segregation is a fact,[52] which produces income disparities at the expense of women. Pay/work equity tries to prize open this dynamic by creating a system of comparison of different occupations.

Applied to the football framework, the first question is whether this is an equal pay or pay equity context – is it an identification of similar jobs or comparable occupations? Choosing the framework for the comparability-analysis in itself is an analysis. A narrow view considers the game itself and what women and men do when they kick a ball; a broader view comprises the whole endeavor World Cup. It could either argue for a different outcome of the equal-pay approach (non-comparability) or lead to the result that female and male players have different occupation while competing in World Cups (equal-value framework).

An assessment based on a narrow view is an easy one. Women and men play football, each team with 10 field players and one goalie, for 90+ minutes on a field 75 yards wide and 120 yards long. They score, they defend, they foul – there is no difference in the administration of the game. The conduct, kicking a ball, is equal. The occupation is the same. This would lead to and be the outcome of an equal pay-analysis.

The broader approach would review the whole World Cup, the other teams, visitors, merchandise, and, in the end, revenue. It is (still) true that men's World Cups convert more money than women's tournaments. A first look at the numbers involved could lead to the assessment, that there is no doubt about the huge difference in "worth". However, a closer look discloses ambiguities and grey areas. While FIFA states that the men's World Cup 2018 led to a revenue of $5.6 billion, the reported number of $131 million for the women's World Cup has proven to be wrong.[53] Neither FIFA nor NAs can produce reliable figures on how much revenue was generated by the women's World Cup in 2019. FIFA calculates that $3,127 billion, most of the revenue from 2018, came from

[51] Shepela and Viviano, 'Some Psychological Factors affecting Job Segregation and Wages', in H. Remick (ed.), *Comparable Worth and Wage Discrimination* (1984) 47, at 47.
[52] ILO, *Report of the Committee on the Application of Standards* (2007), at 69-72.
[53] Ozanian, *Why FIFA's Hidden Numbers Tripped Me Up, And Mask The Issue Of Pay Disparity*, available at https://www.forbes.com/sites/mikeozanian/2019/09/24/why-fifas-hidden-numbers-tripped-me-up-and-mask-the-issue-of-pay-disparity#12a0286177fb.

selling the broadcasting rights.[54] However, that's the crux of the matter. FIFA is selling the broadcasting rights for the World Cups as a package, because the women's World Cup wasn't considered to have bargaining value and was added "as a gift" to the broadcasters.[55] By selling the tournaments together, it is impossible to determine how much could be attributed to each section. However, the whole bundle is subsequently added to the men's revenue. Consequently, as long as this entanglement is not clarified,[56] a comparison based on revenue is pointless.

Besides, there are good arguments against a focus on revenue all together: FIFA is a non-profit organization, established to promote the game, not money. The major aim is to get more people involved in the sport, meaning playing, caring and watching. One statutory objective of FIFA is to promote women's football and to make resources available, regardless of gender.[57] Thus, the benchmark for decisions should be the advance of (women's) football, not the creation of money. This is set out ex verbatim in "FIFA 2.0: The Vision for the Future".[58] In this strategy from 2016 FIFA states that it must "build the women's game and bring it to the mainstream"[59] and "use its influence to address these human rights risks as determinedly as it does to pursue its commercial interests."[60] Furthermore, the lack of profitability women's clubs, tournaments and leagues is not unfathomable, but homemade,[61] which FIFA acknowledges.[62] The women's side of the sport developed considerably later than the men's side, not just because of the traditional lack of support for women's causes in relation to men's, but also because

---

[54] FIFA, *Financial Report 2018*, available at https://resources.fifa.com/image/upload/fifa-financial-report-2018.pdf?cloudid=xzshsoe2ayttyquuxhq0, at 16.

[55] McMorran and Passa, *Australia, New Zealand to co-host 2023 Women's World Cup*, available at https://sports.mynorthwest.com/952450/australia-new-zealand-to-co-host-2023-womens-world-cup/.

[56] E.g. by a comparison of viewers (which is not always in favor of the men's game: the final from the Women's World Cup 2019 was seen by 22% more viewers, than the men's final in 2018 in the U.S., see Pavacich, *Reports: Viewership, ad revenue up for Women's World Cup*, available at https://globalsportmatters.com/business/2019/09/23/reports-viewership-ad-revenue-up-for-womens-world-cup/).

[57] See *infra*, at 23.

[58] FIFA, *FIFA 2.0: A Vision for the Future (2016)*, available at https://resources.fifa.com/image/upload/fifa-2-0-the-vision-for-the-future.pdf?cloudid=drnd5smfl6dhhxgiyqmx.

[59] *Ibid.*, at 30, 36-38.

[60] *Ibid.*, at. 63. The Women's Football Strategy was implemented, inter alia, to fulfil the obligations of FIFA 2.0: A Vision for the Future, see FIFA, *supra* note 2, at 6.

[61] J.G. Ruggie, *"FOR THE GAME. FOR THE WORLD." FIFA and Human Rights, Corporate Responsibility Initiative Report No. 68* (2016), at 24-25. See also Dodd, *supra* note 1; Krech, *supra* note 2, at 14.

[62] FIFA, *supra* note 2, at 4.

women were banned from playing football,[63] and the first Women's World Cup was established 61 years after the men's. The different establishment and subsequently "worth" of the sport were created by FIFA's past conduct.[64] It is more than questionable to base future actions on historical shortfalls contrary to the full pursuit of the non-profit's mission.[65]

The better arguments speak for the equality of the conducted work by female and male athletes. A broader approach focusing on revenue is neither applicable due to unclear facts, nor because it seems to be the wrong framework: female and male players are not working in different occupations. The World Cups are not inherently different and thus do not fall under the "equity" approach. The conduct by the players is equal and directly comparable.

5. Application between Private Parties

Neither the individual players, the NA nor FIFA are member states to the EU. They are private individuals or entities. Thus, the application of Article 157 TFEU between them must be based on horizontal application. The ECJ developed early on that the market freedoms[66] and Article 157 TFEU[67] can have horizontal effect, if intermediary entities are concerned. Intermediary entities can enact collective rules autonomously without the possibility of escape. From the point of view of a market participant, their conduct has the same effect as a member states conduct. Hence, to give full *effet utile* to EU law private entities must adhere to the specific law to protect the internal market.[68] Football associations and especially FIFA are agencies equipped with quasi-legislatory power. If one wants to play football in this world, there is no escape from the reach of FIFA, its

---

[63] Murray, *Does revenue explain the USWNT's World Cup bonus shortfall?*, available at https://www.theguardian.com/football/2019/jul/24/usa-women-soccer-equal-pay-bonus-questions.
[64] Ruggie, *supra* note 61, at 25.
[65] See concerning anti-discrimination principles in the EU Monaghan, *Equality and Non-Discrimination*, 16 *Judicial Review* 418 (2011), 420.
[66] C-36/74, *Walrave* (EU:C:1974:140), at para. 17; C-13/76, *Donà* (EU:C:1976:115); C-415/93, *Bosman* (EU:C:1995:463); Joined cases C-51/96 and C-191/97, *Deliège* (EU:C:2000:199).
[67] C-129/79, *Macarthys v. Smith* (EU:C:1980:103), at para. 10; C-12/81, *Garland v. British Rail* (EU:C:1082:44), at para. 15; C-33/89, *Kowalska v. Freie und Hansestadt Hamburg* (EU:C:1990:265), at para. 12; S.K. Stein, *Drittwirkung im Unionsrecht* (2016), at 59.
[68] C-36/74, *Walrave* (EU:C:1974:140), at para.18; regarding a functional approach to horizontal effect see A.J. Golia, 'The Horizontal Effect Doctrine as a Form of Porosity among Legal Systems', *MPIL Research Paper Series* No. 2018-28.

rules, subsidiaries and tournaments. FIFA and NAs are prototypes of intermediary organizations, consequently Article 157 TFEU must be horizontally applicable to them.

C. ***Remedy***

Remedial measure of Article 157 TFEU is that the discriminated party receives what she ought to be received without the gender discrimination. Prize money paid individually must be the same between female and male players. What remains questionable is the concrete execution of that principle: Must FIFA pay the same amount per World Cup? Must the winning team receive the same number or just the NA? Is equal allocation between participating teams enough, or must it be the equal sum of prize money for each individual or the same percentage of prize money? How the ECJ will decide on this matter is up for debate. Due to the individual appellants and FIFA/the NA as individual defendants, the first intuition would be to base a remedy on an individual approach. To make the female players "whole", they must receive the same price money as their male counterparts. This would subsequently lead to an obligation of the NAs to pay their male and female players the same amount of prize money for the same placement in a World Cup. Eventually, this could lead to FIFA paying more money for the female participants of a World Cup, because NAs cannot distribute money they didn't receive. In the end, FIFA would pay up.

Would FIFA accept such an outcome? Despite Article 59(2) FIFA Statutes, which forbids thee recourse to ordinary courts, the question seems not to fit into the realm of ECJ and national court judgements: one has to accept an outcome. However, FIFA might use its monopolistic power to deter the lawsuit or its implementation, as it has done in the past.[69] Yet, FIFA makes strong claims about its commitment to human rights. "FIFA is committed to providing for or cooperating in remediation where it has caused or contributed to adverse human rights impacts…Where national laws and regulations and international standards differ or are in conflict with each other, FIFA will follow the higher standard without infringing upon domestic laws and regulations."[70] In addition,

[69] See e.g. the actions of FIFA during the U.S. Soccer lawsuit, Tsui, *supra* note 10 as well as the *FC Sion-saga*: Reilly, 'An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes', 2012 *Journal of Dispute Resolution* (*JDR*) (2012) 63, 79-80.

[70] FIFA, *Human Rights Policy*, available at https://img.fifa.com/image/upload/kr05dqyhwr1uhqy2lh6r.pdf, at 6/7.

the EU seems to increase pressure against SGBs and their monopolistic behavior, threatening their long-lived autonomy.[71] Thus, fighting a judgement against itself might not come cheap or easy for FIFA.

3. Court of Arbitration for Sport

CAS was established in 1984 by the IOC to settle disputes related to sports quickly, inexpensively and with expertise. At least after structural reforms in 1994 it is an independent court of arbitration, the "Supreme Court of world sport."[72] It is a quasi-judicial body, basing its jurisdiction not on national sovereignty, but on arbitration agreements. Consequently, and in sharp contrast to the ECJ and the ECtHR, CAS does not operate on a standing set of rules in all cases. Apart from procedural norms, the arbitration court has to apply the contracts and by-laws binding the adverse parties in each instance. A case involving synchronized swimmers depends on different rules than a complaint of a cross-country-skier. Even disputes from the same sport might have varying legal bases, conditional to the actual contractual rules challenged. As a Swiss organization, CAS appeals are heard by the Federal Supreme Court of Switzerland (the *de facto* appellate body for CAS[73]), and, because Switzerland is a member of the Council of Europe (CoE), can eventually be challenged in front of the ECtHR.

A. *Parties and Process*

Similar to a suit in front of the ECJ, CAS will not be the first instance for the question regarding equal prize money. Appellants must first try the FIFA internal channels[74] according to Article 58(2) FIFA Statutes before taking recourse to CAS. The Statues also present the potential parties to the conflict: FIFA, NAs, confederations, leagues, clubs, players, officials, intermediaries and match agents. Individual players are mostly affected by unequal price money, thus being the most promising appellants. NAs could also argue in favor of equality, because they are the distributing entities, thus somewhat bound by

---

[71] Schwab, *supra* note 33.
[72] For a history of CAS see ECtHR, *Mutu and Pechstein v. Switzerland*, Appl. no. 40575/10 and no. 67474/10, Judgement of 2 October 2018, at 24-39. All ECtHR decisions are available at http://hudoc.echr.coe.int/; Reilly, *supra* note 69, at 63-64.
[73] West, 'Revitalising a phantom regime: the adjudication of human rights complaints in sport', 19 *The International Sports Law Journal (ISLJ)* (2019) 2, at 6.
[74] These are the Disciplinary, the Ethics and the Appeal Committee, see Art. 52(1) FIFA Statutes.

the amount they receive from FIFA. However, as shown above,[75] the relationship between FIFA and NAs makes this constellation highly unlikely.

B. *Legal Basis*

As an arbitration court, the CAS can only apply the substantive law it receives from the parties' arbitral agreements and contracts. This includes primarily the various FIFA regulations, the incorporated human rights treaties and, additionally, Swiss law, see Article 57(2) FIFA Statutes, Rule 58 CAS Code, Article 187 of the Swiss Private International Law Act (SPILA). To assess how CAS applies these different rules, a look to CAS former awards might be helpful. However, it has to be kept in mind that CAS, as an arbitral body, is not bound by *stare decisis* – former rulings have no legal compulsion as precedents.[76] Rather, they can provide guidance for future cases, because they are contributing to the emerging *lex sportiva*.[77]

A case providing guidance on the question how human rights treaties could be applied to the conflict is *Jeffrey Adams v. CCES*.[78] To decide whether the decision to administer a doping test for a Paralympic athlete fell under the scope of Canadian human rights treaties, the panel did not put forward an individual analysis of the question, but applied Canadian jurisprudence and law.[79] In other words, CAS did not made up its own mind, but implemented the established findings of the supreme interpreter (and/or author) of the law in question.[80]

Transferring this rule to our case, CAS would apply the human rights treaties mentioned in FIFAs regulations and rules, as well as the other potential international law, *according to their intrinsic interpretation*. FIFAs rules and regulations are subject to FIFA's interpretation, EU law to the ECJ, and other international (human rights) treaties

[75] See *supra*, at 5.
[76] Blackshaw, 'Fair play on and off the field of play: settling sports disputes through the court of arbitration for sport', 6 *The International Sports Law Journal* (*ISLJ*) (2006) 107, at 115.
[77] See e.g. CAS 2008/A/1545, *Andrea Anderson et al. v. IOC*, award of 16 July 2010 at para. 53; J. Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence* (2019), at 91; Nafziger, 'The principle of fairness in the lex sportiva of CAS awards and beyond', 10 *The International Sports Law Journal* (*ISLJ*) (2010) 3, at 8.
[78] CAS 2007/A/1312, *Jeffrey Adams v. CCES*, award of 16 May 2008.
[79] *Ibid*., at 1-15.
[80] See for a same outcome about EU law: CAS 2009/A/1788, *UMMC Ekaterinburg v. FIBA Europe e.V.*, award of 29 October 2009, at 1 dictum, paras. 22, 28-47.

to the authority of their ruling organ. CAS can apply FIFAs own Statutes, international instruments and, possibly, EU law.

1. FIFA's own Assertions

Equal pay is not mentioned ex verbatim by the FIFA regulations. However, the "objectives" of FIFA are summarized in Article 2 FIFA Statutes: "The objectives of FIFA are…a) improve the game of football constantly and promote it globally in the light of its unifying…humanitarian values,…e) to use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age; f) to promote the development of women's football and the full participation of women at all levels of football governance…."[81] Additionally, "FIFA is committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights.", Article 3. "Discrimination of any kind against a…group of people on account of…gender…is strictly prohibited and punishable by suspension or expulsion." Article 4. The Code of Ethics, as well as the Disciplinary Code forbid discriminatory actions on the account of gender.

Looking into the future, FIFA has even advanced its approach and incorporated human rights, including a precise hint to workers' rights, in the bidding process for the men's World Cup 2026.[82] The bidding regulations do not only include the obligation for all involved stakeholders to hosting the World Cup in manners, which don't involve adverse impacts on "international recognized Human Rights", but especially mention ILO Conventions 100 on equal remuneration (C100)[83] and 111 on discrimination,[84] as well as "UN Women Instruments" and the UN Guiding Principles on Business and Human Rights.[85]

---

[81] See regarding the history of the landmark amendments: Dodd and Ordway, 'FIFA Governance Reform. How Crisis Opened the Door for an Ethics of Care Approach.'

[82] FIFA, *REGULATIONS for the selection of the venue for the final competition of the 2026 FIFA World Cup*, available at https://img.fifa.com/image/upload/stwvxqphxp3o96jxwqor.pdf, at 8.1; 3.6.2 and Annexe 1.

[83] ILO, *Equal Remuneration Convention (1951)*, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100

[84] ILO, *Discrimination (Employment and Occupation) Convention (1958)*, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

[85] See regarding the UN Guiding Principles and FIFA: Heerdt and Bernaz, 'Addressing Women's Rights Risk in Football. A Gender-Lens on FIFAs Responsibilities under the UN Guiding Principles.'

On this basis, there are two lines of arguments open to a CAS panel: one is the application of FIFAs own rules according to the interpretation of FIFA; the other is the application of the before-mentioned international instruments according to the interpretation of their supreme bodies. This paper focusses on the latter, while arguments holding FIFA accountable to its own standards will reinforce arguments within the international law framework.

2. International Instruments on Equal Pay

FIFA is committed to respect the "international recognized human rights". These are (at least to FIFAs own interpretation) the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the core conventions of the ILO,[86] including C100.[87] The UDHR includes general prohibitions on discrimination in Articles 1, 2 and 7 and an "equal pay" clause in Article 23(2); the ICESCR includes "equal pay for equal work" in Article 7(a)(i). There is a general anti-discrimination Article in the ICCPR, but it is not mentioning gender (Article 26). The "UN Women Instruments", which are applicable at least from 2026 on, include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which also includes an "equal pay" rule in Article 23.[88] While these instruments are mostly directed at states, who should implement legislation, FIFA makes them applicable to its own conduct by referencing them and promising to respect them. Regardless of the question if FIFA must have made these rights applicable, FIFA chose to.

(a) ILO Convention 100

C100 itself reiterates the status of equal pay (for equal work and work of equal value) as a fundamental right.[89] According to Article 1(a), remuneration includes "ordinary, basic

[86] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

[87] *See* ILO, *History of the ILO, Eight Fundamental Conventions*, available at https://libguides.ilo.org/c.php?g=657806&p=4649148.

[88] See for a brief description of the interplay of the different norms and bodies: Chen, *supra* note 50, at 25-26.

[89] M. Oelz, S. Olney and M. Tomei, *Equal Pay. An introductory guide* (2013), at 2.

and minimum wage and salary, as well as any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker." To limit restriction on equality due to semantic distinctions, the definition is deliberately broad. The drafting committee decided against specifying the term "additional emolument whatsoever" by adding a list or detailed criteria, but to accept the all-embracing phrase.[90] It should include elements as "numerous as they are diverse."[91] The same broad approach is applied to the definition of "worker", which must be understood to open the application to everyone.[92] Furthermore, the Convention establishes the need for an employment-link, similar to Article 157 TFEU: social security schemes that are purely publicly funded or demanded are exempted from the Convention.[93] As with Article 157 TFEU, the remuneration can be paid indirectly.[94] Again, TFEU and C100 are mirroring each other.

This holistic approach makes the Convention applicable to prize money. Prize money is, as shown above, a remuneration paid by FIFA to the NAs, who distribute it to their players. Players act under the supervision of the NA during a World Cup under a labor leasing/temporary agency work scheme,[95] making them workers under the broad definition of C100. Prize money is solely financed by FIFA without public funding. The amount the NAs and subsequently the players get is not determined by national laws. Thus, prize money falls within the scope of C100.

C100 asks for the assurance of the application "of the principle of equal remuneration for men and women workers for work of equal value", Article 2(1). Thus, there is no divergence in substance to Article 157 TFEU:[96] the question is whether female and male football players are conducting the same work or work of equal value, which has been analysed above.[97]

---

[90] International Labour Conference, 33rd Session, 1950, Record of Proceedings, Appendix VIII: Equal Remuneration, at 508.
[91] ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Equal Remuneration*, 72nd Session 1986, Report III, Part 4B, available at http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1986-72-4B).pdf, at 7/8.
[92] „The rule must be that the equal pay principle apply everywhere", *ibid.*, at 10.
[93] *Ibid.*, at 9. See also *supra*, at 10.
[94] ILO, *supra* note 91, at 8.
[95] See *supra*, at 12.
[96] Art. 157 TFEU is the "European translation" of ILO Convention 100, see C-43/75, *Defrenne* (EU:C:1976:39), opinion of Advocate General Trabucchi, at 484; E.C. Landau and Y. Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (2008), at 45.
[97] See *supra,* at 14-17.

(b) CEDAW and ICESCR

The same result would follow by applying CEDAW.[98] Article 11(1)(d) CEDAW defines the "right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work". The CEDAW Committee asked for all signatories to sign C100.[99] Besides, the two texts are even closer related: according to the *travaux préparatoires*, the broad definitions of C100 are incorporated into Article 11(1)(d).[100] Consequently, a legal analysis by a CAS panel would reach the same outcome: unequal prize money is in violation of CEDAW.

Article 7(a)(i) ICESCR refers to equal remuneration for work of equal value – which should be achieved progressively – and equal pay for equal work, which must be guaranteed immediately.[101] As discussed above, the "work" involved in playing football is equal (and not of equal value).[102] Hence, the equality must be guaranteed *immediately*, providing CAS with a strong argument for holding FIFA directly accountable.

Applying the various human rights treaties would all lead to the same result: FIFA and the NAs breach their obligation to non-discrimination and equal remuneration for equal work by providing the women's World Cup with fewer prize money, than the men's tournament.

3. Application of EU Law via SPILA

A CAS panel could apply EU law, even if the choice of law between the parties does not mention it explicitly. According to Article 19 SPILA, Swiss judges must apply mandatory external rules of law, if the interests of one party require the application. CAS has applied this principle analogically to its arbitrators before.[103] If conflict party would invoke EU

---

[98] See regarding CEDAW and FIFA: Perez, 'Transformative Equality, Due Diligence and Football Governance. The Role of CEDAW.'
[99] GA, 'Report of the Committee on the Elimination of Discrimination Against Women', UN Doc. A/44/38, 13 February 1989, at 76.
[100] Raday, *supra* note 50, at 292; L.A. Rehof, *Guide to the travaux préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (1993), at 136.
[101] Committee on Economic, Social and Cultural Rights, 'General comment No. 23 (2016) on the right to just and favorable conditions of work', UN Doc. E/C.12/GC/23, 27 April 2016, at para. 16, 53.
[102] See *supra*, at 12-15.
[103] CAS 98/201, *Celtic Plc v. UEFA*, award of 7 January 2000, at para. 4.

law, CAS could pronounce itself on the claims.[104] In preceding cases, CAS identified three criteria to apply Article 19 SPILA:

> [1] such rule must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case; [2] there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; [3] from the point of view of Swiss legal theory and practice, the mandatory rules must aim at protecting legitimate interests and crucial values and their application must allow an appropriate decision.[105]

CAS panels applied Article 19 SPILA to EU law. Whenever economic activities are carried out within the EU, a sufficient interest is created which justifies the application of mandatory foreign [EU] law.[106] For special subcategories of EU law, CAS has pronounced this principle with outmost clarity: Competition law, as well as provisions regarding the freedom of establishment and movement of capital should be "taken into account anyway", even if the parties had not validly agreed on its application. In regard to Article 19 SPILA, the beforementioned rules fulfill all criteria: they are often quoted as fundamental by scholars and judges (thus making them mandatory) and they are directly applicable in the member states of the EU, which are home to some of the strongest football clubs (thus providing a close connection). Finally, Swiss law in this field was inspired by EU law and protects the same values and interests (thus, the rules are protecting legitimate interests and crucial values of Swiss legal theory).[107]

With this analysis, CAS accepts the pragmatic need to apply EU law, if the internal market might be affected. Based on the fact that CAS is somewhat dependent on (European) national courts to accept and uphold its awards,[108] the need becomes obvious. Mostly, FIFA and other SGBs can self-enforce their awards without interreference or help

[104] Duval, 'The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter', 22 *Maastricht Journal on European and Comparative Law* (2015) 224, at 226.
[105] CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, award of 20 August 1999, at para. 10; CAS 98/201, *supra* note 103.
[106] CAS 2008/A/1485, *FC Midtjylland A/S v. FIFA*, award of 6 March 2009, at para. 29; CAS 2012/A/2862, *FC Girondins de Bordeaux v. FIFA*, award of 11 January 2013, at para. 102; CAS 2009/A/1788, *supra* note 80, at 10.
[107] CAS 98/200, *supra* note 105, at paras. 10-12.
[108] CAS awards are enforceable in the countries, which signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

by national authorities due to their monopolistic position in their respective sport.[109] However, national courts are competent and willing to confront CAS on the grounds of missing application of EU law.[110] Even if the cases might not always be successful in the end, the existence and expertise of CAS is nonetheless challenged – a situation vital to avoid for an independent arbitral body.[111]

There are good arguments to transfer the reasoning of CAS regarding competition law, freedom of establishment and movement of capital to Article 157 TFEU. Article 157 TFEU is declared a fundamental principle (of EU law).[112] It is directly and horizontally applicable in all member states, providing a strong connection between the subject matter and the territory. CAS has already acknowledged the horizontal effect of TFEU law in sport.[113] Last, the principle of Article TFEU is common within Swiss legal theory and practice: the Swiss Constitution provides with Article 8(3) a similar rule. Switzerland also signed the international instruments, which protect equal pay and are fundamental to Article 157 TFEU.[114] Furthermore, Article 157 TFEU affects the common market and is applicable to all market freedoms. Following its direction concerning EU law and its pragmatic assessment of its relationship with member state courts, CAS ought to apply Article 157 TFEU, which in its application must be congruent with the ECJ jurisprudence. Thus, a panel should come to the same result as the ECJ concerning equal prize money based on the assessment of EU law alone.

---

[109] Haas, 'Fußball vor dem Internationalen Sportgerichtshof CAS', in W. Höfling, J. Horst and M. Nolte (eds), *Fußball - Motor des Sportrechts* (2014) 65, at 67.

[110] See e.g. CAS 2009/A/1810 & 1811, *SV Wilhelmshaven v. Club A. Excursionistas & Club A. River Plate,* award of 5 October 2009, in which CAS did not apply EU law. Subsequently, the appellant challenged the award in German courts (LG Bremen, 12 O 129/13, 25 April 2014; OLG Bremen, 2 U 67/14, 30 December 2014). In its final decision, the German *Bundesgerichtshof* did not rule on EU law, but hinted that the implementation of the financial obligations conferred upon the club by FIFA might fail because of *ordre public*, BGH II ZR 25/15, 20 September 2016. See also OLG München U 1110/14 Kart, 15 January 2015 (which challenges the existence of CAS altogether) regarding *Claudia Pechtstein*, see *supra* note 72.

[111] See for a broader analysis and a proposal for a 'Solange'-relationship between member state courts and CAS Duval, *supra* note 104 and for the *Pechstein*-case: Kraayvanger, 'German Federal Supreme Court Strengthens International Sport Arbitration', 5 *Yearbook on International Arbitration* (2017) 205.

[112] Stein, *supra* note 67, at 55.

[113] CAS 2014/A/3776, *GFA v. FIFA*, award of 27 April 2016, at para. 240.

[114] Switzerland ratified the C100 (1972), CEDAW (1997), and ICESC (1992).

C. *Remedy*

If CAS holds the current equal prize money scheme to violate international human rights and/or EU law, it can award the appellants with equal prize money – again with multiple options to calculate.[115]

The likeliness of a CAS ruling in favor of equal prize money is hard to determine. Good arguments, like the pragmatic approach of CAS about EU law speak in favor of it, as does the content of the applicable law. Yet, a CAS award would be highly disruptive to FIFA and the sporting world in general. It is doubtful, if a panel has the courage to challenge its biggest financier and most important client.[116] In the end, it might come down to the personal conviction of the three arbitrators and whom they dread more: FIFAs monopolistic superpower in football or the possibility of CAS losing acceptance in national courts.

4. European Court of Human Rights

The ECtHR rules on inter-state cases (Article 33 ECHR) and individual applications (Article 23 ECHR), if all domestic remedies have been exhausted (Article 35(1) ECHR). Thus, individual players could file an application with the ECtHR after exhausting the national remedies, e.g. through appealing a CAS award before Swiss national courts or losing equal pay claims in all appeals within one member state of the CoE. However, the ECHR, as a classical international law treaty, is binding on its state parties, not private enterprises like FIFA (Article 1). Actions of private entities are – generally – not scrutinized concerning their adherence to human rights. On a first look, this would close the door on a claim for equal prize money in front of the ECtHR, because FIFA and the NAs cannot be a defendant under the ECHR regime. Nevertheless, a closer look uncovers some grey areas, where the ECHR has (some) effect on private parties.

States have to secure Conventions right not just by not infringing them with their own actions, but also by positive obligations. Some of these positive obligations follow from the text of the Charter, e.g. to provide specific prison conditions (Article 3), others have been developed by the ECtHR. Some Convention rights impose the duty to states to

---

[115] See *supra*, at 16.
[116] Most cases, approx. 45%, in front of CAS are involving FIFA, see Reilly, *supra* note 72, at 69.

"adop[t]…measures designed to secure respect…even in the sphere of the relations if individuals between themselves."[117] States must sometimes act to protect or fulfil Convention rights and stop infringement by private entities.[118] A contracting party can breach its obligations under the Convention, if its national law allows for some conduct, which would breach the ECHR.[119] However, even if the ECHR can generate an horizontal effect, the binding effect on private parties would still be indirect and mediated through the state party. The latter remains the defendant in a proceeding before the ECtHR and is subject to the binding force of the judgement according to Article 46. Subsequently, the state party has to implement the judgement. This implementation can consist of legislative change, e.g. a change in the law, which makes unequal prize money unlawful. Consequently, a way through the ECtHR is drawn-out by the need for exhaustion of national remedies, by the judgement itself and the time needed to implement said judgement in the national law.

A. ***Applicable Law***

There is no particular way to challenge gender discrimination in the workplace within the ECHR. First, there is no express right to work and second, as shown above, the Convention is directed at states, thus not directly binding private employers.[120] Nevertheless, the ECtHR has two major anti-discrimination articles in its portfolio, which both have a list of suspect criterions, including sex: Article 14 ECHR and Article 1 Additional Protocol (AP) 12.[121] The latter was established to abolish the restriction of the former: Article 14 prohibits discrimination during the enjoyment of other Convention rights.[122] Thus, from a textual approach, the Article is very narrow in its application, because it presupposes a connection with another Convention right.[123]

---

[117] ECtHR*, X and Y v. Netherlands*, Appl. no. 8978/80, Judgment if 26 March 1985, at para. 23.
[118] ECtHR*, Airey v. Ireland*, Appl. no. 6289/73, Judgement of 9 October 1979; ECtHR, *Plattform Ärzte für das Leben v. Austria*, Appl. no. 10126/82, Judgement of 21 June 1988.
[119] ECtHR, *Young, James & Webster v. UK*, Appl. no. 7601/76, Judgement of 13 August 1981.
[120] Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the ECHR', 16 *Human Rights Law Review* (2016) 273, at 290.
[121] To date, only 20 states have ratified Art. 1 AP 12.
[122] This does not presuppose a "breach" of the Convention, see ECtHR, *Van der Mussele v. Belgium*, Appl. no. 8919/80, Judgement of 23 November 1983, at para. 43.
[123] Petersen, 'The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law, in Y. Nakanishi (ed), *Contemporary Issues in Human Rights Law* (2017) 129, at 130.

However, the ECtHR uses Article 14 ECHR in a broader way, than the text of the Convention might first suggest.[124] When applying Article 14, the Court asks whether the facts of the case fall within the *ambit* of a Convention right, not the *scope*.[125] The ambit of a Convention right is concerned, if facts of a case fall under an exemption of a said right.[126] Even if member states are not obliged to grant something under the Convention but do it nonetheless, showing "respect for [a Convention Article]", the facts fall under the ambit of that Article.[127] Having the help of a "door opening" right, Article 14 can be applied fully.

To allow an analysis of the unequal prize money by the ECtHR, the facts of the case must fall within the ambit of a Convention right to activate Article 14. In a case from 2014, the ECtHR developed that sex-discrimination can fall within the ambit of Article 8. The ECtHR held that the concept of private life includes aspects of personal identity, like sex. Drastic work-related measures like dismissals can have adverse effects of the person's identity, self-perception and self-respect. Additionally, the loss of a job has impact in the "inner circle" of a person, because it results in consequences for the material well-being of the family. Furthermore, the professional relationship of a person with others can be disturbed and job-loss affects the ability to practise a profession, in which the person is qualified. These results culminate to an effect on the private life as set out in Article 8.[128]

A dismissal is one of the most drastic measures in the work environment. Nonetheless, the arguments of the Court can be transferred to unequal prize money. Especially the findings about the impact of the inner circle, as well as the ability to practice in a chosen profession are relevant.

Professional female football players are earning in average $600/month. 50% of players get no salary at all and 47% have no club contract,[129] only 9% of female players have contracts as national team players.[130] Over one-third of the players do not get paid

---

[124] Fredman, *supra* note 120, at 275-277.
[125] ECtHR, *Rasmussen v. Denmark*, Appl. no. 8777/79, Judgement of 28 November 1984, at para. 29; ECtHR, *Inze v. Austria*, Appl. no. 8495/79, Judgement of 28 October 1987, at para. 36.
[126] ECtHR, *Karlheinz Schmidt v. Germany*, Appl. no. 13580/88, Judgement of 18 July 1994, at para. 22; ECtHR, *Darby v. Sweden*, Appl. no. 11581/85, Judgement of 23 October 1990, at para. 30.
[127] ECtHR, *Okpisz v. Germany*, Appl. no. 59140/00, Judgement of 25 October 2005, at para. 32.
[128] ECtHR, *Boyraz v. Turkey*, Appl. no. 61960/08, Judgement of 2 December 2014, at paras. 40-46.
[129] FIFPro, *2017 FIFPro Global Employment Report*, available at https://www.fifpro.org/media/1knjg5lu/2017-fifpro-women-football-global-employment-report-final.pdf, at 22.
[130] *Ibid.*, at 25-26.

for competing for their national team. From the percentage who get paid, 42% get so little, it does not cover their expenses for competing.[131] 90% of female players are thinking about quitting football early, and 46,8% of them because of financial reasons.[132] Most players are unhappy with the amount received in all three pillars of remuneration: prize money, club salary and sponsorship.[133] These figures show that the remuneration for women players is often not sufficient to provide for their family or own needs (67.2% of players hold a second job).[134]

The inner circle, consisting of the players families, is negatively affected by the lack in remuneration, including prize money. Furthermore, it seems more than plausible that the massive unequal amount of prize money for the same work negatively affects female players identity, self-perception and self-respect. Consequently, the unequal prize money can fall within the ambit of Article 8, subsequently activating Article 14.

Under the jurisprudence of the ECtHR, the difference in treatment of persons in comparable situations can be justified by objective and reasonable justifications, which must be proportional.[135] Here, as shown above, the male and female players operate in comparable situations (namely playing the same game) and are treated very differently in regard to prize money. To justify this unequal treatment, the treatment must pursue a legitimate aim and offer a "reasonable relationship between the means employed and the aim sought to be realized."[136] In our case, a possible justification falls flat on the first requirement: a legitimate aim. There is no reason for treating female and male players differently, neither by FIFA nor by state law. Even if one must recur to revenue-participation, which in itself is a weak argument,[137] it doesn't hold up. FIFA cannot figure the exact revenue for women's and men's World Cups because of their entanglement in broadcasting rights.[138] On the contrary, the different treatment of male and female players

---

[131] *Ibid.*, at 28.
[132] *Ibid.*, at 18.
[133] Poppelwell-Scevak, 'The gender pay gap: how FIFA's Women's Football Strategy dropped the ball.'
[134] FIFPro, *supra* note 129, at 44.
[135] Fredman, *supra* note 120, at 278.
[136] ECtHR, *Boyraz v. Turkey, supra* note 128, at para. 50.
[137] See *supra*, at 15.
[138] See *supra*, at 14.

is in contradiction to the aims of FIFA, the self-proclaimed ones[139] and the ones following from its non-profit-status.

Overall, the jurisprudence of the ECtHR speaks in favour of applying Articles 8 and 14 ECHR to unequal prize money.

B. *Remedy*

If the ECtHR is deciding in favour of the applicants, it will first state the violated Conventions rights. Subsequently, it can order special measures.

The Court could grant just satisfaction to the players (if the state party's national law is not allowing for compensation on its own),[140] if they filed their application according to Article 41 ECHR. This would include at least pecuniary damages according to the principle of *restitution in integrum*. The applicant should be placed in a situation, as she would be without the violation, which can include *damnum eregens* and *lucrum cessans*. The applicants must present a clear causal link between the damage claimed and the violation. Even if it is possible, it seems unlikely that the Court would grant damages for future losses, e.g. because a player quit her career early due to financial reasons. First, the causal connection to the prize money is weak, because there are two other possible ways to generate income as a professional player. Second, the amount of damages would be nearly impossible to calculate, because of the unpredictable nature of prize money in sports. Wining prize money is dependent on so many different situations and their outcomes that it is (part of) gambling.

Nonetheless, the Court is flexible in granting compensation and can determine what is "equitable". It can conclude that the finding of a violation in itself provides sufficient satisfaction.[141] Thus, more likely the ECtHR will assess *damnum eregens* and find similar challenges in deciding on a basis for calculating prize money as the ECJ and CAS.[142] However, in contrast to the other tribunals, the ECtHR does not have FIFA or a NA as a party. Thus, the individualistic approach contemplated by the ECJ might not work

[139] See *supra*, at 26.
[140] Steiner, 'Just Satisfaction under Art. 41 ECHR: A Compromise in 1950 – Problematic Now', in A. Fenyves *et al.* (eds), *Tort Law in the Jurisprudence of the European court of Human Rights* (2011) 3, at 10-12.
[141] Steiner, *supra* note 140, at 12.
[142] See *supra*, at 19.

with a state party as defendant. It seems more plausible that the ECtHR will consider other avenues for compensation.

The Court could also take a broader approach and focus on systemic shortcomings in the law of the state party. The CoE or the Court can determine that the possibility of paying unequal prize money is a structural problem, if they see a further risk of similar violations. Such systematic problems or structural shortcomings call for general, instead of individual measures.[143] This could be a case for the relatively new Pilot-Judgement procedure (PJP) according to R61 Rules of the Court.[144]

In the PJP, the ECtHR must identify the nature and structure of the problem and find a remedial measure, which the state can take at a domestic level. The PJP is not only helping the ECtHR with its caseload, but, on a more general principle, provides the opportunity for states to solve problems domestically and fulfilling their obligations under the Convention.[145]

As a first step, the Court would clearly identify the legislative shortcomings in national legislation allowing FIFA and NAs to pay unequal prize money. The Court might go into further detail about the roots of the problem.[146] This would create the chance to hear the ECtHR elaborate on gender equality in global sports. The Court subsequently must speak on the remedial measures. In a PJP, the description of the remedies remains general and the state has a margin of appreciation in executing them. Thus, it cannot be expected to receive a clear cut-out for national legislation about providing equal prize money. Rather, the Court will leave the concrete legislative proposals up to the state, which must balance differing interests on its own.[147] Nevertheless, the Court can set minimum standards and guidance[148] for achieving equality, thus providing opportunity for a dialogue with the state party.[149]

---

[143] Parliamentary Assembly, Committee on Legal Affairs, AS/Jur/Inf (2011), 18 April 2011, at 3.
[144] Gerards, 'The Pilot judgement Procedure Before the European Court of Human rights as an Instrument for Dialogue', in M. Claes *et al.* (eds), *Constitutional Conversations* (2012) 371, at 377-380.
[145] Glas, 'The Functioning of the Pilot-judgement Procedure of the European Court of Human Rights in Practice', 34 *Netherlands Quarterly of Human Rights* (2016), 41, at 44.
[146] See e.g. ECtHR, *Ananyev and Others v. Russia*, Appl. no. 42525/07 and 60900/08, Judgement of 10 January 2012; ECtHR, *Gerasimov and Others v. Russia*, Appl. no. 29920/05 *et al.*, Judgement of 1 July 2014.
[147] ECtHR, *Hutten-Czapska v. Poland,* Appl. no. 30514/97, Judgement of 19 June 2006, at para. 239; See also ECtHR, *Ananyev and Others v. Russia*, *supra* note 146, at para. 232.
[148] Glas, *supra* note 145, at 53-55.
[149] Gerards, *supra* note 144, at 384.

One outcome of a PJP could be that the state in question must provide legislation to make equal prize money accessible for female football players. How the state would implement such an order *in concreto* is up to the state itself. It must create a legislative situation, which can be applied without violating Articles 8 and 14 ECHR. It could be created by changing rules about bargaining agreements, labour law, non-profit organizations and allocation of money or creating a strict and horizontally applicable equal pay provision applicable to prize money in its domestic law.

Due to Article 46(1) ECHR, all judgements are just binding on the state party. A favourable judgement about prize money cannot be directly transferred to other jurisdictions, neither within the CoE, nor outside. Therefore, the PJP might have a very narrow effect and FIFAs obligation to pay equal prize money being just applicable in one state. However, the effect could go beyond the 23 players of a national team. First, future generations will share the outcome. Second, the new national legislation will be applicable to other leagues and sports, who pay different prize sums. Thus, not only national teams, but also other leagues can profit from the new gained equality.

5. Conclusion

FIFAs unequal allocation of prize money between women's and men's World Cups can be challenged in all three analyzed jurisdictions. The main differences between the approaches are the possible parties involved, which subsequently determines the scope of the remedy. Only CAS can straightforwardly referee between players and FIFA and thus yield the most direct effect on the issue. On the other end of the spectrum is the ECtHR, which can only have state parties as defendants. Accordingly, the effect of a judgement is quite indirect and needs domestic long-term implementation. Yet, a judgement implemented into national legislation can have very extensive effects for (all) female athletes in that state. A judgement of the ECJ in a preliminary ruling would have impact on the outcome of the member states court case and, under the doctrine of *acte clair*,[150] may be transferable to other member state jurisdictions. However, due to the specific

[150] C-283/81, *CILFIT* (EU:C:1982:335), Kornezov, The New Format of the *Acte Clair* Doctrine and its Consequences', 53 *Common Market Law Review (CMLR)* (2016) 1318.

question posed to the ECJ in the proceeding of Article 267 TFEU, the remedy might not be transferable to other leagues and sports.

The content of the equal pay-law applicable in the three different scenarios is not differing much. This is because the equal-pay provisions are all connected. Article 23, the equal-pay rule of the Charter of Fundamental Rights of the EU displays this. According to the Explanations of the Charter, Article 20 of the European Social Charter, UDHR, CEDAW, ICESCR and Article 157 TFEU are basis for its own equal-pay norm, which has the same content as Article 157 TFEU. Additionally, Article 157 TFEU is based on C100. The application of the rules to prize money and the definition of "workers" can be slightly different, but the analysis of the equal pay for equal work framework remains the same. Only Article 14 ECHR seems to have a detached approach, because it is a more general anti-discrimination rule. Here, the pivotal question is the possibility of a justification of the discrimination, which already collapses on a legitimate aim.

Another similarity is that all three procedures highlight the tension between sport, law and power, as well as the public-private binary, however, each of the three jurisdictions handle that tension differently.

It is pivotal for the EU to protect the internal market and its supreme authority in this area. Thus, it has great interest in binding private parties to its own rules, if they could otherwise circumvent EU law. The monopolistic and autonomous characteristics of SGBs, especially FIFA, are challenging the EU. With every step that sport takes towards an economic focus and further away from a private pursuit of happiness, the more the ECJ will step in to provide EU law access. FIFA, with its multi-billion revenue, its supreme power in global football and a dubious record[151] calls for a strict scrutiny by the ECJ. FIFA, the other way around, has an interest in friendly relationships with the EU. Europe is a central place for FIFA and global football. Openly confronting EU law could lead to an accumulation of challenges, e.g. by member states and EU courts scrutinizing (even more) of FIFAs actions. Additionally, circumventing Europe is not a viable solution for FIFA.

[151] See e.g. Weiler, 'FIFA – The beautiful Game – The Ugly Organization', 30 *European Journal of International Law (EJIL)* (2019), 1039 and Gill, Adelus and Abreu Duarte, 'Whose Game? FIFA, Corruption and the Challenge of Global Governance', 30 *European Journal of International Law (EJIL)* (2019), 1041.

Outwaiting equality cannot be a sincere strategy and goes contrary to the self-proclaimed aim of addressing the historic shortfalls in resources and representation.

As the one and only official judicial body outside of internal channels, CAS has the most direct access to FIFA and is dependent on FIFAs caseload, which provides nearly half of its work.[152] In contrast to the ECJ and ECtHR, CAS, as a non-state court, is not bound by public considerations and legislatory aims. In the public-private dichotomy, it is on the same rank as FIFA. It could position itself accordingly. However, CAS has interest in its own existence. Ignoring pivotal national legislation and international norms could diminish its acceptance by states in the long term, a deathblow for an arbitral court.

The ECtHR is positioned differently. It derives its judicial power from derived state authority and needs the cooperation of the CoE states. To hold 47 different law systems and states together, it applies the margin of appreciation doctrine.[153] The margin for states to administer the Convention rights is the broadest, if the interpretations of said right differs in the states. It is at its lowest, if all states are agreeing on one interpretation. All but three states[154] of the CoE have ratified C100, thus promising to ensure equal pay for equal work as set out by the ILO. This speaks to a great conformity of interpretation of the fundamental principle of equal pay and subsequently to a very narrow margin of appreciation. This could encourage the ECtHR to take a clear stand for equal prize money. Most recently, the European Committee of Social Rights, a body responsible to monitor the adherence to the European Social Charter of the CoE, found 14 countries in violation of the equal-pay-provision of the Charter.[155] The ECtHR itself might follow suit. Still, the discussed problems about the time-consuming implementation and indirect way to reach the players remain.

Weighing all advantages and problems of the different approach against each other and taking into account the acceptance and scope of remedial measures, it seems the way which would lead to the broadest and most uniform application of equal prize money is a

[152] Reilly, *supra* note 72, at 69.
[153] Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Conesus and Procedural Rationality Control', *28 European Journal of International Law (EJIL)* (2017) 871.
[154] Andorra, Liechtenstein and Monaco.
[155] CoE, *Right to equal pay: European Committee of Social Rights finds violations in 14 countries*, available at https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809ed61b.

change in FIFAs Statutes in accordance with an arbitral award by CAS. On the one hand, this conclusion seems counterintuitive, as CAS is the weakest judicial body of the three. On the other hand, this outcome perfectly illustrates the public-private binary.[156] Regardless of its economic impact or the status in an individual's life, sport is still deemed to be (mostly) private. Hence, FIFA can pay discriminating amounts of prize money, something a public authority couldn't do. Despite their authoritative and monopolistic status, SGBs remain in the private sphere – regulation of their conduct is most powerful, if it uses an approach at the same level. While an impact by ECJ and ECtHR decision is not excluded, the most potent way is to challenge FIFA in its preferred battleground and convince it to adhere to its own, international and European principles. It is in FIFAs own interest to not discourage women as participants in global football, to enlarge its authority to more people. This must be balanced internally with the structural aversion of changing organizational pathways and path dependencies, which might have hindered advances in the past.

Convincing arguments speak in favour of equal prize money. Hope, as legal ways, remain that FIFA ceases sexism in football. It is able to afford it, without doubt.

[156] Gavison, 'Feminism and the Public/Private Distinction', 45 *Stanford Law Review* (1992) 1.