# A REPORT BY PAUL MYNERS INTO THE SALARY CAP REGULATIONS AND PROCESSES OF PREMIERSHIP RUGBY

**MAY 2020**

# 1. INTRODUCTION

**"This whole affair has done huge damage to our sport. We as the rugby community have always prided ourselves on our ethical code of conduct (perhaps even a little 'holier than thou'). But this affair has dragged the sport and its reputation into the gutter, with non-rugby fans seeing us all in the same boat."**

**– Premiership club supporter, responding to the Myners Review consultation.**

Rugby has always prided itself on being different. Rugby football first defined itself by its differences from the other forms of Victorian football; rugby union defined itself by its rejection of professionalism; when it finally did become professional, rugby clung on to its differentiation from other sports through respect for the authority of match officials and rejection of deceptive behaviour on the pitch. The ideas of fair play and the level playing field are crucial pillars in the construction of the sport's self-image. How rugby integrated those ideas with the need to authorise the game and develop it professionally was always going to be a challenge requiring trust and co-operation from all parties. Indeed, it was the impetus in this direction that led to the imposition of a salary cap in 1999 when rugby's special ethos made it an early adopter of financial regulation.

Just before Christmas, I was asked to conduct a comprehensive review into the salary cap regulations "to ensure a continued level playing field for all clubs in the future". The importance was also stressed of another of the five overarching objectives of the regulations – "Ensuring the financial viability of all clubs and of the Gallagher Premiership competition". At that time, Darren Childs, the CEO of Premiership Rugby Ltd ("PRL"), stressed the importance of the competition being one in which "a group of fiercely competitive clubs…agree to play by the same set of rules on and off the pitch". The salary cap regulations (the "regulations") have been a point of contention for some years. They lie at the heart of balancing the interests of all clubs and those of the entire rugby community against the operation of unrestrained laws of a free market.

Here is the relevant text from my terms of reference:

"PRL has appointed Lord Myners to support and lead the annual review process with the aim of further strengthening the salary cap regulations to ensure that PRL has a world-leading system in both investigatory powers and sanctions. Lord Myners will not consider the level of the salary cap.

"More specifically the review will:

- Identify if there are enhancements to the monitoring and investigatory powers that would improve compliance with the salary regulations in future
- Review and consider all forms of transfer of value to players including co-investments and business arrangements between a club (and/or its connected parties) and a player (and/or his connected parties)
- Consider tools and powers from other sports and financial regulatory sectors around the world specifically tailored to the challenges faced by PRL and its clubs
- Review the sanctions framework in relation to the level and forms of sanctions that should be available
- Identify any additional resources/powers that could be provided to support the salary cap manager with particular focus on the salary cap manager's ability to access and obtain relevant information from clubs (and connected parties to clubs)"

There can be no question that the recent breaches of the regulations by Saracens, which itself evoked memories of a near-crisis along similar lines in 2015, has severely affected trust and co-operation among the clubs and other stakeholders of PRL.

The objectives of my review have been to study the current state of the regulations, to consult widely among those involved in the game at this level, and with the wider rugby community, and to make recommendations about how the regulations should be amended and operated to achieve the overall purpose of the review.

My remit in this task was not boundless. For the avoidance of doubt, this is a report into the regulations regime, not an additional review of the Saracens case or its handling, although that is relevant to the context in which I began my review. I was asked to concentrate on the salary cap. I was not asked to consider other forms of financial control, e.g., a rugby version of Financial Fair Play, or study systems used by other unions such as central contracting of international players. It was not within my scope to make recommendations about details such as the size of the salary cap, but to seek a model that would produce a world-leading set of regulations for the future conduct of PRL, a basis on which to build trust and co-operation.

In coming to my conclusions, I have studied the current situation carefully. On the question of governance, that is not part of my remit and I consider governance only in so far as it affects the regulation of the salary cap. My only general observation is that now the CVC investment has been in place for some time, it might be a good idea to review corporate governance against generally established principles of good governance, which would be sound practice and may have a beneficial effect on the quality of decision-making.

I cannot overemphasise how constructive my engagement with Premiership clubs, supporters and all others in the game has been. I have been struck by the passion for the game both within and without the Premiership. Some 450 people filled out the consultation form, far more than I could have ever imagined. The quality and thoughtfulness of analysis and response does enormous credit to the reputation of the clubs and supporters of rugby union at all levels.

I have met and learned from many others at the heart of the professional English game, including the RFU, the RPA, other past and present players, and those who have previously held senior positions in the game.

At the highest level of club owners and directors, I have heard genuine doubts expressed about the enforceability of any system, and about the good faith of other clubs. I would not pretend that building a regulations structure that is robust, fair and a benchmark for the rest of sport will be an easy task. Without mutual trust and support, it may still not work. But the reputation of the PRL brand is at stake and it is important that everyone both understands and fears the outcome of failure to comply in future.

In short, I do believe that the trust and confidence needed to ensure the workability of a reformed system of regulations can be found. I have no doubt that club owners and leaders accept without qualification that a salary cap is essential to the promotion of professional club rugby in England. They may have different views on the level of the cap, exemptions and sanctions, but they are all wholly committed to supporting an effective system.

At the level of ordinary supporters, those whose investment is profoundly emotional, I have found anger and concern for the future of the game that forms such an important part of their lives. That worry focuses on a lack of transparency, which is also in my view an obstacle to the clubs reaching the point at which trust and co-operation are restored.

To help reach that point, I am making a number of recommendations, which I lay out in detail in the pages that follow. However, I wish to stress the importance of some of them in this introduction so that the reader will understand that they form the crux of my report:

- Greater flexibility for a Disciplinary Panel in relation to the range, and severity, of sanctions to ensure "the punishment fits the crime"In addition to fines and points deduction, the PRL needs to find a way of securing sanctions currently only available to the RFU, such as suspensions and the removal of titles
- The promotion of greater transparency, which will broaden and deepen visibility and scrutiny
- Greater accountability for the board and the executives of the constituent clubs of PRL
- Greater accountability for the players and their agents
- Increased reporting obligations on clubs
- Stronger investigatory powers vested in the salary cap manager function and increased resource to perform this function
- Making the regulations easier for clubs to understand, and for PRL to administer

It is important that my recommendations should be viewed as a package of measures which, if taken together, will go a long way to restoring the integrity of the regulations. They should not be viewed as a menu of options from which to pick and choose.

### 1.1 Principles Guiding this Review

In compiling this report and these recommendations, I have been guided by certain principles:

***Keeping Control of Costs***

PRL is not as wealthy an organisation as one might find in other sports and its financial situation has been considerably worsened by the Covid-19 pandemic. I have no wish to impose a bureaucratic and expensive structure for the sake of it. It is also true that the current disciplinary panel process is expensive and the cost of it is borne by all the clubs. The additional costs required to implement the recommendations set out below are modest and need to be set against the benefits to trust and confidence in professional rugby that will follow if my recommendations are accepted.

***Restoring Trust***

It is overwhelmingly clear from the extensive contributions to my consultation and from the debate in the media that trust has been damaged.

Elements of the way in which allegations against Saracens were handled in 2015 and in which the procedures against them were handled in 2019-20 have led to a diminution of trust in the administration of the Premiership.

As one Premiership club supporter put it:

> *"From the whole Saracens affair, the most frustrating part was a lack of transparency. All media outlets seemed to have different information and until the [verdict] came out, no one could be sure of what was the truth or just made up. No one within rugby has come out of this looking good. If one thing can come out of this it must be increased transparency from all parties."*

Words such as “fiasco” and “shambles” came up repeatedly in the public responses. At its heart, this was prompted by the failure to keep informed a public that cares deeply for the future of the game.

***Broader Interest of the Game***

The conduct of PRL and its member clubs, players and staff all reflect on the different levels of the game, both up to the elite level and down through the Championship, NCA leagues and community game. The youngest mini-rugby player is taught from their first session that the decision of the referee is final and the rules must be obeyed without dissent. Only by coming together to agree those rules do participants in any game produce the atmosphere of fairness and faith in each other that they seek and which makes sport so rewarding.

***Reputation of the PRL***

As laid out in the Professional Game Agreement[1], the PRL joins the RFU and other stakeholders in an overarching commitment to make English rugby the best in the world. As business owners, I believe the clubs also understand the imperative of protecting the positive image of their sport through individual and collective behaviour. For PRL to fall short of those commitments in the pursuit of narrower interests would be detrimental to its reputation and consequently to its ability to trade at the highest commercial level possible. Professional rugby in any country trades to some extent on the ethos of the game and its reputation for fairness and decent conduct. It follows that if you borrow the reputation of a sport, you must treasure it. Doing so ensures that trust will flow not just horizontally between clubs in the Premiership, but vertically from fans to clubs to the RFU and down again, to the benefit of all.

***Sharing the Load***

It is vital that responsibility for the sound and fair conduct of rugby at the professional level is shared between authorities, clubs, players, sponsors and supporters. All have a role to play in maintaining its integrity. That is one reason why the Professional Game Agreement emphasised the priority of player welfare. This remains crucial, as does protecting the interests of supporters and members of clubs, the people who give money and time to pursue their love of the game.

## 1.2 Additional Context

There are some other areas that I mention now because they provide valuable context to my review and report:

***Salary Cap Level and Objectives***

Clause 2.2 of the regulations sets out their five overarching objectives:

- Ensuring the financial viability of all clubs and of the Gallagher Premiership competition
- Controlling inflationary pressures on clubs’ costs
- Providing a level playing field for clubs
- Ensuring a competitive Gallagher Premiership competition
- Enabling clubs to compete in European competitions

As a structure, the salary cap is supported by clubs and players and, from what I have understood, if applied rigorously and honestly, the salary cap will continue to achieve its objectives. I have looked at the ways in which other rugby entities and other sports approach these objectives and have concluded that there is no need to look for an alternative mechanism.

[1] The current Professional Game Agreement was concluded in 2016..

It is right that the clubs together set the level of the cap and I do not offer any advice on this. Linking the level of the salary cap to the annual net central distributions from Premiership Rugby to the clubs seems sensible, as it provides an objective starting point.

***Player Welfare***

I have mentioned player welfare in the principle of "Sharing the Load" above, but I do want to make a couple of explicit points about protecting the interests of players without whom no game would exist.

A concern of many of the supporters who completed the consultation was how player welfare can be affected by compliance with and application of the regulations. The salary cap and the regulations are supported by players. Player welfare is best served by robust regulations and a supporting structure which mean players and clubs are treated consistently, fairly and transparently.

As I have considered the many issues covered by this review, I have consistently asked myself: "Is there anything that I am considering recommending that would be prejudicial to player welfare?" I hope the reader will conclude that I have stayed well away from that line, although I remain mindful.

***Exemptions and Marquee Players***

There are some existing areas of the regulations that are obviously not widely supported. Quite a few clubs expressed a desire to end the marquee player system on the grounds that it is inflationary, overcomplex and unnecessary. I have a great deal of sympathy with this position.

Indeed, I have come to the conclusion that the existence of exemptions and allowances cause both confusion and inflation. Particularly at a time of financial hardship such as all participants now face, it seems wrong to me to continue making exceptions to the principle of the regulations which can drive costs only in one direction – up.

Marquee players are the most obvious example. Under Regulation 3.3, clubs are entitled to nominate up to two marquee – the technical term in the regulations is "excluded", but I use the more readily-recognised word here – players each season, whose salaries are unlimited and not taken into account under the cap. This was introduced to help the competition grow with star quality players (both from home and abroad). This enabled clubs to recruit and retain some of the very best players from around the world and add commercial value to the PRL product. It also played to the objective of improving the performance of PRL clubs in European competition The first marquee player was introduced in 2012-13 and a second was allowed from 2015-16. In 2013-14, there were five players in the Premiership with a total cost to their employing club – including such extra costs as agents' fees and image rights – of at least £300,000. In 2019-20, this number had risen to 99 players. It is also worth noting that seven of this season's 24 highest-remunerated players are not "marquee". The 24 players in this cohort cost their various clubs a total of £14m in 2019-20.

It is clear to me, and to many others within the clubs, that the marquee-players exemption completely cut across the objectives of equality and competition and create unhelpful inflationary pressure on wages. The time is ripe for a review of their continued usefulness.

## 1.3 Flow of this Document

A word on how this document has been laid out. Before I set out my recommendations for reform of the regulations, I first summarise the context in which the salary cap came into being, how it

compares to similar regulations in other sports, and the circumstances of professional rugby within which the regulations operate.

After that, I will lay out a summary of the recommendations grouped according to which body of people and organisations are affected by them.

I then offer a short conclusion and acknowledgements.

In an appendix, I will lay out my terms of reference from PRL so that the reader can judge if I have done as requested.

### 1.4 Love of the Game

A final point: I have throughout this report not assumed a specialist knowledge in the reader. I have, therefore, where I believe it is necessary, explained things in rather more detail than will be necessary for the board of PRL.

Two things shine through from my consultation, particularly the responses to the review's website from well-informed supporters: the first is the love of and commitment to the game and its values, shared by all; the second is a powerful desire for people to be kept informed, within the bounds of commercial confidentiality, of the processes that are undertaken to protect those values.

All sports evoke devotion; all sports rely on devotion. Pride in place, in history, in ethos all contribute to the collective love of clubs by their fans and the desire by players, coaches and owners to reward their love with entertainment and success on the pitch.

Rugby is not unique in this, but it is perhaps special because of the balance it has sought between professionalism and amateurism. Some sports have become tainted by money, some have struggled because of lack of investment. That does not mean their fans are any less devoted. But rugby has a chance to draw a balance between finance and affiliation, between the professional and the amateur. In all the interviews I have conducted for this report I did not meet a single person whose motivation for involvement in rugby was purely financial – this applies as much to the players and coaches as it does to the owners whose deep pockets fund so many of our professional rugby teams.

This character of the game is precious, both in the sense that it should be cherished, but also that it has a financial value. Those who invest in rugby also trade on its special character. They would be unwise as well as unpopular to put it in peril.

I am confident that with the changes I have outlined in my recommendations, the game that we all love can be set on a firm footing for the future growth and improvement of rugby union in England. That is, after all, the overarching commitment to which PRL signed up in the Professional Game Agreement, alongside the other powers of the game, and it is the goal that all share.

# 2. CONTEXT

I have received helpful and extensive information from PRL, and their advisers, about the historical background of the league and its financial position, the reasons why sports use financial regulation, and the reasons for having a salary cap in any sports, particularly in Tier 1 rugby. In essence, salary caps seek to achieve both a competitive balance in the league and financial stability for the clubs and the competition.

## 2.1 History of PRL

The first professional rugby union league in England was the Allied Dunbar Premiership, contested in 1997-98. In the decade before that, there had been a more loosely organised amateur top-tier called Courage League Division One, which had been won exclusively by one of Bath (six titles), Wasps or Leicester (two each).

Professionalism proved a difficult process for all clubs and took time to settle down. The signal that rugby was in a new era was that the first club to win the professional league, Newcastle Falcons, replete with highly-paid stars such as Inga Tuigamala, Rob Andrew and Pat Lam (as well as a very young Jonny Wilkinson), had been promoted to the Premiership only that season.

The story off the pitch, more relevant to my review, was a different one.

In his 2019 book *Unholy Union*, the journalist Michael Aylwin writes: "Studying snapshots of available [financial] accounts throughout the Premiership's history reveals the sort of surges between profitability and recklessness that are characteristic of unregulated sports markets." He reports that the eight clubs that actually filed accounts in 1998 recorded a collective loss of £12m on turnover of £27m, or a negative margin of 44%.

But by 2005, almost half the Premiership clubs were profitable or close to it. That led to temptation, however, and there were rumours that in the 2006-07 season a substantial proportion of clubs were breaching the salary cap that had been introduced in 1999. No formal allegations were made, but the cap was almost doubled the following season. By 2012, cumulative losses among clubs that filed accounts were £21m on revenues of £117m. There was a rather more public salary cap scandal a couple of years later, which I have mentioned in my introduction, which led to another relatively settled financial period in which collective revenues rose to £156m in 2015 and a loss margin of only 9%. With the salary cap rising from an effective £5m per club in 2014 to about £8m – including marquee players – in 2018, and a lucrative new TV deal signed with BT, revenues soared to £210m, but losses also rose to £40m.

Aylwin's comment, which is expressed in journalistic language but is nonetheless worthy of consideration, is this: "In these incoherent surges between hope and recklessness, hope and recklessness, we see an organisation lost, admitting in the form of [the] salary cap that they need to be protected from themselves but not respecting the problem enough to draw up any regulatory measures that bite. A salary cap is a key plank of any regulatory system, but on its own it is weak."

The success of a variety of clubs on the field – Bath Rugby, Wasps, Newcastle Falcons, Leicester Tigers, Sale Sharks, Northampton Saints, Harlequins, Saracens, Exeter Chiefs – has given the league plenty of competitive balance over 25 years or so. Eight of the 21 clubs that have competed in Tier 1 since professionalism have won the title; only six of the 49 football clubs that have vied for the Premier League title since it began in 1992 have been crowned champions.

But there has been less by way of financial stability. In rugby's top flight, Richmond, London Scottish, London Welsh, Bristol and Leeds have all experienced some form of administration or financial collapse (in the case of the last, when they were in the Championship). Wasps also came very close to it in 2012. Of the other former professional clubs, West Hartlepool, saddled with debt, plunged down through the leagues after their relegation in 1999. Orrell, too, now play in the lower tiers of rugby.

But overall, English clubs have prospered on the field, winning the European Champions Cup more times (nine) than any other nation in its 24-year history. Success in Europe is another objective of the salary cap.

In March 2019, PRL signed an agreement with CVC Capital Partners Ltd. The clubs, through a new company, PRL Investor Ltd ("PRLI"), took a 73% share in PRL while the remaining 27% was transferred to the ownership of CVC in exchange for a cash sum.

## 2.2 Financial Regulation in Sport

The essence of professional sport is to achieve a competitive balance between participating organisations, which adds to the entertainment value of individual games and of the league, as well as boosting the attractiveness of events from a commercial point of view. One-sided contests have limited appeal to either the winning or losing participants or their supporters. To that end, the normal operations of competitive markets in which the weakness of rivals is considered desirable do not apply.

Competitive balance needs to be set within a context of financial stability for all participants. Both elements are achieved by ensuring a viable commercial environment for all and by creating a "level playing field" so that the results of competition are not predictable. In most team sports, this is achieved by controlling costs, especially the largest single cost, players' rewards.

There are, broadly speaking, two categories of financial regulation in sport: absolute and relative.

In absolute regulation, such as the PRL salary cap, the same limits are placed on spending for all participants; in relative regulation, such as the UEFA Financial Fair Play rules, limits are set which may vary from participant to participant. The former is generally regarded as being the best way of achieving competitive balance while the latter is more targeted towards overall financial stability.

Ideally, both elements should be the aims of any sport because the competition element leads to deeper engagement by fans, which in turn leads to higher revenues through both crowd attendances and from the appeal of the sport to television audiences, which drives the market for broadcast rights sales.

First introduced in the 1980s in US professional sport, financial regulation now exists across the board in European sport as well. Even sports that did not historically have it, such as Formula 1, are planning on introducing it.

Other methods that have been used to maintain a level playing field in financial considerations include revenue sharing for TV rights (e.g., NFL and to some degree English Premier League football). While not strictly financial, the draft system popular in US sport, particularly the NFL, is also aimed at equalising the chances of success for less well financed teams.

## 2.3 Historical Reasons for Having a Salary Cap

The principal purposes of a salary cap in sport are:

- To help participating clubs to control their financial costs
- To prevent clubs with marked financial advantages transferring those advantages on to the field of play through the control of so many of the best players available that competition is unfair

By using caps, the theory runs, the competitive nature of any sport is preserved and clubs that are relatively less well funded do not suffer immediate disadvantage.

## 2.4 History of the Salary Cap in Tier 1 Rugby

The regulations for a salary cap in what was then English First Division Rugby were introduced after EFDR Ltd commissioned a report by Deloitte and Touche LLP in October 1998 into the financial crisis facing top-tier club rugby in England. This crisis was brought into sharp relief by the fate that befell Bristol in 1998 and Richmond, London Scottish and West Hartlepool the following year.

The Deloitte report, published as these dramas played out in public, made it clear that reducing "unsustainable player payrolls" was as critical to club survival as increasing revenues. The consultants also called addressing the player wage bill "the most immediate task" before the clubs and the board of EFDR. Salary caps had recently been introduced in English rugby league and in the NFL in the US.

Deloitte stressed the need for:

- "first and foremost" tough penalties for non-compliance with the regulations
- The right of EFDR (now PRL) to inspect data related to player remuneration
- The allocation of sufficient resources to monitor and police the regulations

Some said that the system would be plagued by clubs trying to get round it. Deloitte responded by saying that "the level of avoidance is totally dependent on the tenacity with which the cap is policed".

A cap would work, the consultants said, if there were "a genuine desire and consensus on the part of the interested parties to make it work – and a firm resolve (and action to prove it) to enforce it".

I share this view wholeheartedly and believe it still to be true more than 20 years later. I also agree with Deloitte's conclusion that: "Independent wage control is impossible without quality, reliable and regularly inspected financial data [and] [t]he unwillingness to share data is symptomatic of the suspicion within the game and the failure to buy into the concept that a strong competitor makes for a strong league, with commercial benefits for all."

In 2020, in my conversations with them, the clubs indicated they appreciated the need to share accurate and current financial information and stood ready to do so. This meets with the PRL's critical precondition of an effective regulatory regime.

Following the Deloitte report, the remaining EFDR clubs introduced what were then known as "squad-capping" regulations, which were finalised in November 1999.

With some small variations over time, the five overarching objectives of the regulations are:

- Ensuring the financial viability of all clubs and of the Premiership competition
- Controlling inflationary pressures on clubs' costs
- Providing a level playing field for clubs
- Ensuring a competitive Premiership competition
- Enabling clubs to compete in European competitions

It became clear in the years following 1999 that the regulations were helping to stabilise the economies of English club rugby and results in European competitions affirmed that the positive effect had spread on to the pitch too.

There was a hiatus in salary cap growth in 2009 when clubs had been adversely affected by the global financial crisis, which helped to bring finances back towards profitability, but led to English clubs becoming less competitive in Europe, where French clubs profited from higher salary caps and TV rights payments, and Irish provincial clubs from central funding and contracting systems.

Because success in Europe was one of the five stated objectives of the cap regulations, reform was undertaken in 2011, raising the cap and linking it to the growth of league revenues as well as introducing exemptions for so-called marquee players.

In 2012, the first major review of the regulations took place. It led to the introduction of a number of measures including the creation of an independent panel appointed by Sport Resolutions UK to determine alleged breaches and the introduction of investigatory audits.

In 2014, the first of two major breaches of the regulations occurred, with an investigatory audit being launched by the salary cap manager ("SCM") against Saracens and another club, which has never been formally identified. Saracens were charged with a breach of the regulations for failing to co-operate with the investigatory audit. In their defence they argued that the regulations were in breach of competition law. The disciplinary action against both clubs was settled outside the formal procedures on the eve of a first hearing.

In 2016, an "overrun tax" for relatively minor overspends of the cap was introduced. Both Wasps and Harlequins have since been punished under this system, paying a little over £20,000 and a little over £6,000 respectively. Both cases were found by the SCM to be matters of administrative oversight.

I will summarise the 2019 breach case against Saracens, and say more about the 2014-15 incident, under the heading "The Current Situation" below.

***Quantum of the Salary Cap***

The salary cap has been under regular review throughout its history and has risen over time from a starting point of £1.8m per club in 1999. Some directors of rugby made unspecified accusations of cheating as early as August 2000.

The level rose slowly to £2.2m in 2007-08 when an 80% increase to £4m was agreed for the following season ('08-09) to help clubs cope with the demands of playing in Europe against well-funded rivals. I am told there were unpublished allegations that half the Premiership clubs were breaking the salary cap before this large increase.

However, before Christmas 2008 there were already discussions about reducing the cap to £3.5m for '09-10 because some clubs were struggling to attract crowds in the wake of the global financial crisis. No cut was made, although the cap remained the same for the next two seasons. Further change was announced in 2011 to introduce salary cap credits for up to eight home-grown players at £30,000 each. This increased the maximum spend to £4.24m. It was announced at the same time that the following season, to increase competitiveness in Europe, clubs would be permitted one "excluded" or

"marquee" player, whose salary was not counted in the salary cap calculation. The total (including academy credits) rose to £4.5m plus one marquee player in 2012-13.

In 2014-15, the cap including academy credits was set at £5m. The season after that ('15-16) saw the addition of a second marquee player, an increase of the base cap to £5.1m and the boosting of the home-grown player credit to £50,000 each, or a total of £400,000. This set the total cap at £5.5m (including academy players) plus two marquee players.

In 2016-17, academy credits rose again to £500,000 (and £600,000 in subsequent seasons) and the base to £6m, rising to £6.4m in 2017-18, the level where it is today. In total, currently, the cap is £7m (including academy players) plus two marquee players. There is also a credit, brought in for '17-18, of £80,000 per member of the England Senior EPS or international player. The salary cap may be exceeded by up to a maximum of £400,000 a season to replace players who are certified as having long-term injuries.

For the sake of comparison, the French Top 14 salary cap is currently €11.3m (£9.7m at May 2020 exchange rates) with an additional "credit" of €200,000 for each player named in the French international squad. For example, in 2019 this would have been worth €1.6m (£1.37m) to Toulouse. There is no marquee system in France.

Punishment for breaches of the English Premiership cap take the form of what is known in other sporting leagues as a "luxury tax" – i.e., that for certain levels of breach, the club is punished with a financial penalty. Beyond a certain point, known as the "senior ceiling", the breach is considered so serious that the penalty is a much greater fine, equivalent to a 300% surcharge on the amount of the breach and the deduction of points to a level, at the highest point, designed to make relegation of the offending club a near certainty.

***Structure of the Regulations***

For those not familiar with the regulations, below is a brief summary.

**Box 1: A Summary of the Current Salary Regulations**

**Structure:** There are 57 pages of regulations, including main clauses and nine schedules. These are updated every year, at least once a year.

**Parties:** All clubs are subject to the salary regulations and each club agrees to be bound by and comply with the regulations. The regulations are an agreement between Premiership Rugby and the clubs.

**Purpose:** The regulations set out various provisions that support the effective compliance of the salary cap and were introduced to achieve the five objectives described above in an appropriate and proportionate manner.

**Setting the regulations:** The clubs, as a collective, have sole authority to set the regulations. When changes are being proposed before the 31 October prior to the new salary cap year ("SCY"), approval requires 10 out of 13 clubs. Thereafter, as happened earlier this year, any change requires unanimous support.

**The level of the salary cap:** The regulations set out the amount a club can spend, including the various allowances and exclusions.

**Senior ceiling:** Each SCY the clubs set a maximum total salary permitted to be paid directly or indirectly by or on behalf of each club in connection with its senior (non-academy) players. For the last three SCYs, the senior ceiling has been set at £6,400,000.

**Academy ceiling:** There is also an academy ceiling set on the total amount that can be paid to academy players who are not home-grown academy players. For the last three years, this has been set at £100,000.

**Credits:** Clubs are eligible for various credits for home-grown senior players, and senior EPS and international players.

**Excluded players:** Also known as marquee players, in each SCY, each club is entitled to nominate up to two excluded players whose salaries are excluded from the senior ceiling.

**Breaches and overspends:** The regulations specify different types of breach:

- Overspend of the senior ceiling by less than £350,000
- Overspend of the senior ceiling by more than £350,000
- Failure to co-operate
- Others, which could include a failure to provide required documentation or a failure to reply properly to any query raised by the SCM within the relevant timeframe

**Sanctions:** Sanctions and procedures for applying these are set out for the different types of breach. Available sanctions range from a fine of £100 to the deduction of 70 points.

Before leaving the regulations, I would point out the individual objectives of the salary cap should not be given equal weighting when reform of the regulations is at issue. Those who set the level of the cap or make other changes may decide to give one or two of the objectives a greater priority at any given moment. But it is important that the objectives are considered in the round and that decisions are articulated by reference to all the objectives.

### 2.5 The Current Situation

I was asked to conduct my review of the regulations against the backdrop of repeated breaches of the salary cap, some of which are better known than others.

Most recently, on 5 November 2019, PRL announced the independent disciplinary panel's decision relating to a succession of breaches of the salary cap by Saracens. The panel was led by Lord Dyson, the recently retired Master of the Rolls and Head of Civil Justice, the second most senior judge in England and Wales. Lord Dyson was supported by Aidan Robertson QC, a specialist in competition, EU and public law, and Jeremy Summers, a solicitor with deep knowledge of rugby.

**Box 2: The Disciplinary Panel**

This is the panel appointed pursuant to the regulations by Sports Resolutions UK, an independent, not-for-profit dispute resolution service for sport.

If the SCM is of the view that a club has exceeded the senior ceiling or academy ceiling by more than £350,000 and/or the club has failed to co-operate, then the SCM serves a charge on the relevant club.

Within five days of receipt of the charge, a disciplinary panel is appointed and this panel has discretion to decide all procedural and evidential matters and must communicate its decision within 60 days of appointment.

Members of the panel will include one solicitor or barrister to act as chair and two individuals from the "rugby pool" or, if unavailable, solicitors or barristers appointed as replacements.

NB: The "rugby pool" is, in theory, a pool of individuals selected by the board of PRL who have "extensive experience of professional club rugby at the highest level". In practice, a pool has never been created.

The panel found that Saracens had "continually and recklessly failed to comply with its obligations to co-operate with the SCM" and had breached the cap in the three seasons 2016-17, '17-18 and '18-19. A 70 point deduction was considered disproportionate and therefore the panel imposed concurrent deductions of 35 points which resulted in a total points sanction of 35 points, imposed in the 2019-20 season. Lord Dyson also imposed a financial penalty of £5.4m.

**Box 3: League Points**

The results of matches contribute to points in the league as follows:

- 4 points are awarded for a win
- 2 points are awarded for a draw
- 0 points are awarded for a loss, however 1 losing (bonus) point is awarded to a team that loses a match by 7 points or fewer
- 1 additional (bonus) point is awarded to a team scoring 4 tries or more in a match

There is a system of promotion and relegation to and from the Premiership which is based on points accrued during the season. The last-placed club is relegated to the RFU Championship and the top club in the final Championship table is promoted to the Premiership for the subsequent season.

(Promotion and relegation are also subject to minimum standards criteria and, if the team scheduled for promotion does not meet these standards, there is no relegation or promotion.)

Shortly after the hearing, the SCM sought proof of continuing cap compliance. This would have required a forensic audit (see below for explanation). Saracens declined to co-operate with the audit, suggesting, at least in the minds of some, that there were things that they did not want found. Saracens instead struck a deal with the fellow clubs whereby they would accept relegation. After an amendment to the regulations agreed by the clubs, a 70-point deduction was added to their total, which was intended to ensure relegation at the end of the season.

Since this arrangement was outside of the existing salary cap regulations, the clubs negotiated between themselves and agreed a mid-season change to the regulations that allowed the SCM to impose this sanction. They effectively stepped in to the independent disciplinary panel process and made retrospective changes to the regulations, introducing a large-scale point deduction, a decision in which several of the clubs could be said to have had material interest.

**Box 4: Investigatory Audit**

An investigatory audit, also known as a forensic audit, is an audit carried out by any person or persons nominated by the SCM, "the investigator", in connection with a suspected breach of the regulations or a false declaration.

Prior to the audit, the SCM shall write to the relevant club providing brief details of the suspected breach(es) which are the subject of the audit, and the club who is subject to the investigatory audit is obliged to take all reasonable endeavours to co-operate with and assist the investigator.

Full obligations on clubs in relation to an investigatory audit are listed in Regulation 4.9 and include:

- allowing the investigators to access all electronic devices held at the club's premises or controlled by the club
- "so far as is reasonably possible making arrangements for the investigators to meet persons at any third party or connected party that the investigators wish to meet for the purposes of carrying out the investigatory audit"

In addition, if a disciplinary panel finds that a club has exceeded the senior ceiling by £350,000 or more in a salary cap year, then the salary cap manager may, at any time within 12 months of his receipt of that decision, investigate whether the club is now compliant with the regulations by taking on, or nominating another person(s) to have the powers afforded to an investigator in an investigatory audit.

A new Regulation 14.8 was added after the Saracens hearing which states that if a club does not fully co-operate in a timely manner with an investigatory audit, then the SCM may deduct 70 points with immediate effect. This was a mid-season change and so needed unanimous approval by the clubs including Saracens in respect of their case.

But 2019 is, by no means, the only serious breach that is known about. In December 2014, the SCM initiated an investigatory audit in relation to Saracens. When the SCM decided that Saracens failed to co-operate with this audit, he charged the club with a breach of the regulations and, in line with the regulations, a disciplinary panel was convened and a full hearing arranged. On the eve of the hearing, the disciplinary proceedings were settled and it was agreed between the clubs that the case would not be heard and that Saracens would accept undisclosed sanctions as part of the settlement. The salary cap regulations then in force did not provide for disciplinary proceedings to be settled. I conclude that this matter must, therefore, have been settled outside, and regardless of, the regulatory framework, with the consent of the clubs. It might make good sense for settlements to be reached on occasions such as these – I believe that both the Premier League and UEFA have done so – but the critical point is not to give any impression of circumventing the regulations and the officials whose role it is to enforce them in order to reach a settlement.

In other words, it seems – and I have been given no evidence to counter this narrative – that in 2015 the clubs stepped outside the processes they had established and struck a private deal with Saracens without any explanation about the terms of the agreement with Saracens nor any apparent sense of obligation to explain the decisions. It is perhaps not surprising that old enmities bubbled to the surface when the 2019 breach process began and an appearance of settling old scores emerged in various press reports. This was to the detriment of the Premiership.

Multiple sources, who I have no reason to distrust, have told me that there was at least one other top-flight club under an early stage of investigation in 2015 and that this investigation was halted in a similar way, through a negotiation and agreement outside of the regulations. I understand that this case centred on the role played by the club in question in securing a significant number of individual sponsorships for players which were either not disclosed to the SCM or not included in the salary cap calculation. Once again it appears that proper process was set aside, with decisions taken into the hands of clubs so that they could find a route to resolution outside the formal regulatory process.

It strikes me that the events of 2015 were a defining moment for the salary cap. The clubs effectively pulled the rug from beneath due process and established a precedent that the regulations could be changed at any time through negotiation and mutual agreement between the clubs.

This is clear evidence that no matter how robust the regulations are, if the current cap governance rules pertain, the clubs have the power to decide to ignore them and take whatever action they unanimously agree to.

If, as appears to me the case currently, the clubs continue to adopt an attitude that the regulations and procedures are a matter for private negotiation and not a transparent process, then faith in the system (a faith already undermined by the fact that Saracens breached it for not one, but three successive seasons) will not be rebuilt. However much the clubs, through PRLI, might try to set aside their individual interests when coming together to take decisions in the best interests of PRL, this is, in practice, a challenging thing to do.

PRL is not alone in this – similar challenges can arise with trade associations and mutuals – but there are opportunities here to apply principles from codes on governance and the management of such conflicts in a way that will encourage decisions and behaviour which support the clubs collectively and, beyond that, PRL and the broader rugby community.

If all agree that a trustworthy salary cap regime is necessary for the league's financial stability and competitiveness, it follows that the clubs must show unqualified support for regulations and actively promote confidence in the cap among all who take part in and support the game.

**Box 5: The Regulations and Competition Law – Findings from the Disciplinary Panel**

Competition law in the EU is governed by Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and it is well established that sporting rules are subject to competition law in so far as they have potential to apply to sport and this would include the PRL regulations.

It is a general principle that in these circumstances rules or regulations that restrict competition are allowed as long as there is a regulatory or sporting objective that is legitimate, necessary and pursued in a proportionate manner.

The disciplinary panel found that the regulations do not infringe the relevant Article 101 of TFEU and that they have operated and continue to operate in a pro-competitive manner by promoting the five objectives set out in their Section 2.2. of the regulations. The evidence cited by the panel to support this finding included:

- PRL's member clubs have remained financially viable with none folding despite generally being loss-making, and the Premiership competition has generated increasing central revenues, with consequent distribution to clubs
- Salary costs are subject to a cap which is under constant review
- Clubs benefit from a level playing field so far as a fixed salary cap is concerned
- The Premiership competition benefits from competitive balance (a variety of clubs are successful, not just the one with the biggest financial backer), which leads to a competition that is more attractive to spectators and television audiences, which in turn drives greater revenues for all clubs
- Premiership clubs have successfully competed in European competition, none more so than Saracens themselves, who have been a European Champions Cup semi-finalist every year but one since 2012-13 and have won three of the last four European Champions Cup finals

## 2.6 Economics of PRL and its Member Clubs

### *Ownership*

From its inception in the mid-1990s until March 2019, PRL's shareholders were its member clubs (each of which are either private or public limited companies). In March 2019, private equity firm CVC Capital Partners ("CVC") concluded a deal to invest a sum, widely reported as being more than £200m, to acquire a 27% stake in PRL. Under the terms of the deal, during the period of CVC's ownership, any commercial profit received is split commensurate with respective shareholdings. The 73% which is retained by PRL forms the basis of its central payments to the clubs, after paying for certain central costs.

### *Income*

As the organiser of the Premiership competition, PRL's main sources of commercial income derive from the sale of broadcast rights (domestic and international), sponsorship, and the annual Premiership Final played at Twickenham.

Club revenue comes from three sources:

- **Share-based licence payments from PRL.** The Premiership competition made revenues of £75.5m in the year ending 30 June 2019[2], mainly from a television rights deal with BT Sport and a sponsorship contract with US insurance company Gallagher. The cash payments in 2018-19 were the highest level in the company's history for a sixth consecutive year
- **Club income.** Each club generates its own direct income from areas such as ticketing, hospitality, sponsorship, merchandising and commercial use of its facilities on non-match days. In YE2018 this varied from more than £32m (Wasps Holdings Limited) down to £5.3m (Bristol Rugby Club Limited)[3]
- **RFU income.** Each club receives income directly from the RFU under the terms of the Professional Game Agreement. In 2018-19 clubs received £25.5m, shared equally.[4] It has been reported that from next season this becomes a variable payment and, given the Covid-19 effect, is likely to fall.[5] This agreement is worth more than £200m and sees the 12 clubs in the Premiership receive funding linked with meeting the threshold for English qualified players, Elite Player Squads and standards for club academies being achieved

The aggregate income received by clubs from PRL and RFU since 2014-15 is set out below.

| Season | Total income to clubs from PRL & RFU |
|---|---|
| 2018-19 | £76.8m |
| 2017-18 | £75.5m |
| 2016-17 | £62.6m |
| 2015-16 | £48.1m |
| 2014-15 | £47.9m |

[2] Source: Financial Times
[3] Sourced by PRL from Companies House.
[4] Source: Companies House, annual accounts of PRL YE2019.
[5] https://www.theguardian.com/sport/2020/apr/25/premiership-rugby-union-clubs-in-danger-funding-shortfall-from-paused-season

***Costs***

The single largest item of expenditure for the clubs is staff costs (predominantly comprising player salaries). During the 2017-18 season, the aggregate total staff costs of PRL's member clubs constituted over 50% of their aggregate total operating costs. Since the 2007-08 season, total staff costs as a proportion of total revenue have been somewhere between 60-70%, down from 85% at the time the regulations were introduced in 1999.

The clubs manage their salary cap spending very carefully and, on average, spend close to the maximum levels permitted by the cap. For example, in the 2018-19 season:

- Nine of the 12 clubs were within 4% of the senior ceiling
- Headroom – i.e., the gap between a club's spend on salary and the salary cap level of £6.4m – ranged from £20,000 to £575,000, with an average headroom of £111,000 (excluding Saracens' breach)
- This means that clubs spent an average of 98% of the total spend permitted by the salary cap

***Profit***

Nearly all clubs are loss-making, with only one (Exeter) posting a pre-tax profit in both 2017 and 2018. A summary of pre-tax profit/loss is set out below.[6]

| **Club/company** | **YE2017** | **YE2018** |
|---|---|---|
| Bath Rugby Limited | -£2,567,201 | -£3,148,559 |
| Bristol Rugby Club Limited | -£5,241,823 | -£7,236,460 |
| Exeter Rugby Group PLC | £1,143,676 | £909,432 |
| Gloucester Rugby Limited | -£1,197,771 | -£2,181,184 |
| Harlequin FC Holdings Ltd | -£6,624,239 | -£4,954,954 |
| Leicester Football Club PLC | -£938,000 | -£1,236,000 |
| London Irish Holdings Ltd | -£3,069,678 | -£3,492,139 |
| Newcastle Rugby Ltd | -£3,164,117 | -£4,278,255 |
| Northampton Saints PLC | -£1,230,295 | -£2,787,708 |
| Manchester Sale Rugby Club Ltd | -£818,829 | -£1,709,181 |
| Saracens Limited | -£2,750,645 | -£3,886,925 |
| Wasps Holdings Ltd | -£4,705,000 | -£9,723,000 |
| WRFC Trading Ltd | -£8,080,035 | -£5,757,477 |

These figures illustrate just how dependent many clubs are on their owners or benefactors, normally an individual, for viability and sustainability. The continuing operations of PRL in its present model depend on the generosity and financial resource of owners. It was clear to me after listening to the owners that many are not motivated by the potential to generate profit from the game, but to compete and win on the field.

The mentality of many of those individuals is indicative of the unique economics of sport. It also suggests that without regulations limiting their ability to spend more, owners/benefactors who could afford to would spend even more than they currently do in pursuit of victory.

[6] Sourced by PRL from Companies House.

The effect of the salary cap since its introduction has therefore been to control rising costs for clubs relative to increases in revenue. The cap could be said to act as a safety valve against unsustainable losses. However, it is obvious that the uncertain outcome of the current season with all the attending economic implications may change the economics of PRL's member clubs. Their long-term financial viability was not assured before this moment; it is far less so now.

### 2.7 Ownership structure

Box 6 below sets out my understanding of the current ownership and governance structures. This is relevant to my report, because it decrees who has ultimate responsibility for decisions about the salary cap regulations.

**Box 6: PRL Governance**
PRL has two groups of shareholders:

- **CVC Capital Partners ("CVC")** owns 27% through one of its funds - CVC Fund VII, which also holds other rugby-related investments. I am told this fund is likely to remain active until at least 2027 with the option of extending beyond that time
- **The 12 Premiership Rugby clubs and Newcastle Falcons** (who will be a Premiership rugby club next season), who own the other 73% indirectly

Within this structure, there are a number of bodies who have a role to play with respect to governance of the salary cap:

- The **main board of PRL** is comprised of three club representatives, three CVC representatives, and an independent non-executive chair. Board meetings are attended by an independent non-executive observer, the chief executive officer and the chief financial officer. Only the chair and club and CVC members are entitled to vote. As I understand it, the PRL has delegated authority for the regulations and cap to a **sporting and regulatory committee**, whose members are nominated by the clubs. The detailed arrangements are confidential.
- The **PRLI board** consists of 13 club-appointed directors and a non-executive chair. Board meetings are attended by the PRL CEO. Only the club members are allowed to vote (and this includes any original Premiership club currently in the Championship). It is this board that approves changes to the salary cap regulations. In particular:
    - A supermajority (10 out of 13) is required to agree the salary cap regulations and the actual amount of the cap for any particular season or to agree changes to the salary cap outside the current season
    - Unanimous approval of all clubs is required to make changes to the regulations or the level of the cap mid-season.

  PRLI has no executive function or resource. It relies upon PRL in this regard.
- There is a **salary cap sub-committee ("SCC")**, which acts as an advisory group to support the clubs in the PRLI forum. It does not have the power to make decisions but does make recommendations about the regulations and level of the cap. It is chaired by the PRL director of rugby and its membership is prescribed in the regulations to include at least four representatives from the clubs who are appointed by the clubs.
- The **SCM**, whose full role is **head of governance and regulation**, reports to the PRL director of rugby with a dotted line to the CEO. Currently, the SCM may periodically present salary cap KPIs or other information to the PRL main board but there is no standing item on its agenda or formal reporting structure in place.

# 3. RECOMMENDATIONS

***Introduction***

Before I come on to my recommendations, I would like to refer again to my terms of reference, which asked me to further strengthen the salary cap regulations to ensure that PRL has a "world-leading system in both investigatory powers and sanctions". As I hope I illustrate in this report, PRL is facing some obstacles to the goal of a fair and effective system. However, by implementing the recommendations I set out below and by adhering to the common good rather than pursuing individual aims, I believe it is quite possible to operate a successful system underpinned by mutual trust and co-operation.

It is important to point out that if there were an easy solution to this complex issue, the regulations would not be 57 pages long, nor would it have been necessary for a comprehensive review of this nature. Some areas of the system now in place do offer the basis of stability. These include the practice of an annual auditor-led review of all clubs, which is of an unusually rigorous standard, and the existence of an independent disciplinary panel with a powerful level of financial sanctions available to it. The fact that the regulations have already withstood a legal challenge in the 2019 Saracens case is also a reflection of its solidity.[7]

***The Continuing Need for a Salary Cap***

As I said in the introduction to the report, we are living in extraordinary times for sport, for business and for society in general, forced upon us by a virus. The current health crisis and the economic climate associated with it will be at the forefront of issues facing PRL and these, inevitably, will require tough decisions and actions. Yet I believe it would be a major mistake for the clubs to be distracted by economic turmoil from implementing reform of the regulations to make them effective in achieving their objectives. If these regulations operate fairly, in a way that removes the temptation and perceived opportunity to "game the system" and achieve unfair advantage, then PRL will have a more secure and more desirable basis on which to build its future as a competitive league.

My recommendations have at their heart a wish to see professional rugby expand its horizons, using a basis of fair relations between clubs, players and supporters. Whatever the effects of Covid-19 on the economics of the game, it is only by expanding those horizons that professional club rugby in England can expect to flourish both on the pitch and in its coffers.

***The Spirit of the Game***

In laying out my recommendations, I have tried to find balance. The dominant aim has been to find a balance between maintaining healthy competition and trustworthy co-operation.

But I have also sought a balance between clarity and openness in the operation of the system on the one hand and practicality and enforceability on the other. That also implies a balance between language in this report that is sufficiently legally precise and language that makes plain the intention of each section as well as the intention of the reforms as a whole.

It is my assumption that PRL will instruct its advisers to turn these recommendations into legally binding and workable regulations, but I would make one very clear statement of principle:

> If any club or other participant in professional club rugby seeks to use the legal definition of certain terminology to get around the clear intentions of these recommendations, then they have entirely missed the point of this exercise and failed to learn the lesson of this painful episode in the history of our game.

[7] See article by Benoit Keane in the CPI's *Antitrust Chronicle*, April 2020.

The spirit in which PRL enters into this aspect of the competition, a competition that the company was formed to enable, is every bit as important as the spirit in which their players take to the pitch.

Any player knows before the whistle blows that the referee may not stick exactly to the letter of the laws of rugby union, but as long as the ref applies them to both teams fairly, they are the rules by which the game is played: if you are caught straying offside at a ruck, you can expect to be penalised; if you are caught in a "professional" foul you can expect a card that will most likely deprive your team of points as well as playing strength; and if you are found to have set out to harm deliberately the health or interests of others, you can expect to leave the field of play, perhaps for ever.

If clubs view these recommendations in that light, they will have no trouble in understanding the spirit of the regulations and they will have no need to employ expensive legal advice on how to comply with them.

***The Objectives of these Recommendations***

Taking an optimistic view, I believe that the Premiership and the wider game of English rugby has an opportunity now to present a different face to its public when it returns. It can use this moment to appeal, as I am convinced it must, to a broader audience by living the values that all lovers of the game espouse: of fairness, of respect for the rules as well as for those who apply them; above all, of the pursuit of a common good.

My recommendations form an integrated package of change driven by a need to re-establish the credibility of the salary cap. They are not, as I have said elsewhere, a menu from which to pick certain morsels that please the appetite and ignore others.

While the package is broad ranging, its core purpose is to promote a clear and accountable process for cap governance, rooted in the published objectives, and enabled by effective monitoring and investigating processes and enforced, where necessary, by meaningful sanctions.

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I now turn to the detail of my recommendations on how to meet these challenges in the interests of reform to produce the open, fair, prosperous and efficient operation of professional club rugby in England. They are grouped broadly into the following sections:

- Separation of investigation, prosecution and enforcement
- Transparency
- Drafting of the regulations and definition of salary
- Club accountability
- Player accountability
- Accountability of others
- Power and resource of the SCM and the auditors

## 1. Separation of Investigation, Decision to Prosecute, and Enforcement

It makes sense to me that the clubs have ultimate responsibility for setting their own sporting rules. This is an almost universal approach across the most successful professional sports leagues in the world. For example:

**Premier League:** Its board of directors consists of a chief executive, an independent chairperson and an independent non-executive director, but the setting and amendment of the rules of the league (which include financial regulations akin to the salary regulations) are reserved solely for the member clubs to be voted on by members' resolution.

**NFL:** The ultimate decision-making body in all matters (including game rules, agreeing a CBA, league policy, the hiring and firing of the commissioner etc) is the executive committee. The executive committee is made up of 32 members, one representative (usually an owner) from each of the league's 32 clubs.

**NBA:** The ultimate decision-making body is the board of governors, which carries out "general supervision of the affairs of the association". The board of governors is made up of 30 governors, one from each of the NBA member clubs (again, usually an owner).

In addition, the recent Saracens case showed that the involvement of all the clubs (and not just some thereof) in the approval of the salary regulations improves the legal defensibility of the regulations. That the salary cap is "kept under continuous review by the clubs" and that "the regulations are carefully worked out and reviewed with the agreement of the clubs" was cited with approval by the disciplinary panel chaired by Lord Dyson in the Saracens v. PRL decision.

In certain circumstances, when a non-club shareholder is also involved, there are decisions that need to be escalated beyond solely the clubs' authority. In Formula 1 this includes changes to regulations that are made for safety reasons and, in the case of PRL, this includes changes that could prove to be anti-competitive or have a commercial impact on PRL as a whole.

However, while it is important that clubs retain control of the setting of the regulations, they should not be involved in their application or enforcement. Historically the clubs have been able to impose themselves on the administration of the regulations, including the disciplinary process, and this has undermined effectiveness. I believe this is sometimes done purely out of curiosity as they try to find out what is going on. But at times, by doing so, the clubs have effectively compromised the proper process that they themselves set up. In the past, they have exercised the power to take matters into their own hands, deciding the guilt of their rivals and decreeing what sanctions should apply, thereby acting as judge and jury for fellow competitors.

To illustrate this point, I give a few examples:

- The last-minute settlement in 2015 of the salary cap breach case against Saracens, at a stage when the SCM and his legal advisers had determined that there was a case to answer and the disciplinary panel was scheduled to sit the following day
- A second incident in 2015, when an unnamed club was in breach of the regulations in an arrangement involving player sponsorship. I have been told that the clubs also stepped in in this instance and struck a private deal, thus heading off a formal charge and disciplinary process
- Saracens' recent choice of a 70-point deduction over an investigatory audit and the resultant rushed changes to the regulations to make them conform to the collective will

In a related observation, one aspect of the regulations is drafted explicitly to give clubs the ability to opine on the appropriate sanction for a peer. In the event that a disciplinary panel finds that a club has recklessly or deliberately breached the ceiling and that any chair, CEO or finance director has signed a false certification, then the other clubs can choose whether or not they want to remove that person from post. While this is currently allowed within the regulations, it seems *ultra vires* to the power that the clubs should be allowed to wield. This is a power that should be reserved for the disciplinary panel alone.

The clubs must now step back from the application and enforcement of the regulations. The board of PRLI must decree that it will no longer engage in matters relating to investigations, sanctions or to the disciplinary panel's processes related to the salary cap. They should hear no reports, aside from what is made public, and give no instructions, reserving these matters for independent bodies. The clubs

must commit to abide by any disciplinary panel ruling with respect to findings of culpability and recommended sanction *(Recommendation 1.1)*.

**Recommendation 1.1 –** Enshrine a commitment by the clubs to respect the independence of the regulations.

**Recommendation 1.2 –** The current discretion for clubs to choose to remove a director of a club pursuant to Regulation 14.7 should be removed.

Currently, investigatory powers are not separated from the decision to prosecute. The SCM runs all investigations and uses his judgement to determine whether there is sufficient evidence to bring a charge and initiate a disciplinary panel. This places a large amount of decision-making power in the hands of a single individual, who has to decide whether there are grounds for pursuing an investigation and, potentially, to decide whether there is sufficient evidence to bring a case before a disciplinary panel with a reasonable prospect of success. These are important and expensive decisions and the process would be more robust if it involved some independent perspective. In other professional situations, such as the Solicitors Regulation Authority or the General Medical Council, and, of course, in criminal prosecutions, investigatory powers are independent of prosecution decisions.

In the case of PRL I am not aware of an instance to date where this lack of separation has created problems. The current incumbent has effectively chosen to use external advisers to decide whether there is a case to bring and is an independently minded individual. However, in different circumstances in the future, with different individuals involved at PRL and the clubs, the existing system could facilitate intimidation or manipulation.

For this reason, I recommend that PRL appoints an independent cap governance monitor ("CGM"). The CGM would have reserved powers in relation to the regulations, including the sole authority to trigger a disciplinary process and the appointment of a disciplinary panel, in the event that the SCM finds sufficient evidence of a breach *(Recommendation 1.3)*.

**Recommendation 1.3 –** Appoint an independent cap governance monitor, with reserved powers in relation to the enforcement of the regulations.

***Role of the Independent Cap Governance Monitor***

The CGM should be someone with a background in law at a senior level and, ideally, an interest in sport in general, even if not necessarily rugby, who can act as a sounding board for the SCM and provide the necessary oversight.

The SCM should continue in the role of monitoring and investigation in line with the regulations and, when he is of the view that there is a case to be heard, this case should be brought to the CGM, who will decide on the next steps, including possible referral to the disciplinary panel. The CGM should be empowered to approve the costs associated with the formal disciplinary panel process. To avoid additional bureaucracy and cost, it would make sense for the SCM to continue to run the process after the CGM has approved a prosecution.

To ensure that the CGM can express his or her independence, I recommend that they be required to publish, probably in the non-statutory part of the annual report, their own report on the conduct of PRLI, the SCC and the SCM in the performance of their duties. I believe this would be facilitated if

they were present at all meetings of the SCC and that part of any meeting of PRLI which was expected to discuss the salary cap.

The proposal I am making would establish a clear break between the process of investigating breaches of the regulations and the point at which a disciplinary panel is assembled. This reform would take the PRLI board and the CEO out of the equation when considering any aspect of regulatory breach.

The CGM should also review and advise on appropriate SCM resource and remuneration.

**Box 7: Cap Governance Monitor – Roles and Responsibilities**

- Receive evidence from the SCM and decide whether an investigation should proceed to any of the following next steps (and authorise necessary expenditure):
  - The serving of a charge, which will result in the appointment of a disciplinary panel by Sports Resolution UK.
  - A decision that a proposed case is credible but currently too weak, with an indication to the SCM of where more evidence might be required to build a stronger case
  - A decision that there is no case to answer and that the investigation should cease

  If necessary, the CGM should seek the advice of PRL legal advisers in coming to their decision.
- Consider, and approve or reject, any proposed divergence from the disciplinary process set out in the regulations, including any settlement agreements
- Provide oversight of activities of the SCM, who will report to it quarterly on any discretionary decisions and action taken for more minor breaches, e.g., failure to report
- Act as a sounding board for the SCM, particularly concerning issues where confidentiality restrictions prohibit or limit conversations with others
- Advise on appropriate SCM resource and remuneration. The latter should be arrived at in an independent way, if necessary taking guidance from the PRL HR function to put it in the context of overall PRL employee remuneration, and should be recommended to the PRL remuneration committee for the final decision.

## 2. <u>Transparency</u>

Alongside shortcomings in governance, the lack of transparency in the system has caused its own set of issues. As a general point, it is accepted in the business world that trust within organisations and between them and the people they rely on for their reputations and business models – customers, shareholders, employees, the media, policymakers, regulators, local communities – is a fundamental need. Secrecy and obfuscation are the enemies of trust.

Over the years in the top tier of English club rugby, a variety of dramas involving salary cap infringements, negotiations and awarding of sanctions has played out against an unhelpful backdrop of secrecy. Inevitably, there has been a corresponding culture of unauthorised leaks. Most recently, the judgment from Lord Dyson was withheld from publication, contrary to Lord Dyson's wishes.

This happened at a time when the direction of travel in public life is towards open justice with as much of the process held in public as is possible. Open justice is a cornerstone of our criminal and civil justice systems. Its primary purpose is to ensure that a trial is fair and that the public have confidence in the process itself. With some exceptions, criminal cases and employment tribunals are heard in public, as are the hearings of regulators such as the General Medical Council and Solicitors

Regulatory Authority. A sport's governing body should be as transparent and open as reasonably possible. UK Sport's "A Code for Sports Governance" encourages sports organisations to be transparent.

***Announcement of a Charge***

Of course, the regulations are ultimately a private contractual arrangement between 13 clubs, and some of the information relating to the cap will be financially sensitive and/or involve personal player information. For these reasons, I understand there is a balance to be struck between confidentiality and transparency, but I have a personal bias to openness as a facilitator of trust.

Currently, the SCM is under a duty of confidentiality with respect to any disciplinary proceedings brought against a club for breaching the regulations and this extends to the existence of those proceedings.

To establish transparency and reduce unhelpful speculation and leaks, once a charge has been made its substance should be announced as soon as is reasonably practical and definitely within seven days by reporting on the PRL website, or some other equivalent means, and the details and dates for any hearing should be provided *(Recommendation 2.1)*.

**Recommendation 2.1 –** Announce the fact that a charge has been brought as soon as is reasonably practical and within seven days, with a brief summary of the substance and details, and proposed dates for a hearing.

***Publication of Decisions***

Once the proceedings have ended, it is up to the clubs to decide whether the full decision should be published. In the recent Saracens case, the 13 clubs could not initially reach agreement to publish. After much speculation in the media, this was revisited and the clubs unanimously agreed but, before this could happen, a non-redacted version was leaked to the press.

It is common for sports to publish their disciplinary proceedings and there are considerable advantages to doing so. Publishing full written reasons allows other participants to understand in greater detail the nature of the allegations facing the participant charged and how those allegations were ultimately considered and determined by the decision-making body. It helps foster a greater understanding and trust in the process on the part of participants, other stakeholders and the public. It is also likely to encourage whistle-blowing and future witness participation, to the greater good of the game. Moreover, publication encourages tribunals to maintain the quality of decision-making. For these reasons I recommend that PRL publishes full disciplinary decisions as soon as is reasonably practical, whatever the outcome, with the discretion to redact confidential or personal data. These announcements should be agreed in advance with the disciplinary panel as to their accuracy, balance and completeness *(Recommendation 2.2)*.

**Recommendation 2.2** – Publish disciplinary decisions in full, with the redaction of confidential information or personal data.

After consideration, I have decided **not to recommend holding the hearing in public**. Although it would be a strong deterrent and in the public interest, this is balanced by the additional cost that would be required to enable the public to attend, and the sensitivity of some of the personal and financial information involved. However, I recommend that this is kept under review by the PRL

board and, in the event that another club is found guilty of widespread abuse of the regulations, would have no reservations recommending that all future hearings should be in public.

***SCM's Annual Report***

The recommendations set out above focus on the more serious breaches of the cap where there is a formal charge and a process ending with a hearing before an independent disciplinary panel. PRL should, in my view, apply these principles to all breaches of the regulations, including those that are of a more minor and administrative nature, and publish details of every sanction as part of the SCM annual report *(Recommendation 2.3)*. The annual report should draw on the auditors' findings and should also detail any adjustments, decisions made, breaches and the rationale for any changes to the rules or guidance. I note that PRL has already been doing much of this to some extent, but it has not all been made public. I can understand that a club may consider it to be unfair to suffer the public stigma for a purely administrative breach, such as the accidental late submission of a contract to the SCM. In my view, the countervailing considerations prevail. Ultimately, being publicly held to account will encourage compliance with all aspects of the regulations. Something similar happens in anti-doping and I see no reason why compliance with the salary cap should not be treated in the same way.

**Recommendation 2.3 –** Include details of all breaches and sanctions in a comprehensive SCM annual report, which is made public.

***Guidance to the Clubs from the SCM***

The recommendations set out above will significantly improve transparency where there is a breach of the regulations or a new area of uncertainty about their application.

I now turn to whether day-to-day transparency can also be improved.

The operation and regulation of the salary cap can be complicated for clubs as there are so many variables. To mitigate this complexity, the SCM needs to provide significant guidance throughout the season *(Recommendation 2.4)*. The guidance that the SCM gives to one club is an important part of the evolution and understanding of the salary cap. In my view, that guidance should be made public where it concerns a material and novel point of construction or management of the salary cap.

**Recommendation 2.4 –** Publish guidance from the SCM regularly and make this publicly available.

***Publication of an End-of-Season Report***

The SCM receives a significant amount of data from each club each season. This information is not just used to check each club's compliance with the regulations. With the assistance of PRL's accountants, the SCM aggregates the information (so as to maintain confidentiality) and presents the findings to all of the clubs at the end of each season. The report is comprehensive and is used to keep the operation of the salary cap under constant review. This review allows the sport to continuously refine and develop not just the level at which the salary cap is set, but also the various exemptions that are afforded to each club.

I see no reason why this report, or a suitably revised version of it, should not be published *(Recommendation 2.5)*. It would provide the public and the media with a significantly enhanced degree of transparency about how the salary cap operates in practice without compromising individual

clubs' confidential personnel and financial information. I note that there is precedent for such reporting in sport: the World Anti-Doping Agency ("WADA"), for example, publishes an annual report that covers topics such as testing statistics and disciplinary processes and a separate compliance annual report, which is intended for signatories to the code and provides information about the maintenance and implementation of the WADA code.

**Recommendation 2.5 –** Publish general information to share details about the operation of the cap and how it is achieving its objectives.

***Publication of Any Change to the Regulations and Supporting Rationale***

To make sure that any process and resultant decision to change the regulations is robust and transparent, I recommend that PRL makes any such decision available to the public through the PRL website *(Recommendation 2.6)*. This covers any decisions relating to the regulations, including the level of the cap, exemptions, allowances or credits. As well as including details of the change, the publication must include a full rationale and explanation for how the decision is consistent with each of the five regulatory objectives.

**Recommendation 2.6 –** Publish any changes to the regulations, along with a rationale for how it is consistent with the five regulatory objectives.

## 3. Drafting of the Regulations and Definition of Salary

I now turn to the drafting of the regulations themselves.

The regulations are 57 pages long. They are comprehensively drafted in an attempt to address an almost endless array of changing payment scenarios. During my interviews and conversations, it has become apparent that, in an admirable attempt to allow flexibility in remuneration, we have seen the emergence of grey areas which have provided opportunities for misunderstanding and manipulation. I was struck by more than one of the people I interviewed expressing pride in their authorship of ingenious ways to circumvent the regulations, assuming this to be an acceptable way of gaining competitive advantage.

Rugby is a game where the competitors are continually finding ways to gain an edge or advantage by working around the fringes of the rules – one thinks of the "caterpillar" now commonly formed at the base of defensive rucks – and this follows into off-field systems. Neither on or off the field do such practices advance the interests of the game, its supporters and of those who depend upon it for a living. My recommendations are designed to discourage this type of behaviour and the regulation drafting is a fundamental component in this.

***Rules Backed up by Principles***

Some have argued for a much shorter set of regulations based on principles rather than detailed rules. Principles-based regulation has been adopted by a number of regulators and can be highly effective. It allows regulated bodies to decide how best to align their individual objectives and processes with specified outcomes, rather than providing a prescribed format for compliance. However, my view is that, for PRL, where we are dealing with direct competitors and have an objective of creating a level playing field for competitive balance, principles alone will not provide the clarity needed. The regulations need to continue to consist of detailed rules.

Prescriptive drafting does have its limitations and can be exploited by those looking to take advantage of particular circumstances that may not have been envisaged or even possible when the drafting was completed. To mitigate this risk, I recommend supplementing the rules-based approach with a set of guiding principles, such as a duty to act honestly, with integrity and in accordance with the spirit of the regulations *(Recommendation 3.1)*.

**Recommendation 3.1 –** The regulations should remain as a set of detailed rules, backed up by principles.

### *Definition of Salary*

One of the most important parts of the regulations is how to define what is and what is not salary. The overriding objective is to achieve clarity so that each club can plan effectively and be sure about what constitutes salary.

**Box 8: Summary of the Current Definition of Salary**

The key aspects of the definition of salary in the current regulations are as follows:

- Subject to certain exceptions, each club can spend up to a fixed amount on paying all their players within each salary cap year, which is defined as the period from 1 July to 30 June. In the ’19-20 season, the amount was £6,400,000. There are no limitations on what individual players can be paid provided that the overall cap is respected.
- The regulations exhaustively list what types of transfer of value will be treated as salary. The list includes a broad range of types of transfer of value from a club to a player, from those that can be more readily defined, such as wages, match bonuses, childcare or the provision of accommodation, to more general categories such as “any payment or benefit in kind which the player would not have received if it were not for his involvement with a club”.
- There is then a separate list of types of payments that will not be treated as salary. One notable example, which was the subject of intense scrutiny in the recent Saracens proceedings, is the following: *any transfer of value that the SCM reasonably concludes on the balance of probabilities should not be considered salary, after having taken into account 16 factors listed in the regulations*. Another example is insurance premiums paid directly by a club for private medical insurance policies.
- Qualifying “salary” is salary whether it is paid directly or indirectly from the club (or its “connected parties”) to the player (or his “connected parties”). This broad approach is taken to try to limit straightforward forms of circumvention (such as payments being made from a shareholder in a club, or a business associate of such a shareholder; or payments being made to a relative of, or a company owned by, a player).
- There are then several exemptions that have evolved over time such as the ability of teams to nominate two players whose salary is excluded from the salary cap altogether.

In their current form, if the regulations are silent about a type of arrangement, then there is an assumption that a payment will be allowed and will not be included in the cap, no matter how closely it might resemble salary. This provides opportunities for the creation of new and complex vehicles for value-transfer. If challenged, clubs can claim that the arrangement was not covered by the regulations and so need not be included in their cap. This approach is akin to putting candy in front a baby. The presumption needs to be reversed. Everything received by a player from a club or party connected to a

club, assuming it is a permitted payment, should be automatically included within the salary cap, except for a small number of clear exceptions *(Recommendation 3.2)*. I understand that there are a few elements of salary that need specific treatment (for example, redundancy payments, flights, signing and agents' fees) but, aside from these, the full amount should be counted in salary and not just the "benefit" as HMRC might tax a benefit.

**Recommendation 3.2 –** All permitted payments to players should be automatically included within the salary cap, except for a few clearly communicated exceptions.

The list of excluded items should be carefully determined and shared by the SCM, who has already developed a schedule, based on experience and commonly occurring examples and will be able to determine how this list needs to evolve over time as part of the annual review. It is likely to include types of sponsorship and ambassadorial and promotional work, education fees and testimonial year income.

The exceptional items must be pre-approved by the SCM *(Recommendation 3.3)*, who should continue to use the criteria outlined in the regulations, evolving over time, to determine whether they should be counted as salary. If they are not presented to the SCM for determination, then the item should be automatically treated as salary.

**Recommendation 3.3 –** All exceptional items to be pre-approved by the SCM, otherwise they will be automatically treated as salary.

For exempt arrangements that are currently in place and would now fall into the definition of salary, these should be counted as salary from next season until they expire.

***Prohibited Payments***

Aside from deciding which payments should fall within or without of the cap, there is another decision to be made and that relates to which payments are allowed and which payments are prohibited. There is a rich mosaic of ways in which value can be transferred to a player and, as I have heard, this is continually evolving with new inventive schemes developed. Agreeing that everything is salary except for a few limited exceptions and requiring SCM pre-approval will go a long way to simplifying this, but there remains a challenge for certain types of payment. I did consider recommending that players are only able to receive value from a dramatically slimmed down list, as is the case with some other sporting bodies such as NFL. It would side-step a lot of issues, but I think that would be disproportionate and would prejudice players unfairly by restricting their earning potential. Therefore, I recommend prohibiting payments that fall into one or more of three different categories *(Recommendation 3.4)*:

1. **Co-Investments and other subjective payments:** These are the transfers of value that are less certain than others and may require subjective judgements in order to value them. The valuation of these payments can be complex and involve the SCM appointing external advisers. I recommend that only transfers of value where the amounts are fixed or capable of objective definition should be allowed. This means that those payments that cause the most ambiguity and complexity should be prohibited. The following types of transfer are examples:

    **Co-Investments**: The precedent established in the 2015 settlement was that co-investments between clubs and players and their respective connected parties are

permitted if they are genuine arm's length transactions. The SCM has discretion to determine whether or not this is the case but, in practice, this is very difficult to do. There is also no bulletproof way of valuing these investments and the process of doing so is expensive and time-consuming. While there is an argument that co-investments are a helpful way of safeguarding a player's future welfare, as shown in the recent Saracens case, they are usually used for those players who are least in need of welfare support. For these reasons, I recommend that all co-investments are disallowed. This is the case in many other sports including US professional basketball.

**Financial loans***:* A loan is an easy way to circumvent the regulations. A club could loan a player money on the informal understanding that the club would not try to recover the money from the player. While I considered banning loans altogether, I can see that there are occasions when a loan is a reasonable and proportionate arrangement. For example, as with many employers, a club might provide a season-ticket loan or an advance on salary to satisfy a player's short-term cash flow problem. To ban these types of informal arrangement would seem to be taking matters too far.

I am persuaded that the risk presented by allowing loans can be sufficiently mitigated by requiring that (i) the SCM is informed of the arrangement in advance, (ii) that the loan is repaid in the same salary cap year and (iii) it is repaid by way of a deduction from a player's wages, so the SCM can easily check that it has been repaid. If these requirements are not met, the full amount of the loan should be treated as salary in the salary cap year in which the player received the money.

2. **Payments post-playing career:** One issue that was highlighted by the Saracens case surrounds the effective policing of arrangements between a player and a club (or their respective connected parties) which persist once the player has left the club in question, or even after they have retired or left the country. I can see no good reason why a player should continue to be remunerated for player services once the player has left the club. In my view, this should be prohibited. I do not object to limited exceptions, such as testimonial games played after a player has left, provided the exception has a sound justification. Also, I understand that some players will continue to work with and be paid by a club after they have left in other capacities, such as coaching or working on match days in hospitality. These arrangements should be allowed to continue, but it must be clear that any payment that is received is for these services, set by reference to market rates and is not a way of further compensating players for playing for the club after they have left.

Advocates of allowing arrangements such as the property arrangements in the Saracens case have pointed out that this is important for player welfare and protecting a player's future after rugby. While, in principle, I of course support initiatives designed to improve player welfare, schemes such as the one used by Saracens give rise to significant regulatory problems as described in (1) and (2) above. Furthermore, I am not convinced that any such scheme would be used to protect the welfare of all players equally. I consider it likely that the more extravagant schemes with a significant administrative burden, such as the property co-ownership arrangements, would be reserved for those who need it the least, namely the best and highest-paid players. For these reasons, my view is that these types of arrangements should not be allowed to continue. I do, however, strongly encourage clubs to put in place schemes designed to promote player welfare after retirement and note that there are ways of doing this which are actively encouraged by the regulations, such as the carve-out for clubs to pay education expenses.

3. **Connected party transactions:** The regulations capture any transfer of value that flows directly from a club to a player and indirectly via parties that are connected to a player and/or a club, referred to in the regulations as "connected parties". For a club, these include

directors, family members of a director, a shareholder with more than 5% of the capital, and an employee of a club. For a player, these include their partner, parents, agent and any company in which they have at least a 10% interest.

The recent disciplinary proceedings concerning Saracens demonstrated that arrangements put in place involving connected parties can be difficult to detect if the club does not report the arrangement to the SCM. As discussed more fully below, the SCM does not have statutory powers of investigation and there are real limits to what he is able to investigate. This is a frequent problem for investigators employed by sports governing bodies anywhere in the world. The modest fines for not reporting arrangements meant that Saracens, irrespective of whether it thought it was in the right or not, were able to conceal those arrangements and then, when discovered, argue that the SCM should exercise his discretion to exclude them from being treated as salary. In my view, any value transferred via connected parties should be prohibited. If a club is found to have made a payment via a connected party, it should be sanctioned. I also recommend that PRL review the definition of connected party to make sure that it is sufficiently broad and includes, for example, ex-directors or an individual who attends every match and sits in the directors' box, although I am reminded of the quotation referencing deductive reasoning – "if it looks like a duck, swims like a duck and quacks like a duck, it probably is a duck" (James Whitcomb Riley, 1849-1916). We all know a connected party when we see one.

**Recommendation 3.4 –** Prohibit payments which are subjective, extend beyond a player's playing career or come from connected parties (including sponsorship by connected parties). Any prohibited payment should result in a sanction.

***Sponsorship and Endorsement Deals***

Sponsorship of players is a special category of payment and I have spent a long time thinking about sponsorship of players in general, and how to make sure that this is done transparently and fairly.

Sponsorship and endorsement deals are a common and important part of many players' income. They do, however, present a potential risk of abuse where there is a connection between a player's sponsor and the player's club. I have been told about the example of a sponsor agreeing to pay the club a percentage of the sponsorship fee, with the balance paid to players at the suggestion of the club, and none of this being disclosed to the SCM. At the same time, there are examples such as a nutrition brand sponsoring a club and, independently, sponsoring one of the club's players at market value.

The starting point in my view is that I cannot recommend that sponsoring players is prohibited altogether. It can be an important part of a small number of players' income and, as I go on to explain, there are other less restrictive ways of managing the risk. The potential for abuse occurs with sponsorship by those who already have a close relationship or link to the club. The current definition of connected party includes any sponsor of the club in question. I have already recommended that any transfer of value via a connected party should be prohibited. I wish to stress that this prohibition should continue to apply to any sponsor of a club.

There is still the potential for a sponsor to have a relationship with or link to a club where that relationship does not fall within the definition of "connected party". It is not possible in practice for that definition to capture all forms of relationship or link between a sponsor and a club. In theory, any business could be a sponsor. How does one cater for an owner of a business being, say, old school friends with an owner or a director of a club? Moreover, policing any definition that sought to include that type of relationship would be problematic. In my view, the better way of policing the arrangement would be to introduce a requirement that the SCM must approve all sponsorship

arrangements in advance, using his discretion exercised by reference to a defined set of criteria *(Recommendation 3.6)*.

I accept that this solution is not perfect and that the exercise of the SCM's discretion proved problematic during the Saracens disciplinary proceedings. However, there are two notable differences to the scheme that I am proposing. First, I have recommended a requirement that the discretion must be exercised in advance of the arrangement being put in place. If it is not, the arrangement shall be counted as salary. This should ensure that the arrangement is brought to the SCM's attention. Second, in the Saracens case there was a significant dispute between the parties as to how to value some of the arrangements in question. Valuing a sponsorship is more straightforward, and the SCM can rely on external expertise in this regard as required. However, that problem should not arise in the context of sponsorship and endorsement deals as I have recommended that the player's payment must be fixed or readily capable of calculation. These conditions, combined with the player obligation set out below, should serve to eliminate many of the problems caused in the past by the exercise of discretion.

**Recommendation 3.5 –** Broaden the current definition of connected party.

**Recommendation 3.6 –** The SCM must approve all sponsorship arrangements in advance.

Some of these prohibited arrangements are currently legitimately in place. To minimise disruption and avoid players being treated unfairly, any such bona fide arrangements which do not finish before the next season should be allowed to continue but count as salary until they expire.

***Arrangements, Credits and Exemptions***

As described above, the provisions in the regulations for arrangements, credits and exemptions are highly complex. While I understand some of the rationale for adding the various credits over time, these add to the complexity and permit unhelpful ambiguity. I would recommend they be considerably simplified. In addition, the exemptions in particular need to be reviewed and adjusted to respond to the current economic environment.

One area that I find particularly unsatisfactory relates to loans of players to other clubs, both inside and outside the Premiership. Although the loan provisions were introduced for legitimate reasons to allow development players to get rugby experience at lower-level clubs, it is clear to me that they are now being used as a tool to keep payrolls below the cap. Currently, the regulations allow players to go on season-long loans to other clubs and continue to receive their full salary from the lending club. The rules are hugely complex but, in effect, mean that, at the extreme, only 8% of the player's salary is counted towards the calculation of the cap, while they are actually allowed to play nearly 40% of matches in the season for the club that has lent them. In fact, extraordinary as it may seem, training and playing commitments can change so little that players have apparently been put on loan to another club for six months without even being aware they are on loan. Clubs were open with me about taking this action as it is within the letter of the regulations and hence they see it as a potential way of gaining competitive edge. While it is within the letter of the regulations, it strays beyond its intention. The provisions around player loans need to be tightened *(Recommendation 3.7)* so that all loans must be bona fide and documented as such, with copies of the loan document submitted to the SCM. Loaned players should be notified that they have been loaned and required to sign a loan agreement. Failure by the borrowing club to use loaned players would be taken as prima facie evidence of an imperfect loan. The loan of a player should be for a defined period and should not be renewable with the same club in less than 12 months unless the SCM confirms that he is confident that it is a genuine loan rather than primarily a ruse to circumvent the cap. The loan must include a reasonable exchange of value from the borrowing club to the lending club.

**Recommendation 3.7 –** Tighten provisions around player loans to ensure they are bona fide.

***Exempt Players***

The system of so-called "exempt" players, more commonly known as "marquee" players, has become subject to manipulation. Clubs rotate their players in and out of "exempt" status in order to facilitate the payment of extremely high salaries for at least one year. A system of "averaging provisions" was devised to try to end these schemes, but they are complex to understand and apply. Earlier in this report, I put forward the argument for removing the provisions for exempt players and the inflationary pressures they bring. I recommend that the provision for exempt players is reviewed..

***Recommendation 3.8 –*** Review provisions for exempt (marquee) players.

***Deemed Salary***

One way to circumvent the regulations would be to pay a player a lower wage and then find a way to supplement the wage with an "off the books" payment. To combat this risk, the regulations currently include a mechanism that allows the SCM to "deem" a new salary for a player when he considers the one quoted by the club to be too low and to include the "deemed amount" in the cap. However, this has not proved to be an effective tool in practice. There are several factors that might make a player move to a particular club, such as whether he will start in the team, the impact of the move on his chances to play international rugby, location, club facilities, how good the team is and so on. Such a high level of subjectivity makes it almost impossible in practice for a third party such as the SCM to calculate the value players themselves attribute to each factor. It would be better if the evidence of a salary being declared at too low a rate was in itself enough to launch an investigation, without the SCM needing to "deem" the salary. For this reason, I recommend that this provision is removed from the regulations *(Recommendation 3.9)*. I am hopeful that my other recommendations will be sufficient to ensure that clubs do not make "off book" payments, rendering this provision redundant in any event.

**Recommendation 3.9 –** Remove the provision to deem a salary. Instead, allow evidence of inaccurate salary declaration to be sufficient grounds for the SCM to launch an investigation.

***Clarification from the SCM***

The current regulations provide that a Club may contact the SCM to "clarify the meaning or applicability of any of the Regulations". Whilst this right should of course remain, I believe it should be emphasised to ensure it forms an important part of the working dialogue between clubs and the SCM. If a club fails to seek clarification from the SCM, and proceeds to act in breach of the regulations, that failure should be treated by the disciplinary panel as an aggravating factor leading to an increased sanction. (Recommendation 3.10).

**Recommendation 3.10 –** Strengthen emphasis on clubs seeking clarification from the SCM in relation to any uncertainty in the interpretation of the regulations. Failure by a club to do so should be treated by the disciplinary panel as an aggravating factor leading to an increased sanction.

## 4. Club Accountability

As described above, the behaviour of the clubs is paramount to an effective salary cap regime.

The success of any form of financial regulation requires that penalties are available, and seen to be used. They should be severe enough to have a deterrent effect. The level and range of available sanctions must provide a clear framework for participants so that they know what the penalty for a breach will be, while allowing the SCM and the independent disciplinary panel the scope to ensure that the "punishment fits the crime".

### *Increase Level of Sanctions for Clubs Breaching the Salary Cap*

Having carried out my analysis, I am satisfied that levels of sanction currently available for a serious breach of the regulations (a fine of £3 for every £1 overspend plus a points deduction of five points for a 5% per season breach rising to 35 points for a breach in excess of 9% per season) are robust, particularly when compared to other sports.

The sanctions currently available are as follows:

| Level of breach | Entry points sanction | Financial penalty |
|---|---|---|
| £0 to £49,999.99 | 0 | £0.50 for every £1 overspend |
| £50,000 to £199,999.99 | 0 | £1 for every £1 overspend |
| £200,000 to £349,999.99 | 0 | £3 for every £1 overspend |
| £350,000 to £399,999.99 | 5 | £3 for every £1 overspend |
| £400,000 to £449,999.99 | 10 | £3 for every £1 overspend |
| £450,000 to £499,999.99 | 15 | £3 for every £1 overspend |
| £500,000 to £549,999.99 | 20 | £3 for every £1 overspend |
| £550,000 to £599,999.99 | 25 | £3 for every £1 overspend |
| £600,000 to £649,999.99 | 30 | £3 for every £1 overspend |
| Over £650,000 | 35 | £3 for every £1 overspend |

For comparison, the sanctions imposed under UEFA's Financial Fair Play regulations generally include a conditional withholding of future prize money, which is calculated at a fraction of the amount of the relevant breach. The NFL sanctions for breach of the salary cap include fines capped at $6.5m plus forfeiture of draft picks. The NBA sanctions for breaches of its salary cap include fines of up to $6m plus forfeiture of draft picks.

I am broadly satisfied that the levels of financial penalty available for breaches are sufficient. However, I believe that the entry level for points sanctions should be increased to ensure that any club that breaches the cap, regardless of how successful they have been that season, will be seriously affected *(Recommendation 4.1)*. My recommended revised sanction levels are therefore as follows:

| Level of breach | Entry points sanction | Financial penalty |
|---|---|---|
| £0 to £99,999.99 | 0 | £0.50 for every £1 overspend |
| £100,000 to £199,999.99 | 0 | £2 for every £1 overspend |
| £200,000 to £399,999.99 | 15 | £3 for every £1 overspend |
| £400,000 to £599,999.99 | 35 | £3 for every £1 overspend |
| Over £650,000 | 50 | £3 for every £1 overspend |

***Increasing the Discretion of the Disciplinary Panel***

As shown in the above table, I am recommending that the bands dealing with level of breach are broadened. This should allow a disciplinary panel a greater degree of discretion to make sure that the sanction is appropriate, rather than being constrained to narrow bands, which could in some circumstances be too prescriptive. Alongside this, I recommend that the panel be entitled to take into account a wider range of factors (and be given more guidance in relation to how those factors might influence their decision) *(Recommendation 4.2)*. These changes taken together (and accompanied by an increased breadth of available sanctions, discussed below) will result in an improved ability for a disciplinary panel to impose appropriate and proportionate sanctions.

The current regulations allow a panel to increase or decrease a points sanction taking into account the following factors:

- Whether the club has admitted the breach identified
- Whether the breach of the senior ceiling was deliberate, reckless, negligent or due to a non-negligent mistake
- Whether the club has been found to have breached the regulations before
- Whether the club has deliberately or recklessly failed to co-operate during the disciplinary process

The additional factors which I recommend that a panel be able to take into account are:

- The level of the breach within the relevant band
- Whether the club has previously been found by a panel to have breached the ceiling or to have committed a non-co-operation offence
- Whether as part of the case before the disciplinary panel the club has been found to have breached the salary cap in more than one season
- Whether the club has concealed payments, arrangements or documents
- The league position of the club and the likely impact of the points sanction on the breaching club and other clubs in the division (for example, if the sanction would result in relegation or a club missing out on Champions Cup qualification)

I also recommend that the regulations give more guidance to the panel as to the weighting of these factors; making it clear, for example, that the entry level of points sanction should be significantly increased (up to doubled) if the breach is found to have been reckless or deliberate.

I should add, for the avoidance of doubt, that I support the retention of the current plea-bargaining system.

***Increase of Sanctions for Failure to Co-operate***

For the salary cap to be effective, each club must comply with the regulations. So it must be managed and enforced effectively by the SCM. If he makes a reasonable request to a club for documents, that club must have no choice but to comply. In sport, in circumstances where the investigators do not have statutory powers, this is generally achieved by introducing a penalty for not co-operating with an investigation. That penalty needs to be severe to prevent a club from deciding not to co-operate and taking a lower penalty as a "cost of doing business", rather than co-operating even if that might prove a breach. Existing provisions do not act as a significant deterrent. Clubs have at various times chosen to behave in contravention of the regulations and risk receiving a sanction.

The penalty for non-cooperation needs to be potentially severe, irrespective of the level of assistance being sought from the club. In other words, provided there is a reasonable basis for the request, it does

not in principle matter whether the SCM is asking for one document or tens of thousands of emails. If the club refuses, the sanction should be equally severe in both cases. The withholding of one document, which could be the "smoking gun" that proves a breach, might be as serious as more widespread non-cooperation.

Therefore, it is my recommendation that the sanctions available for a "failure to co-operate" be increased from their current level (a points sanction of up to six points, a fine of up to £100,000) to a level equivalent to the sanctions available for breach of the salary cap *(Recommendation 4.3)*.

The other serious non-cooperation offence (Regulation 14.8) was inserted unanimously by the clubs during the 2019-20 season to deal with a club that has exceeded the salary cap which then refuses to submit to an audit to check future compliance with the salary cap. This regulation allows the SCM to deduct 70 points with no right of appeal. I agree with the principle behind this regulation: the SCM should be able to initiate a "compliance or forensic audit" following a club being found guilty of a serious breach (being a breach of the senior ceiling, or a failure to co-operate). I also agree that the sanction for failure to co-operate with the compliance audit should be serious, at the very top end of the sanctions available under the regulations. But a sanction of this size goes extensively beyond appropriate levels to be decided by a single person and should, therefore, be dealt with by a disciplinary panel in the same manner as the failure to co-operate breach discussed above.

**Recommendation 4.1 –** The entry level for points sanctions should be increased.

**Recommendation 4.2 –** The disciplinary panel should be entitled to take into account a wider range of factors and be given more guidance in relation to how those factors might influence their decision and their relative weighting.

**Recommendation 4.3 –** Increase sanctions for failure to co-operate to a level equivalent to the sanctions available for breach of the salary cap.

***Increase the Range of Available Sanctions for Clubs to Include Sporting Sanctions***

In 1999, when Deloitte suggested the initiation of a salary cap, it pointed out that there needed to be tough penalties for non-compliance. With the adjustments to points and fines described above, my recommendations will go part of the way towards this. However, it is my view that a broader array of sanctions should be available in relation to breaches of the senior ceiling and failure to co-operate. These sanctions, especially my proposed range of sporting sanctions, should help other clubs as well as the public at large to feel that justice is both done and seen to be done.

Having reviewed the sanctions used in other sports for breach of financial regulations, I believe that the following additional sanctions should be available to a disciplinary panel in the most serious cases *(Recommendation 4.4)*:

- Relegation
- Suspension
- Stripping of titles won and trophies awarded in breaching seasons
- The return of prize money won in breaching seasons

I also considered sanctions such as limiting subsequent squad size or restricting the registration of new players for a defined period. In my view they would not be as good a fit in rugby as other sports given the nature and structure of the game and of the Premiership in particular. Enforcing smaller squad sizes could lead to health and safety issues, while restrictions on the registration of new players would be very difficult given the timing of contracting new players in rugby (which is usually done

well in advance of a season). I prefer the approach of making a compliance audit available to ensure that the breaching club is now compliant.

I recognise that the introduction of some of these sanctions may require co-operation between various stakeholders within the sport. The RFU put it to me that it would like to support PRL in matters relating to the cap, including the availability of broader sanctions, and I encourage PRL and the RFU to build upon this goodwill to put these in place.

**Recommendation 4.4 –** Make additional sporting sanctions available, including relegation, suspension, stripping of titles and return of prize money.

***Provide the Disciplinary Panel with the Power to Install an Independent Monitor***

At the extreme, and for consistent and serious breaches, the disciplinary panel should be able to appoint an independent monitor who could be sent into the operations of a breaching club. They would have access to any documents, records or meetings, including board meetings, that the monitor believed necessary *(Recommendation 4.5)*. At the end of a fixed period, the monitor should report to the SCM on whether they are now confident that the club is complying with the regulations or whether a further period of monitoring is required. The salary and any costs of the monitor should be paid by the club in breach. This feels like a draconian measure and I sincerely hope that it would never be invoked, but it is important for clubs to know that the consequences will be severe if they indulge in repeated breaches and undermine the regulations to gain unfair advantage.

**Recommendation 4.5 –** Provide the disciplinary panel with the power to install an independent monitor for consistent and serious breaches.

***Increasing the Summary Sanction Powers of the SCM***

The SCM is currently able to impose summary sanctions for lower-level regulatory breaches, such as not submitting, or submitting late, a contract with a player for which he receives a payment. During my interviews, these sanctions were described by clubs as "inconsequential". My recommendation is that these sanctions be increased significantly to have the desired deterrent effect.

I have set out in the table below the summary sanctions available under the current regime, together with my recommendation as to where they should be set:

| **Current and Proposed Summary Sanctions** | | |
|---|---|---|
| **Breach** | **Sanction under current regime** | **Recommended sanction** |
| **<u>Late submission</u>** of player contract or other contracts, arrangements, heads of terms etc by club. Not submitted within 21 days of entering/signing | 1st offence: £100<br>2nd offence: £200<br>3rd offence: £400<br>4th and subsequent: £800<br>*Doubles for every 21 days of non-payment thereafter* | 1st offence: £1,000<br>2nd offence: £2,000<br>3rd and subsequent: £3,000 |

| | | |
|---|---|---|
| **Failure to submit** player contract or other contracts, arrangements, heads of terms etc by club in relevant salary cap year | Same as above, i.e., no difference to late or not at all | 1st offence: £20,000<br>2nd offence: £30,000<br>3rd offence: 2 league points |
| Failure to provide requested document to SCM within 14 days | 1st offence: £100<br>2nd offence: £200<br>3rd offence: £400<br>4th and subsequent: £800<br>*Doubles for every 21 days of non-payment thereafter* | £2,000 if provided between 14 and 21 days<br>£4,000 if provided between 21 and 28 days<br>2 league points (plus financial penalty as set out above) if provided after 28 days and automatic trigger to initiate an investigatory audit |
| Failure to provide salary cap accountants with club accounts on time | 1st offence: £100<br>2nd offence: £200<br>3rd offence: £400<br>4th and subsequent: £800<br>*Doubles for every 21 days of non-payment thereafter* | £50,000 and right for SCM to begin investigatory audit |

You will see that in certain cases I have recommended that the SCM is entitled to deduct a small number of points from clubs for repeated breaches of this nature. I believe that it is reasonable and proportionate that the SCM imposes sanctions of this nature, provided they do not exceed two points and that clubs are entitled to a full appeal before an independent disciplinary panel.

**Recommendation 4.6 –** Increase the sanctions available to the SCM for breach of lower level regulatory breaches, including the ability to deduct 2 points, with a right of appeal for clubs before an independent disciplinary panel.

## 5. Player Accountability

***Broader Accountability is Required***

Currently, the regulations provide only obligations (and potential sanctions) on clubs and, in extremely limited circumstances, senior executives of clubs. With no consequence available, I have heard stories of employees, players and agents being flexible with the truth when it comes to declaring details around payments. For the regulations to have real teeth, accountability must be cast more widely to bring in any club officials, players and agents who play a part in deliberate efforts to circumvent the regulations or who are reckless as to whether this is the case. A meaningful sanctions regime must be introduced in relation to players, agents, employees and club officials.

From my comparative review of similar regulations in other sports, I know it is common practice to hold agents, players and a broader range of club personnel accountable and make them subject to sanctions. I am advised that Super League in this country provides for fines and suspensions for players who breach its salary cap regulations and fines are commonplace for players who participate in the breach of a salary cap across the major US sports. In the Australian Football League, players can be fined up to 7.5% of their basic salary if they fail to disclose arrangements with an associate of their club.

***Embed Player-Accountability into the Regulations***

The regulations say clubs must use all reasonable endeavours to ensure players co-operate with the SCM in his monitoring and investigation, and attend interviews when requested. However, they do not bind players directly. I have heard examples of players having been less than wholly truthful with the SCM and not suffering any consequence. The players' union (the RPA) has been open in its support for a functioning salary cap regime and told me so at interview. It therefore seems only sensible to tie players into the regulation obligations so those few who are tempted to circumvent the system do not cause damage for others.

**Recommendation 5.1 –** Tie players into the regulations so that they have accountability with respect to the salary cap.

Before I set out the details of my recommendations for players, I wish to pre-empt four protests that have been put to me about imposing sanctions on players. First, some clubs have argued that players are too naive or too busy to fully understand their financial arrangements. I do not accept that this is the case.

For most players, the value they receive is straightforward and is received from a very limited number of sources. If players are entering into complex arrangements, then that should be a signal to them that they need advice about the arrangements. I have met no players who I would consider unable to understand their own finances and so I find this argument unconvincing.

Second, there is an argument that players should not have to understand all the complexities of the regulations and, with this, I concur. However, they do need to understand their own obligations under the regulations and, to help them, PRL will need to engage in education and training.

The third objection is that players should not be responsible for the salary cap for an entire club and, again, I agree. The recommendations I have set out below oblige players to report and co-operate with respect to the value that they receive individually. It would be wholly inappropriate to ask them to take responsibility for the payments to any of their team-mates, aside from reporting any suspected circumventions of which they become aware.

Finally, I have heard the argument that the principle of universality of sanction means that sanctions against players will require co-operation with the RFU. This is not a valid reason not to impose player accountability. I urge PRL and the RFU to work together and find a way to make this work.

**Recommendation 5.2 –** I recommend that the following player obligations are adopted:

- **Player declaration**
    - At the start of every season players should sign an enhanced declaration, which sets out their anticipated earnings, including any income he, his image rights company or any other connected party receives from his club, from third parties or from those connected to the club. This should include payments that fall within the cap and payments that are excluded from the cap and should be supported by relevant documentation. At the end of the season, the player should sign a declaration of actual earnings.
    - At the start of the season, players must disclose bank account details to the SCM where all payments related to their rugby employment will be received.

- **Reporting arrangements for players**
    - A player must inform the SCM of the name of all companies and trusts of which he is an officer, shareholder or beneficiary at the start of the season or within 14 days of such arrangement being put in place.
    - A player must disclose all contracts to the SCM and inform him of any new arrangement he enters into within 14 days of it becoming binding or the end of the next salary cap year, whichever comes earlier. This latter obligation should exist irrespective of whether the player believes the club is aware of the arrangement or not.
    - A player must notify their club of any agreement they are going to enter into where value of any kind is transferred. Therefore, CEOs and clubs cannot say they do not know about the agreement in the instance the co-party is actually connected to the club.
    - Any sponsorship arrangement that the player has must include a declaration from the sponsor as to whether the arrangement is independent of any sponsorship of the player's club and the player is under an obligation to share this information with the SCM when the agreement is notified.
    - Once the notification has been received, the SCM may direct that the player must disclose additional documents relating to that arrangement and, as long as the request is reasonable, the player must provide the document within an appropriate timeframe.
    - Players should also be under an obligation to notify the SCM if they become aware of an attempt to circumvent the salary cap. And players should be subject to severe sanction if they knew, or ought to have known, that they were involved in an attempt to circumvent the salary regulations. This is consistent with the approach taken in a number of other sports.
- **Onus on player to clarify arrangements**
    - In the event that a player is unsure whether a payment is prohibited or whether it should be included within the cap, he must contact the SCM for clarification. Failure to do so will result in the entire payment being included in the cap and, in the case of a prohibited payment, sanctions.
- **Co-operation**
    - Players must co-operate with the SCM by answering honestly any questions that the SCM may have.
    - A player must make tax returns available on request if this is part of a random request or if the SCM has reasonable suspicion of breach. This includes tax filings of any company that owns 25% or more of the player's image rights. (A requirement to share tax returns has many precedents and is standard practice in, for example, the NFL, NHL and NBA.)
    - The SCM may require a player to provide copies of the bank statements from any disclosable bank account if he has reasonable suspicion of a breach.
    - The player must co-operate with the auditors in the annual audit by providing requested information and engaging in interviews if requested.

If players are in breach of their obligations, then they need to be subject to penalties *(Recommendation 5.3)*. This needs to be a meaningful amount.

I set out some recommended financial sanctions for players below:

| Type/breach | Current regime | Proposed penalty |
|---|---|---|
| Late submission by player of annual declaration | N/A | £1,000, and amount doubling for every further 7 days late, up 21 days. Thereafter, player is suspended from playing until he complies |
| Failure to submit new documents/contracts/other to SCM as required in accordance with signed annual declaration | N/A | £1,000, and amount doubling for every further 7 days late, up 21 days. Thereafter, player is suspended from playing until he complies |
| Failure by player to submit his tax return or bank statement to SCM within 14 days of written request | N/A | £1,000, and amount doubling for every further 7 days late, up 21 days. Thereafter, player is suspended from playing until he complies |
| Failure to meet with SCM (or nominated person, e.g., salary cap accountant) for interview (player, club official, agent) | N/A | £10,000 per person |
| Found to lie or providing false or misleading information to the SCM (or nominated person) either at interview and/or in response to written request from SCM | N/A | A fine up to £250,000 and/or suspension of up to one season |

As with clubs, it will be important to extend this to sporting sanctions such as the suspension which is available in Super League or the forfeiture of employment for a period of time as in the Australian Football League. Owing to the principle of universality of sanctions, this will require co-operation with the RFU. One option might be to join the RFU to any disciplinary panel hearing which involved potential breach by a player. An alternative would be to include an express provision in the regulations for any evidence about a player to be presented to the RFU head of discipline. It will be for PRL and the RFU to work together to establish the best way forward.

**Recommendation 5.3 –** Provide sanctions for players who are in breach of their obligations under the Regulations. These sanctions should include fines and sporting sanctions

## 6. Accountability of Others

In addition to players, accountability must be extended to other individuals at the clubs and to agents. I take each of these in turn.

***Fit and Proper Test for Owners***

If a club owner is found by the disciplinary panel to have seriously and systematically breached the regulations, then it should be possible for the panel to deem them not fit and proper to own the club and to put the club into stewardship *(Recommendation 6.1)*.

If the disciplinary panel finds that stewardship is not effective, then it should have an ultimate sanction of forced divestment, subject to any competition law restraints. While I sincerely hope that this is never necessary, the inclusion of this extreme sanction is necessary to create gold- standard regulations.

Such forced-divestment powers do exist in some American sports, but they differ from the UK in being exempt from competition law. This is a complex issue. So, I recognise that despite the desirability of such a sanction, the mechanics would require the advice of legal specialists and possibly the involvement of the RFU.

**Recommendation 6.1 –** Introduce a fit and proper test for club owners to be available to the Disciplinary Panel in extreme circumstances.

***Club Officials***

It is vital that a club's senior officers must take responsibility for their club's compliance with the regulations. At the moment the regulations do provide that compliance with the regulations rests with the CEO of each club and that the documents submitted to the SCM at the beginning and end of each season setting out what the club will or has spent must be signed by the chair, CEO and finance director. There is currently one sanction for non-compliance by club personnel. If a disciplinary panel finds that a club has exceeded the senior ceiling, that it did so recklessly or deliberately, and that the chair, chief executive officer or club signed a false certification, then other clubs may resolve by special resolution that the director is removed from office. The club in question then has a responsibility to remove the individual from their office.

The first problem with this is Section 1 of the Recommendations. It puts the power of imposing sanctions inappropriately in the hands of the other clubs.

The second problem is that only a chair, CEO or finance director can be sanctioned, and then only for signing a false certification. This can easily be circumvented either by the individual responsible for the breach not holding one of those positions, or not signing the certification.

In my view, any senior executive, director or shareholder of a club who knew, or ought to have known, about a breach or attempted circumvention of the salary cap should be subject to a sanction. For these purposes, "club official" should be defined to include any 10%-plus shareholder (solely or in concert), a director (including shadow directors), CEO, CFO and director of rugby (or personnel carrying out the roles associated with those titles). All club officials should be required to register with PRL and it would be an offence for a club to have a club official who has not been registered *(Recommendation 6.2)*.

The CEO, chair, FD, director of rugby (and any other senior people at a club) should be asked to sign a declaration statement confirming that they have read the regulations and agree to abide by them *(Recommendation 6.3)*. In the recent hearing, Nigel Wray said that he had not read the regulations over the previous 20 years.

Each club board should receive regular updates and proactively discuss their own salary cap compliance as a standing agenda item. A board representative should also sign a declaration at the

beginning and end of the season of the club's anticipated and actual compliance with the regulations *(Recommendation 6.4)*.

My recommendation is that any club official who knew, or should have known, about the breach of the salary cap and who has signed a false declaration or certification or has unreasonably failed to co-operate with salary cap regulations should be subject to sanctions including a ban from PRL for up to two years (first offence) or up to lifetime (any subsequent offence). A ban would prevent the individual from having any association with PRL or its clubs during its duration *(Recommendation 6.5)*.

I note that it is common in a number of other sports for club officials who were involved in a breach to be sanctioned by way of a fine (NFL) and/or a ban in this way (NBA and NHL). In the National Rugby League in Australia, as a repercussion of Melbourne Storm's breach of the salary cap, both CEO and CFO were suspended.

**Recommendation 6.2 –** Define a category of "club officials" to include directors and shareholders with more than a 10% holding and each club official should register with PRL.

**Recommendation 6.3 –** Require club officials to sign a declaration confirming that they have read the regulations and agree to abide by them.

**Recommendation 6.4 –** Require a board representative to sign a declaration of anticipated and actual compliance with the regulations.

**Recommendation 6.5 –** Provide that any club official who knew, or should have known, about the breach of the salary cap and who has signed a false declaration or certification or has unreasonably failed to co-operate with salary cap regulations is subject to sanctions including a ban from PRL for up to two years (first offence) or up to lifetime (any subsequent offence).

***Nominate Club Salary Cap Officers with Duties to the SCM***

Different people take day-to-day responsibility for the cap at the different clubs. It could be the director of rugby, a member of the finance team or another employee. Even though this person may, arguably, be best placed to know about potential circumvention or breach, they have no responsibility under the regulations for monitoring and reporting compliance with the cap. I want to make this role more rigorous and make this individual more accountable.

In the same way that law firms are required to have a compliance officer who is approved by the Solicitors Regulation Authority, and that financial services firms have nominated officers who provide oversight of their firm's anti-money-laundering systems, each PRL club should nominate an employee who will be the club's salary cap officer. This should be a senior, experienced employee of the club, approved by the SCM as having sufficient authority and skill to take the role. Their main duties should encompass:

- Oversight of the club's salary cap systems
- Being the contact point for enquiries from PRL
- Having duty to disclose any information, knowledge or suspicion of non-compliance to the club board and to the SCM
- Assisting the SCM in providing training for others who are accountable under the regulations

This individual should sign a declaration at the start and end of every season setting out anticipated and actual earnings across the squad with a statement that they have made reasonable endeavours to

uncover and establish the true picture of earnings. They must agree to report to and co-operate with the SCM in line with the regulations.

The regulations should include a power to sanction salary-cap officers who fall short of their duties. In extreme cases, where proven duplicity is involved, there needs to be a mechanism to remove them from their position within the club and even for them to be "warned off" so that they are not able to gain employment with other clubs within the PRL. Any right of appeal needs to be through a disciplinary panel.

**Recommendation 6.6 –** Require clubs to nominate a salary cap officer who has duties to the SCM.

***Incorporate Agent Accountability***

Finally, I turn to agents. To the best of my knowledge, no agents replied to the consultation document, but they play a very significant role within Premiership rugby. Through the negotiation and arrangement of payments to players, they wield a significant level of power and are privy to much of the financial information needed to monitor compliance with the salary cap. I have no hesitation in recommending that they be brought within the obligations of the regulations and held to account. Again, there is precedent. Other sports impose a level of accountability on agents with respect to salary caps. For example, the NFL requires a player agent to submit a certification to the NFL Players Association confirming that they have not entered into any undisclosed agreements, while suspensions (e.g., Super League, NHL, AFL) and fines (e.g., NFL, NHL) are commonly available as sanctions for agents who participate in the breach of salary caps**.**

I recommend that new provisions are added to the regulations governing the requirements of agents, mirroring those of players in relation to disclosure and an obligation to co-operate with the SCM. A provision should be added to the RFU's agent declaration that includes an agreement by each agent to comply with the regulations *(Recommendations 6.7 and 6.8)*.

Breach of the relevant provisions of the regulations by an agent should lead to a suspension of an agent's licence, a forfeiture of any commission earned from a relevant transaction and/or fines *(Recommendation 6.8)*. This will need to be agreed with the RFU.

As an observation, I note that the RFU has sanctions only for individual agents and I suggest it considers extending these powers to firms as well as individuals.

**Recommendation 6.7 –** Provide obligations for agents in the regulations that mirror those of players in relation to disclosure and obligation to co-operate with the SCM.

**Recommendation 6.8 –** Add a provision to the RFU's agent declaration that includes an agreement by each agent to comply with the regulations.

**Recommendation 6.9 –** Provide sanctions for breach of the regulations by an agent, including suspension of licence, forfeiture of any commission and/or fines.

## 7. Powers and Resource of the SCM and the Auditors

The SCM is responsible for the management and administration of the regulations. The role is broad and ranges from checking that clubs comply with the cap to fielding numerous interpretation questions from clubs, working with auditors to conduct annual reviews and preparing cases for disciplinary panels.

### *Information Provided to the SCM*

At the start of the season each club must provide the SCM with a document called a "declaration", which sets how much the club expects to spend on salaries in the forthcoming season, together with a breakdown of that sum. The club must set out how much each player is expected to earn and how that amount is calculated. The declaration is a standard form document appended to the regulations. At the end of the season, each club must provide a similar document to the SCM called a "certification". This document sets out how much the club actually did spend and provides details about how much each player was paid and how that sum is broken down. The certification is then audited by an independent firm of accountants.

In addition to that basic framework, clubs are subject to more general disclosure obligations that persist throughout the season. They currently must, for example, disclose within 28 days documents such as (i) all contracts and other arrangements entered into with players and (ii) any documents evidencing payments to a player's agent.

The clubs are obliged to provide a snapshot of their overall financial position twice a year, at the beginning and end of each season. I considered whether clubs should be required to do this more often during the season. The Super League, for example, has implemented a system that enables a form of live monitoring of each club's compliance with the salary cap. Each club operates a spreadsheet that can be accessed at any time by the Super League's equivalent of the SCM and clubs must seek the express written pre-approval from its SCM-equivalent for any transaction or any other conduct that may change a club's aggregate liability. I am not suggesting that PRL goes as far as the Super League, but a move is needed in this direction.

I was told by many of the club representatives that they monitor their salary cap data on an almost daily basis and were supportive of providing the SCM with access to that information on a more regular basis. I consider this to be a good idea as it would at the very least require the clubs to focus more regularly on making sure they had an up-to-date picture of their financial position. It makes sense for all clubs to use the same format for their spreadsheet so that the SCM can easily review the information shared. The SCM currently has a central portal where clubs upload contracts, declarations and certifications. I understand that, with relatively modest cost, this system can be expanded so that clubs can also upload the spreadsheet they use to track their own salary cap. I therefore recommend that PRL invest in adapting this system so that it allows central access to each club's spreadsheet at all times *(Recommendation 7.1)*.

I also recommend that the 28-day deadline to provide a copy of documents such as new contracts to the SCM be reduced. In my view, the SCM should be in possession of that information more quickly. I recommend that the deadline is reduced to 14 days so that the SCM can have an up-to-date view of each club's situation, and run meaningful and timely analytics *(Recommendation 7.2)*.

**Recommendation 7.1 –** Extend system to allow central access to each club's salary cap spreadsheet at all times.

**Recommendation 7.2 –** Require clubs to provide copies of documents such as new contracts to the SCM within 14 days.

### *The SCM's Powers to Seek Information*

The SCM's powers under the current regime are, in theory, comprehensive. The fact that every club is audited every year makes it a relatively robust system compared to some other sports. However, there is an obvious flaw, which is that the SCM's powers can be thwarted by clubs in a way that goes undetected or has little consequence.

The SCM has the power to require a club or player to provide him with any information that is "reasonably required to ensure compliance with the regulations" and may, with or without prior notice, interview "a player to discuss any aspect of that player's remuneration". These powers are broad and cover any possible information that the SCM could reasonably want, provided that there is proper co-operation. I have recommended elsewhere that the sanctions for not co-operating should be greatly increased, both in terms of when they bite and the penalty that should be applied, which should improve co-operation with the SCM.

For clarity, the regulations should make it explicit that the SCM should have the ability to attend clubs without notice, either at random or based on intelligence, and to ask them to run finance reports and provide him with access to management accounts *(Recommendation 7.3)*. The SCM function should also have the ability to make requests to see players' tax returns on a random basis. Based on other sporting regimes, approximately 20 every year would be a reasonable level. *(Recommendation 7.4)*.

**Recommendation 7.3 –** Clarify the power of the SCM to attend clubs without notice and require clubs to provide him with finance reports and access to management accounts.

**Recommendation 7.4 –** Allow the SCM to make requests to see players' tax returns on a random basis.

***The Annual Audit***

At the end of each season, a prominent firm of accountants audits each club's certification. The accountants have a broad remit and are empowered to investigate (i) compliance with the salary cap during the season in question and the previous five salary cap years and (ii) a club's "compliance with the [regulations] generally". Moreover, "the scope of any audit shall be at the accountant's sole discretion and determination". The scope of the auditors' remit is broad and rightly so.

Clubs are obliged to (i) "show the accountants all reasonable co-operation and assistance in a timely manner to enable them to carry out their audit comprehensively", (ii) to answer as fully and honestly as possible all queries of the accountants, (iii) to procure that their players, directors, employees and shareholders are made available to the accountants, and (iv) make available "full accounting records, copies of all contracts, the originals or all relevant club records, books and any other related paperwork".

However, there are different interpretations among the clubs of what some of these powers mean and so the regulations need to be amended. There is a need to clarify that, as a part of their annual review, the auditors must be able to obtain downloads of raw accounting data from each club's system to allow them to carry out rigorous data analytics, including key word searches *(Recommendation 7.5)*. In addition, certain clubs are sometimes slow to comply with requests for information from the auditors. This is usually, I am told, not because they might have something to hide, but because they do not prioritise the process properly.

To aid in the annual audit process, I recommend the following additions *(Recommendation 7.6)*:

- Mandatory interviews with a small number of players from each club to review their submissions to the SCM, with the SCM present if the auditor deems helpful
- A review of a sample of players' tax returns. Players' tax returns for the most recent salary cap year will not yet be available. However, they can be used to investigate and perform spot checks on historic salary cap years
- Mandatory interviews with the CEO and/or CFO and/or director of rugby (or equivalent), if requested by the auditor with an explanation of why it is required

- Mandatory interviews with the person at the club with ultimate responsibility for the club's certifications and declarations
- A requirement for the club to provide any documents and information that is not privileged, including any financial information, email correspondence and access to hard drives of club officers, players and employees, provided the request from the auditor is well specified, reasonable and proportionate.

I recommend that greater sanctions are introduced for where a club does not comply with a reasonable request from an auditor within a reasonable time frame *(Recommendation 7.7)*.

**Recommendation 7.5 –** Clarify that, as a part of their annual review, the auditors are able to obtain downloads of raw accounting data from each club's system.

**Recommendation 7.6 –** Enhance the powers available to the auditors in their annual audit to include mandatory interviews, sampling of tax returns and more extensive provision of information and documents by the clubs.

**Recommendation 7.7 –** Introduce sanctions for clubs that do not comply with reasonable requests from auditors within a reasonable timeframe.

Reporting from the clubs can be haphazard with a large variation between clubs. I am minded to accept that the vast majority of failure to adequately report is due to administrative error or misunderstanding and misinterpretation on the part of clubs.

Not all failures to report fall into this innocent category. There is a limit to what can be found during the annual audit. Off-book transactions, cleverly designed to be hidden, will not be found, no matter how robust the annual audit. The success is dependent on whole and honest disclosure by the clubs and their management.

***Educational Role of the SCM***

At present, the SCM sends a note to all the clubs when he has made a significant ruling on what is or isn't salary to act as a guide to other clubs. This is helpful, although is sometimes overlooked by the clubs and needs higher prominence *(see Recommendation 2.4 above)*.

With the creation of player and agent accountabilities, additional education will be required for these groups so that they are up to speed with their obligations under the regulations *(Recommendation 7.8)*.

**Recommendation 7.8 –** The SCM should work with the Rugby Players Association and RFU to provide a programme of education for players and agents so that they understand their obligations under the regulations.

***Additional Resource for the SCM***

Overall, it is unsatisfactory that **t**he SCM role at PRL should rest in the hands of a single individual who also has the role of head of governance and regulation. This role has a remit much broader than the salary cap alone. He has inadequate levels of support. Currently, there is part-time, in-house support from an analyst and the SCM is able to access advice from external lawyers and auditors. Yet he has no one to assist with the day-to-day workload and decision-making, nor to cover for him when he is committed on other PRL duties, on holiday or ill.

I have nothing but praise for the current incumbent, who is highly skilled, experienced and has shown strong judgement. He has used the resources available to him effectively. However, given the size of the salary cap challenge, I have no doubt that he will need additional resource to continue to fulfil the role robustly.

The title should be changed to "salary cap director" (SCD) to emphasise the seniority of the role *(Recommendation 7.9)*. While I have tried to be as cost conscious as possible, given the current circumstances, my recommendations will require a change in resource. I suggest the appointment of a deputy to assist the SCM with his monitoring and investigative work, and education role, and who can stand in when the director is absent *(Recommendation 7.10)*. I also recommend the appointment of a full-time data analyst to monitor reporting, perform robust analytics and assist in reporting to the IDC *(Recommendation 7.11)*.

I am conscious that this means additional expenditure for PRL at a time when nothing could be less welcome to all stakeholders. Yet fulfilling this recommendation will be taken by commentators as an indication of serious intent in enforcing the regulations as a whole.

**Recommendation 7.9 –** Change the title of the SCM to salary cap director

**Recommendation 7.10 –** Appoint a deputy SCM to assist the SCD.

**Recommendation 7.11 –** Appoint a full-time data analyst.

***Strengthen the Investigatory Audit***

The investigatory audit, also referred to as a forensic audit, must be non-negotiable and within the power of the SCM. The regulations need to be drafted and adhered to in such a way that if the SCM has sufficient evidence to launch a forensic audit, then it should be impossible for clubs to refuse. The recent amendment to the regulations, rushed through by the clubs, now allows a club to choose to accept a 70-point deduction instead undergoing a forensic audit. This cannot be right. Clubs should not be able to choose from a menu of sanctions and should not be able to thwart a forensic audit if the SCM has reasonable grounds to initiate it *(Recommendation 7.12)*.

The investigatory audit should include pre-specified searches of external hard drives and the hard drives of laptops of any shareholders and employees, including directors and players. It should also cover communication between players, the club and/or agents, including WhatsApp messages or similar *(Recommendation 7.13)*. If a club or an individual is found to have deleted evidence post the notification of an investigatory audit, then there must be a significant sanction *(Recommendation 7.14)*.

Every year, two clubs should be chosen at random to be subject to a mini investigatory audit at the cost of PRL. The scope of this audit should be agreed between PRL and their auditors to ensure a balance between the rigour necessary to obtain reasonable reassurance and disproportionate cost or disruption. At least one of these clubs must have been in the top six positions at the end of last season *(Recommendation 7.15)*.

**Recommendation 7.12 –** Make investigatory audits compulsory if the SCM has reasonable grounds to initiate.

**Recommendation 7.13 –** Expand the scope of investigatory audits to include broader powers of search.

**Recommendation 7.14 –** Provide sanctions for any club or individual who is found to have deleted evidence post the notification on an investigatory audit.

**Recommendation 7.15 –** Introduce random mini investigatory audits for two clubs every year.

# 4. CONCLUSION

Some years ago, a football-supporting friend of mine came to watch a rugby match as my guest and observed with admiration two qualities that he said he feared his preferred code would never be able to copy: the respect for the referee and the absence of segregation among the fans of what were two fierce rival clubs. Before I could feel too superior about his remark, he added: ~But it's hardly surprising the players show respect for the ref, because anyone who can understand what on earth is going on out there deserves respect. And presumably the fans are able to mix together because you are too busy trying to work out what the rules mean to start fights with each other."

That seemed to me to sum up rugby's dilemma neatly. It is a complicated game with a simple ethos. People are drawn to the intense combat which ends the moment the final whistle blows, with friendly hugs and handshakes all round. It must be the one of the sports in the world least suited to social distancing.

In my review of the salary cap regulations, I have been careful to seek a balance between complexity and simple respect for the rule of law. The objectives of the salary cap are easy to understand and an honest endeavour to achieve them should not require a lot of explanation. My own objectives have been straightforward too: to help move Tier 1 English rugby towards a system where everyone can see where the offside line is, where all know how to keep on the right side of it and where everyone – players, coaches, spectators and the people who own the grass on which the game is played – can clearly understand what the rules mean.

In seeking a fair balance, I believe I have looked under every stone. I am sure this system will work if everyone involved co-operates and honours its intent. I have been very conscious of the need not to add cost at a time of such financial uncertainty. Of course, there been previous moments of reflection on the salary cap which have led to similar statements of confidence only to end in disappointment. But my recommendations would significantly strengthen monitoring and sanctions and I think the omissions and non-compliance of the past would have been found earlier and acted upon more decisively if they have happened under this proposed regime.

# ACKNOWLEDGEMENTS

Elsewhere in this report I have expressed my most sincere thanks to those who responded to the Consultation Document and gave up their time to meet with me – including representatives of all thirteen clubs. I would also like to acknowledge the support I received in my work from Elizabeth Mohr (www.elizabethmohr.co.uk/) and Ben Fenton (www.edelman.co.uk ). Liz, with whom I have worked on other reviews, brings a forensic analysis and focus on the practical to a project. Ben polished the thinking in the review into something readable. I also received a great deal of help from two PRL executives – Andrew Rogers, Head of Governance and Regulation and Salary Cap Manager, who provided invaluable insights into the operation of the Salary Cap, and Sam Hammonds, General Counsel, who unravelled the mysteries of PRL's governance model post the arrival of CVC. Finally, and by no means lastly, I would like to thank Ian Lynam and James Eighteen from the sports law specialist Northridge Law (https://northridgelaw.com ) who helped guide me on the legal context of the Salary Cap.

# APPENDIX 1 - RESERVED RECOMMENDATIONS

During this review, I have considered a number of additional actions that would further strengthen the integrity of the regulations. However, I have listened intently to the responses of the clubs and been convinced by them that, at this point, these more draconian measures are not necessary. In what I believe to be our shared view, the recommendations above will be sufficient to strengthen the regulations and ensure compliance.

It cannot be stressed enough that achieving the outcome desired by all is dependent upon the intent of those involved. If future violations continue to the detriment of the economics and reputation of PRL and the game more broadly, then I have no hesitation in recommending these additional measures:

- All hearings of the disciplinary panel to be heard in public, along the same lines as the General Medical Council, employment tribunals or criminal law
- The publication of all players' salaries at the start of every season. To avoid any GDPR concerns, I would suggest that this obligation is embedded into the players' standard contract
- Further restriction of the value that any player can receive to
    - salary from the club
    - one image rights contract, whether it counts within the salary cap or not

# APPENDIX 2 – TERMS OF REFERENCE

These Terms of Reference set out the scope of a review into the operation of Premiership Rugby's Salary Cap. The review has been initiated by the CEO of Premiership Rugby and will be led by Lord Myners of Truro CBE, with conclusions being reported to the CEO by April 2020.

***Background***

On 5 November 2019 Premiership Rugby ("PRL") announced the independent panel's decision relating to Saracens' breach of the salary cap. The written judgment gave a strong endorsement by Lord Dyson (and the independent panel) of the salary cap and the regulations were found to be pro-competitive and the panel upheld all charges in full. PRL's annual detailed review of the salary regulations was deemed by the panel to be a fundamental reason for PRL's successful defence of the competition law challenge brought by Saracens.

***Aim and scope***

PRL has appointed Lord Myners to support and lead the annual review process with the aim of further strengthening the salary cap regulations to ensure that PRL has a world-leading system in both investigatory powers and sanctions. Lord Myners will not consider the level of the salary cap.

More specifically the review will:

- Identify if there are enhancements to the monitoring and investigatory powers that would improve compliance with the salary regulations in future
- Review and consider all forms of transfer of value to players including co-investments and business arrangements between a club (and/or its connected parties) and a player (and/or his connected parties)
- Consider tools and powers from other sports and financial regulatory sectors around the world specifically tailored to the challenges faced by PRL and its clubs
- Review the sanctions framework in relation to the level and forms of sanctions that should be available
- Identify any additional resources/powers that could be provided to support the salary cap manager with particular focus on the salary cap manager's ability to access and obtain relevant information from clubs (and connected parties to clubs)