

# For the Love of Money, Football, and Competition Law:

---

An analysis of whether UEFA's Financial Fair Play  
Regulations breach European competition law.

**Thomas James Jemson**

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at  
the University of Otago – Te Whare Wananga o Otago.

October 2013

## *Acknowledgments*

Thanks to Professor Rex Ahdar, for sharing wisdom on competition law, offering advice on the dissertation process, and engaging in discussion on sports-related matters.

Thanks to my family, for being a constant source of support in everything I do.

Finally, thanks to my friends, for making my five years at the University of Otago memorable.

## *Table of Contents*

I. Introduction .....	1
II. Chapter One.....	3
A. Background to the Financial Fair Play Regulations. ....	3
B. Content of the Financial Fair Play Regulations. ....	5
III. Chapter Two.....	8
A. Salary Caps and Competition Law. ....	8
B. The Legal Process to Date. ....	11
C. The Legal Framework.....	12
IV. Chapter Three. ....	15
A. Does UEFA Implementing the Financial Fair Play Regulations Constitute a Decision or Agreement of an Undertaking or Association of Undertakings? .....	15
B. Will the Financial Fair Play Regulations Affect Trade Between Member States?.....	17
C. Do the Financial Fair Play Regulations Have as Their Object or Effect the Restriction of Competition? .....	18
V. Chapter Four. ....	24
A. Overview of the Possible Justifications.....	24
B. Does the Wouters Exception Apply to the Financial Fair Play Regulations? .....	24
C. Do the Financial Fair Play regulations satisfy Article 101(3) of the Treaty? .....	42
VI. Conclusion .....	49
VII. Bibliography.....	51

## *I. Introduction*

European football is undoubtedly a big money industry. In the 2011/2012 season, each of the top leagues in England, Germany, Spain, and Italy had combined revenue figures of over £1 billion, with the combined revenue of English football clubs over £3 billion for the first time.<sup>1</sup> However, while clubs are bringing in large revenues, they are also spending a lot of money. In the 2011 financial year, 55 per cent of the clubs participating in Europe's top divisions made a net loss and 38 per cent recorded negative net equity.<sup>2</sup>

With figures such as these, it is no surprise that some high profile football clubs have suffered financial collapse. The Scottish football club Rangers is a prime example of this. Rangers is a hugely popular and successful football club that has won 54 Scottish football titles, more than any other club.<sup>3</sup> Yet, off the field, Rangers was put into administration after amassing debts of approximately £75 million in unpaid taxes owed to Her Majesty's Revenue and Customs.<sup>4</sup> Then, in June 2012, Rangers began the liquidation process after failing to reach an agreement with creditors.<sup>5</sup> The club has now returned to playing, competing in Division Three of the Scottish Football League, effectively the fourth tier of Scottish football.<sup>6</sup>

Amidst concern over this financial backdrop, the Union of European Football Associations (UEFA) devised the Financial Fair Play (FFP) regulations in an attempt to restore some financial rationality into European football. The FFP regulations are based on the theory that clubs are overspending on player salaries, that this will ultimately drive them into bankruptcy, and that external intervention is necessary to prevent this from happening.<sup>7</sup> The regulations operate as part of UEFA's existing club licencing system and set out a variety of

---

<sup>1</sup> James Riach "Revenue made by English football clubs tops £3bn for the first time" (6 June 2013) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

<sup>2</sup> "The European Club Licensing Benchmarking Report Financial Year 2011" UEFA.com <[www.uefa.com](http://www.uefa.com)> at 15, 105. Negative net equity is defined as a situation where debts are larger than the reported assets of a club (at 15).

<sup>3</sup> Christopher Elser "Rangers Administrators Will Consider Three Bids for Soccer Team" (April 6 2012) Bloomberg <[www.bloomberg.com](http://www.bloomberg.com)>.

<sup>4</sup> Jon Pritchett "What Can We Learn From the Financial Meltdown of Glasgow Rangers FC?" (10 August 2012) Forbes <[www.forbes.com](http://www.forbes.com)>.

<sup>5</sup> Roddy Forsyth "Rangers in crisis: the final whistle sounds on Rangers' 140 years of history" (12 June 2012) The Telegraph <[www.telegraph.co.uk](http://www.telegraph.co.uk)>.

<sup>6</sup> Chris McLaughlin "Rangers: Newcastle's Mike Ashley ready to buy Ibrox share" (11 August 2012) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>. Rangers had originally applied for a place in the first tier of Scottish Football, the Scottish Premier League. However, the Scottish Premier League denied the application, and Rangers will rebuild in the lower levels of the Scottish Football League.

<sup>7</sup> Mark Chaplin "Financial Fair Play Protects Football's Stability" (May 27 2010) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

financial requirements that a club must meet in order to gain a licence.<sup>8</sup> The details of these regulations will be discussed later in this dissertation, however, the most discussed element of these regulations is the 'break-even' rule. Put simply, this rule requires clubs to live within their means, and not spend more than they earn.<sup>9</sup>

At first glance the FFP regulations may appear to be a mere quality standard.<sup>10</sup> However, the 'break-even' rule, highlighted above, limits how much a club is able to spend on player salaries. Thus, the regulations take the form of a quasi-salary cap. Because salary caps inherently restrict competition, this raises the question of whether the FFP regulations breach European competition law. This dissertation seeks to answer that question.<sup>11</sup>

Chapter One will set out the details of the FFP regulations themselves. This will discuss the background of the regulations, the specific objectives UEFA hopes the regulations will achieve, and why football clubs will try to comply with the regulations. Furthermore, it will detail the fine print of the regulations, with an emphasis on what the 'break-even' rule entails.

Chapter Two will set out the background to a competition law challenge to the FFP regulations. It will provide a brief overview of the use of salary caps and their clash with competition law. Next, it will discuss the parties that have reason to bring a challenge, and the legal jostling that has occurred so far. Finally, this chapter will set out the European law framework that this dissertation will use to analyse the legality of the FFP regulations.

The final two chapters will provide a legal analysis of the FFP regulations. Chapter Three will analyse whether the regulations would give rise to a *prima facie* breach of the general prohibition on anti-competitive conduct. Chapter Four will explore whether any legal justifications apply to prevent a declaration that the regulations are void.

---

<sup>8</sup> "Focus on club licensing and financial fair play" (26 May 2010) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

<sup>9</sup> "UEFA and European Commission Joint statement on UEFA's Financial Fair Play rules and EU State aid policy" (21 March 2012) European Commission <<http://ec.europa.eu>> at [4].

<sup>10</sup> See Thomas Peeters and Stefan Szymanski "Vertical Restraints in Soccer: Financial Fair Play and the English Premier League" (Research Paper 2012-028, Department of Economics, University of Antwerp, 2012) at 4.

<sup>11</sup> This author recognises that the FFP regulations may conflict with other areas of European law. Namely, they may constitute an obstacle to the freedom of movement for workers. However, this dissertation proposes to focus solely on the competition law implications. For an analysis of the freedom of movement issue, see Johan Lindholm "The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play" (2010) 12 *Tex Rev Ent & Sports L* 189 at 201-203; Christopher Flanagan "A Tricky European Fixture: an Assessment of UEFA's Financial Fair Play Regulations and their Compatibility with EU Law" (2013) 13 *ISLJ* 148 at 154.

## *II. Chapter One.*

### *A. Background to the FFP Regulations.*

UEFA is the governing body of football in Europe and one of the six continental confederations of world football's governing body FIFA.<sup>12</sup> In this role, UEFA works with, and acts on behalf of Europe's national football associations and other stakeholders in the game to "promote football and strengthen its position as arguably the most popular sport in the world."<sup>13</sup> In 2003, UEFA decided to implement the Club Licensing Regulations with the aim of "fixing minimum standards that had to apply to all clubs, across all UEFA member associations, irrespective of their size and degree of professionalism."<sup>14</sup> These regulations stipulate that UEFA will grant a football club a licence to compete in UEFA-run competitions that season if they meet certain minimum criteria.<sup>15</sup> However, UEFA indicated that even with this licensing system in play, they were still concerned with the financial state of European football.<sup>16</sup> Thus, in 2010, UEFA approved the FFP regulations to strengthen the financial criteria of the licencing regulations.<sup>17</sup>

UEFA instituted the FFP regulations in response to concerns over the financial stability of European football. Hence, it is no surprise that the stated objectives of the regulations mirror this. Article two of the regulations sets out the aims of FFP:<sup>18</sup>

To improve the economic and financial capability of the clubs, increasing their transparency and credibility; to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually; to introduce more discipline and rationality in club football finances; to encourage clubs to operate on the basis of their own revenues; to encourage responsible spending for the long-

---

<sup>12</sup> "Overview" (25 May 2013) UEFA.com <[www.uefa.com/uefa/aboutuefa/organisation/history/index.html](http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html)>.

<sup>13</sup> Above n 12.

<sup>14</sup> "Club Licensing Here to Stay" UEFA.com <[www.uefa.com](http://www.uefa.com)> at 5.

<sup>15</sup> "UEFA Club Licensing and Financial Fair Play Regulations" (2012) UEFA.com <[www.uefa.com](http://www.uefa.com)> at Article 1(2)(c). This minimum criterion sets out standards relating to sporting, infrastructure, personnel and administrative, legal, and financial matters.

<sup>16</sup> See David Conn "Platini launches inquiry into level of club debts" (29 August 2008) The Guardian <[www.theguardian.com](http://www.theguardian.com)>. This 2008 article indicates that UEFA's president Michel Platini was concerned with the level of debt some clubs were carrying, and states that UEFA planned to launch an investigation into the major financial challenges facing European football.

<sup>17</sup> "Financial Fair Play Regulations are approved" (27 May 2010) UEFA.org <[www.uefa.org](http://www.uefa.org)>.

<sup>18</sup> UEFA Club Licensing and Financial Fair Play Regulations, above n 15, at Article 2.

term benefit of football; to protect the long-term viability and sustainability of European club football.

Furthermore, the UEFA website sets out additional objectives, including:<sup>19</sup>

To decrease pressure on salaries and transfer fees and limit inflationary effect; to encourage long-term investments in the youth sector and infrastructure.

These objectives can be summarised as aiming to ensure the long-term financial stability of European football.

The FFP regulations only apply to football clubs who apply for a UEFA club licence. However, it seems likely that most clubs will seek to comply with the FFP regulations. UEFA organises four club competitions: the UEFA Champions League, UEFA Europa League, UEFA Super Cup, and the UEFA Women's Champions League.<sup>20</sup> These four competitions are some of the most prestigious and lucrative that European clubs can compete in. In particular, the UEFA Champions League is arguably the most prestigious club competition in world football. This competition offers extremely lucrative earnings, with the clubs involved in the 2012/13 version sharing €904.5 million, with the winning club FC Bayern München earning €55.046 million for their performance.<sup>21</sup> Thus, it is easy to envisage why any European club that has a chance of qualifying for these tournaments will aim to comply with the regulations. In fact, for the 2011/12, season 81 per cent of all top-division clubs in Europe underwent the licencing procedure.<sup>22</sup> Furthermore, simply choosing not to apply for a club licence and just competing in their respective domestic league may not be a valid alternative. As Johan Lindholm points out, national federations often model their own club license requirements after UEFA's.<sup>23</sup> Hence, it is a "distinct possibility that the Financial Fair Play rules will trickle down the sporting pyramid and apply to clubs participating in national club competitions."<sup>24</sup> This observation proved to be quite astute. In England, both the Barclays

---

<sup>19</sup> "Financial Fair Play" UEFA.com <[www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/index.html](http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/index.html)>.

<sup>20</sup> "UEFA" UEFA.com <[www.uefa.com/index.html](http://www.uefa.com/index.html)>. To bring up the list of competitions, click the 'all competitions' tab.

<sup>21</sup> "Clubs benefit from Champions League revenue" (23 July 2013) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

<sup>22</sup> "Financial Fair Play Media information" (25 January 2012) Financial Fair Play <[www.financialfairplay.co.uk/resources/FFP%20Press%20Kit%20EN\\_FINAL\\_en%20\\_1\\_.pdf](http://www.financialfairplay.co.uk/resources/FFP%20Press%20Kit%20EN_FINAL_en%20_1_.pdf)> at 3. This 81 per cent figure amounts to 591 of the 730 top-division clubs.

<sup>23</sup> Lindholm, above n 11, at 193.

<sup>24</sup> At 193.

Premier League and the lower Football Leagues have now voted to introduce similar versions of FFP.<sup>25</sup>

*B. Content of the FFP Regulations.*

The FFP regulations are set out in a 93-page document that details clubs' financial obligations.<sup>26</sup> These obligations range from a requirement to publish annual and interim financial statements, to ensuring the club has no overdue payables to other clubs, employees or social/tax authorities. However, the controversial aspect of the FFP regulations is the 'break-even' rule.

The notion of a 'break-even' result is introduced in Article 60 of the regulations. This stipulates, "the difference between relevant income and relevant expenses is the break-even result, which must be calculated in accordance with Annex X for each reporting period."

The terms 'relevant income' and 'relevant expenses' are defined in the regulations in Article 58, and further defined in Annex X. These definitions signal a few important aspects of FFP. Firstly, 'relevant income' is limited to income arising out of football operations.<sup>27</sup> This ranges from gate receipts to sponsorship and advertising.<sup>28</sup> However, the definition does not include equity injections from wealth owners. Hence, football clubs are limited in their ability to include funding from wealthy owners in the 'break-even' calculation.<sup>29</sup> This will essentially prevent a situation similar to that seen in the English Premier League where Manchester City owner Sheik Mansour invested over £1 billion into the club, taking them from a ninth place team in 2008 to a first place team in 2012.<sup>30</sup>

---

<sup>25</sup> "Premier League clubs agree new financial rules" (7 February 2013 ) Premier League <[www.premierleague.com](http://www.premierleague.com)>; "Financial Fair Play in The Football League" The Football League <[www.football-league.co.uk](http://www.football-league.co.uk)>. These regulations are not identical to the FFP regulations. The restrictions on acceptable club losses and levels of equity investment are different under the different systems. However, they do share the same principle of limiting expenditure to the amount a club earns.

<sup>26</sup> UEFA Club Licensing and Financial Fair Play Regulations, above n 15.

<sup>27</sup> At Article 58(1).

<sup>28</sup> At Article 58(1).

<sup>29</sup> This is not a complete ban on funding of this type. There is an allowance for a restricted level of equity investment under the 'acceptable deviation' provisions of the FFP regulations. This is set out later in this section.

<sup>30</sup> David Conn "Manchester City: a tale of love and money" (18 May 2012) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.



‘Relevant expenses’ is defined in a way which encourages spending on the future development of the club.<sup>31</sup> The definition includes things such as cost of sales and employee expenses (player wages).<sup>32</sup> However, it explicitly excludes other items such as expenditure on youth development activities, expenditure on community development activities, and finance costs directly attributable to the construction of tangible fixed assets.<sup>33</sup> This is in line with one of the FFP objectives, which is to encourage long-term investments in the youth sector and infrastructure.

The FFP regulations will be enforced for the first time in the 2013/2014 season.<sup>34</sup> Generally, the ‘break-even’ rule is assessed based on the previous three reporting periods, with the aggregate of those three periods being the ‘aggregate break-even result’.<sup>35</sup> If the ‘aggregate break-even result’ is negative, then the club has an ‘aggregate break-even deficit’ for that monitoring period.<sup>36</sup> Nevertheless, as long as the deficit is within an acceptable deviation, the club will not breach the FFP regulations. Article 61 sets out that the base acceptable deviation is up to €5 million. However, a club can exceed this level if the excess is entirely covered by contributions from an equity participant and/or related party (i.e. a wealth owner).<sup>37</sup> The maximum acceptable deviation in that case is then €45 million for the 2013/14 and 2014/15 monitoring periods, €30 million for the three periods after that, and then a lower yet to be determined amount.<sup>38</sup>

If a club does have a break-even deficit larger than the acceptable deviations, or breach any other part of the FFP regulations, then they may be penalised by the UEFA Club Financial Control Body.<sup>39</sup> The possible penalties range from a warning, through to barring a club from participating in a UEFA competition.<sup>40</sup> Some high profile football managers have indicated

---

<sup>31</sup> See Daniel Geey "The UEFA Financial Fair Play Rules: A Difficult Balancing Act" (2011) 9(1) *ESLJ* 50 at 2.

<sup>32</sup> UEFA Club Licensing and Financial Fair Play Regulations, above n 15, at Article 58(2).

<sup>33</sup> At Article 58(2).

<sup>34</sup> At Article 59.

<sup>35</sup> At Article 59. Despite this rule, assessment of the first monitoring period only takes into account the previous two monitoring periods (Article 59(2)).

<sup>36</sup> At Article 60(2).

<sup>37</sup> At Article 61(2). The terms ‘equity participant’ and ‘related party’ are defined at Annex X(D).

<sup>38</sup> At Article 61(2).

<sup>39</sup> At Article 72.

<sup>40</sup> "Procedural Rules Governing the UEFA Club Financial Control Body" UEFA.com <[www.uefa.com](http://www.uefa.com)> at Article 21.

concern over how UEFA will enforce the regulations.<sup>41</sup> However, the evidence so far suggests they should not worry. As of August 2013, the UEFA Club Financial Control Body has returned decisions against nine clubs for overdue payables.<sup>42</sup> Eight of these clubs have received sanctions, with six excluded from participating in the next UEFA club competition that they would otherwise qualify to compete in.<sup>43</sup>

With the details of the FFP regulations laid out, Chapter Two will explain how measures like these regulations inherently conflict with competition law. It will then set out the specific European competition law framework used to analyse these regulations.

---

<sup>41</sup> See Chris Wheeler "Fergie doubts whether Financial Fair Play will curb Premier League's big spenders" (8 February 2013) Mail Online <[www.dailymail.co.uk](http://www.dailymail.co.uk)>; Tariq Panja "Liverpool, Chelsea Are Concerned Amid Billionaires' Soccer Spree" (23 July 2013) Bloomberg <[www.bloomberg.com](http://www.bloomberg.com)>.

<sup>42</sup> "CFCB adjudicatory chamber decisions" (21 December 2012) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

<sup>43</sup> Above n 42.

### *III. Chapter Two.*

#### *A. Salary Caps and Competition Law.*

As Stephen Ross explains, “in most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed among themselves”.<sup>44</sup> A common rule that is imposed in these leagues is a salary cap. Salary caps come in several different variants. A ‘club salary cap’ consists of a limit on the amount a sports team can spend collectively on player wages.<sup>45</sup> The limit may be set as a universal amount for all clubs, or may be a limit that is relative to each team, based on something such as a percentage of a team’s revenue.<sup>46</sup> There are also ‘player salary caps’ which stipulate the maximum amount that can be paid to a single player, which often varies depending on the player’s years of service in the league or the salary the player was previously paid.<sup>47</sup> Despite these subtle differences, they all share the same core characteristic of restricting spending on player salaries. This core characteristic is also present in the FFP regulations. The regulations operate in a similar way to the previously mentioned relative salary cap, with the cap based on the individual clubs revenue.

Salary caps have been implemented in various forms across several different sports, in several jurisdictions. The United States first introduced a salary cap into the NBA in 1982, with the NFL following in 1993.<sup>48</sup> England has also introduced salary caps, with the Rugby Football League introducing a salary cap in 1997,<sup>49</sup> closely followed by the Rugby Football Union in 1999.<sup>50</sup> Three Australian domestic competitions have also implemented salary caps, namely the Australian Football League, NRL, and the A-league.<sup>51</sup> We have also seen the

---

<sup>44</sup> Stephen Ross "Player Restraints and Competition Law Throughout the World" (2004) 15 Marq Sports L Rev 49 at 49.

<sup>45</sup> At 50.

<sup>46</sup> Helmut Dietl and others "Welfare Effects of Salary Caps in Sports Leagues with Win-Maximizing Clubs" (Working Paper No 08-25, Institute for Strategy and Business Economics, University of Zurich, 2008) at 3-4.

<sup>47</sup> Ross, above n 44, at 50.

<sup>48</sup> PC Weiler and GR Roberts *Sports and the Law: text, cases, problems* (3rd ed, Thomson/West, New York, 2004) at 240-241.

<sup>49</sup> See Andrew Howarth and TA Robinson "The Impact of the Salary Cap in the European Rugby Super League" (2008) 3(6) IJBM 3. This article provides a background to the Salary Cap, and assesses how the measure effects the competitive balance of the league.

<sup>50</sup> See "Salary Cap" Premiership Rugby <[www.premiershiprugby.com](http://www.premiershiprugby.com)>. This website sets out general background information to the salary cap, and some details of how the cap works.

<sup>51</sup> Chris Davies "The Financial Crisis in the English Premier League: is a Salary Cap the Answer?" (2010) 31 ECLR 442 at 445.

New Zealand Rugby Football Union implement a salary cap in the New Zealand domestic rugby competition.<sup>52</sup>

Despite their use in other sporting leagues, a salary cap was a relatively foreign concept to European football.<sup>53</sup> This changed upon the introduction of the FFP regulations. The closest European football had come to implementing a salary cap was in 2003 when the G-14, a group of Europe's 14 most successful football clubs, got together and agreed to limit spending to 70 per cent of revenues.<sup>54</sup> However, this measure was never successfully implemented. The exact reason for the failure is up for debate, with some commentators indicating that it was due to the lack of an enforcement mechanism, while others indicate it was never actually put in place.<sup>55</sup>

Regardless of the specifics of a salary cap, they will always conflict with the competitive process. Competition is a process by which several individuals come together in a market as rivals to trade certain similar goods and services to a group of consumers.<sup>56</sup> The basic proposition of competition law is that it consists of a set of rules that regulate the competitive process, with the aim of maximising consumer welfare.<sup>57</sup> These rules deal with a range of practices, including anti-competitive agreements, abusive practices that damage competition, and mergers that are harmful to the competitive process.<sup>58</sup> Yet, competition law does not just apply to the relationships between buyers and sellers of tangible goods.<sup>59</sup> It can also apply to a wide range of "commercial and personal services available and necessary for the smooth operation of a developed modern economy".<sup>60</sup> Hence, competition law can be used to

---

<sup>52</sup>See generally Rex Ahdar "Professional Rugby, Competitive Balance and Competition Law" (2007) 1 ECLR 36. This article discusses the background of the salary cap and player transfer system introduced by the New Zealand Rugby Football Union. It then analyses the New Zealand High Court's authorisation of the measure.

<sup>53</sup> See generally Ross, above n 44, at 50-51. Stephen Ross explains that European football probably has not introduced a salary cap, as it is the only sport where there is serious inter-league competition for the best players. Hence, a domestic league will not introduce such a measure for fear that it will leave that league vulnerable to player poaching by other domestic leagues. A European wide measure would prevent this; however, that would be difficult to implement.

<sup>54</sup> Dietl and others, above n 46, at 5-6.

<sup>55</sup> At 5-6. Dietl and others argue that this measure was never put in place because the G-14 was dissolved in 2008. However, Lindholm, above n 11, at 194 (footnote 35) points out that the G-14 was disbanded two full seasons after it was put into force.

<sup>56</sup> Joanna Goyder and Albertina Albors-Llorens *Goyder's EC Competition Law* (5th ed, Oxford University Press, New York, 2009) at 8.

<sup>57</sup> See Richard Whish *Competition Law* (6th ed, Oxford University Press, New York, 2009) at 1.

<sup>58</sup> At 2-3.

<sup>59</sup> Goyder and Albors-Llorens, above n 56, at 9.

<sup>60</sup> At 9.

regulate various agreements and decisions that relate to the market for the services of professional athletes.

Placing a restriction on salaries inherently restricts the competitive process. The direct effect of a salary cap is lower salaries for players.<sup>61</sup> Under a free market without the salary restriction, the optimal allocation of players will be achieved where market forces operate to place players with the teams that value them the most.<sup>62</sup> However, when a salary cap is in place, the club faces a more complex decision making process when they are deciding whether or not to sign a player. The club has to consider factors such as how much money they have under the cap to offer the player, and how much room this signing will leave them with to purchase other players. The cap may also force teams to decide whether to purchase one high quality player, or two lesser quality players, when previously they may have just purchased them all. This means a club that previously valued a certain player higher than any other club may not end up signing that player due to the salary cap. Thus, by preventing the free market process, salary caps may result in the inefficient allocation of players among teams.<sup>63</sup>

To date, there have not been many competition law challenges to salary caps. In the United States, sporting bodies are able to avoid challenges under the Sherman Act<sup>64</sup> through the ‘non-statutory labour exemption’.<sup>65</sup> This Act provides that where “players form a union, they cannot challenge a restraint that is a mandatory subject of bargaining under labour law”.<sup>66</sup> Additionally, in England, several parties have questioned whether the salary caps are compatible with European law; however, it does not appear that a legal challenge has eventuated.<sup>67</sup> Furthermore, a salary cap has not been subject to a challenge in an Australian court.<sup>68</sup>

This means that initial guidance on whether the FFP regulations will breach competition law is limited. The Commission has explicitly recognised that the legality of a salary cap under

---

<sup>61</sup> Ross, above n 44, at 51.

<sup>62</sup> At 51.

<sup>63</sup> At 51.

<sup>64</sup> Sherman Antitrust Act 15 USC § 1. This is the United States competition law Act.

<sup>65</sup> Ross, above n 44, at 57; For an example, see *Wood v National Basketball Association* 809 F 2d 954 (2d Cir 1987) at 962-963.

<sup>66</sup> Ross, above n 44, at 57 - 58.

<sup>67</sup> See generally Leanne O’Leary "Price-fixing Between Horizontal Competitors in the English Super League" (2008) 3-4 ISLJ 77; Neale Harvey "Top clubs may fight salary cap in court" (4 September 2012) The Rugby Paper <[www.therugbypaper.co.uk](http://www.therugbypaper.co.uk)>.

<sup>68</sup> Davies, above n 51, at 444.

European law is yet to be determined.<sup>69</sup> Hence, in the future, the result of a legal challenge to the regulations will put a marker in the ground for the legal treatment of European salary caps.

### *B. The Legal Process to Date.*

There are several obvious parties that may have reason to challenge the FFP regulations. One example is a football club that is excluded from getting a club licence because of a breach of the 'break-even' rule. Alternatively, a football player who is forced to accept a reduced salary under the regulations may also want to bring a challenge. In fact, any party that suffers a financial loss as a result of the regulations may have cause to take UEFA to court.

UEFA is very aware of the possibility of a legal challenge to the FFP regulations. In order to ensure such a challenge would not be successful, UEFA undertook detailed discussions with the European Commission to ensure the legal reasoning behind the FFP regulations is sound.<sup>70</sup> Additionally, UEFA has reportedly been involved in discussions with the European Commission in an attempt to get the FFP regulations "judicial protection of some sort."<sup>71</sup>

The European Commission responded by releasing a joint statement with UEFA.<sup>72</sup> Some people have claimed that the European Commission has given the FFP regulations an exemption from European law, and that it would be fruitless to challenge the legality of the regulations.<sup>73</sup> However, the only mention of legality in the statement is that the objectives of the FFP regulations are "consistent with the aims and objectives of European Union policy in the field of State Aid."<sup>74</sup> The joint statement makes no mention of European Law generally, or compliance with competition law. In fact, a further communication from the Commission indicated that while they welcome the adoption of measures with similar objectives to FFP, these measures must comply with competition rules.<sup>75</sup> Hence, while the European

---

<sup>69</sup> Commission Of The European Communities "White Paper on Sport" (Accompanying document to the White Paper on Sport, July 11 2007) at 76.

<sup>70</sup> Geey, above n 31, at [46]–[48].

<sup>71</sup> "Platini wants EU cover" (25 September 2011) The Daily Star <<http://archive.thedailystar.net>>.

<sup>72</sup> UEFA and European Commission Joint Statement, above n 9.

<sup>73</sup> For example, see Mike Collett "Platini wins EC backing for financial fair play regulations" The Independent <[www.independent.co.uk](http://www.independent.co.uk)>.

<sup>74</sup> UEFA and European Commission Joint Statement, above n 9, at [7].

<sup>75</sup> "Communication on Sport - Developing the European Dimension in Sport" (05 July 2013) European Commission <<http://ec.europa.eu>> at [4.5]; Further evidence that the European Commission supports the principles of FFP can be found at: UEFA and European Commission Joint Statement, above n 9, at [2]. That states, "indeed, the principles underlying FFP could serve, with adaptations, as an effective model for other sports facing similar financial challenges".

Commission appears to support the principles underlying the FFP regulations, it is questionable whether the regulations themselves comply with European competition law.

One party has already laid a complaint with the European Commission. On the 6<sup>th</sup> of May 2013, Belgian football player agent Daniel Striani, represented by Jean-Louis Dupont,<sup>76</sup> made a complaint to the European Commission regarding the regulations.<sup>77</sup> Striani has asked the Commission to declare whether the FFP regulations breach European law. The complaint focusses on the 'break-even' rule, and claims that it restricts competition in several ways that will likely lead to him earning a reduced income. Later, on the 20<sup>th</sup> of June 2013, Daniel Striani launched a second legal action against the FFP regulations.<sup>78</sup> This action is in the Court of First Instance in Brussels, where Striani is arguing along the same lines as the previously mentioned complaint. However, Striani is also arguing that the Court of First Instance of Brussels should seek a preliminary ruling on FFP's compatibility with European Union law from the European Court of Justice. This is on the basis that the rule affects a wide range of people, from players to staff across the whole of the European Union.

### *C. The Legal Framework.*

The Treaty on the Functioning of the European Union<sup>79</sup> (Treaty) contains the Articles that would be used to challenge the FFP regulations. However, first it is necessary to examine whether sports and specifically these regulations are challengeable under European law.

In 1974, the European Court of Justice set out that European law can be used to challenge certain sporting activities, as far as they constitute an economic activity.<sup>80</sup> The more recent ruling by the European Court of Justice in *Meca Medina v European Commission* confirmed this, stating that there was no exception from European law for "purely sporting rules."<sup>81</sup> There is little doubt that the FFP regulations constitute an economic activity for two reasons.

---

<sup>76</sup> Jean-Louis Dupont has an extensive history challenging sporting regulations. He was involved in the successful legal challenge to the UEFA transfer system and nationality quota in Case C-415/93 *URBSFA v Bosman* [1995] ECR I-4921. He was also part of the legal team challenging anti-doping rules in Case C-519/04 P *Meca Medina v European Commission* [2006] ECR I-6991. In regards to the FFP regulations, he wrote this article in the Wall Street Journal: Jean-Louis Dupont "Football's Anticompetitive Streak" (2013) The Wall Street Journal <<http://online.wsj.com>>.

<sup>77</sup> Ed Thompson "Legal challenge to UEFA FFP rules by 'Bosman' Lawyer" (9 May 2013) Financial Fair Play <[www.financialfairplay.co.uk](http://www.financialfairplay.co.uk)>.

<sup>78</sup> Ed Thompson "Further legal challenge to FFP by Striani and Dupont" (20 June 2013) Financial Fair Play <[www.financialfairplay.co.uk](http://www.financialfairplay.co.uk)>.

<sup>79</sup> Treaty on the Functioning of the European Union [2010] OJ C83/47.

<sup>80</sup> Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405 at [4].

<sup>81</sup> *Meca Medina v European Commission*, above n 76, at [27], [33].

Firstly, the European Commission has previously stated that UEFA “engages directly in economic activities.”<sup>82</sup> Secondly, the Accompanying Document to the White Paper on Sport states that “organisational sporting rules ... that determine the conditions for ... clubs to engage in sporting activity as an economic activity, are subject to scrutiny under the anti-trust provisions of the treaty.”<sup>83</sup> Thus, the implementation of the FFP regulations by UEFA would be considered an economic activity and challengeable under European law.

The Articles of the Treaty that are relevant to a competition law challenge are Articles 101 and 102. Put simply, Article 101 relates to whether the action of a group restricts competition in a market, whereas Article 102 looks at whether that action of a group constitutes an abuse of a dominant position.

A challenge to the FFP regulations under Article 102 of the Treaty is highly unlikely. To violate this Article an agreement must satisfy two core requirements. They are that the undertaking must be in a dominant position in the market and have abused that position.<sup>84</sup> A court is highly likely to find UEFA has a dominant position. Sports organisations like UEFA usually have “practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sports events”.<sup>85</sup> Nevertheless, UEFA has not abused that position by implementing the FFP regulations. Abuse has not been defined in the Treaty or by the courts.<sup>86</sup> Despite this, Richard Whish outlines some guiding principles around abusive conduct.<sup>87</sup> The first principle, and the telling one here, is that “behaviour is only abusive where it ... is likely to cause clear and demonstrable harm to consumers.”<sup>88</sup> The FFP regulations concern the relationship between UEFA, football clubs, and players. The regulations impose no direct effects on consumers as they do not affect pricing or harm the

---

<sup>82</sup> Case 37398 *Joint selling of the commercial rights of the UEFA Champions League* [2003] OJ L291/25 at [106].

<sup>83</sup> Commission Of The European Communities "White Paper on Sport" (Accompanying document to the White Paper on Sport, July 11 2007), above n 69, at 36.

<sup>84</sup> Treaty on the Functioning of the European Union, above n 79, at Article 102.

<sup>85</sup> Robert Siekmann *Introduction to International and European Sports Law* (TMC Asser Press, The Hague, 2012) at 102. For an example, see Case T-193/02 *Piau v Commission of the European Communities* [2005] ECR II-209, at [115]. Here FIFA was held to have a dominant position due to their “supervisory powers over the sport-related activity of football and connected economic activities”.

<sup>86</sup> Whish, above n 57, at 193.

<sup>87</sup> At 194.

<sup>88</sup> At 194.



viability of a competitor. Thus, without this crucial element of harm to consumers, the FFP regulations cannot be considered abusive.<sup>89</sup>

On the other hand, a challenge under Article 101(1) of the Treaty is finely balanced. Article 101(1) consists of several elements that, if satisfied, may cause the agreement or decision to be automatically void.<sup>90</sup> The first element is that the FFP regulations must be a decision or agreement made by undertakings or an association of undertakings. Secondly, the regulations must have the potential to affect trade between Member States. Thirdly, the regulations must have as their object or effect, an appreciable prevention, restriction, or distortion of competition within the internal market. The elements of this Article will be analysed in Chapter Three.

However, there are two legal justifications that, if satisfied, may prevent the FFP regulations violating Article 101(1). The European Court of Justice in *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* created the first possible justification (hereinafter referred to as the ‘*Wouters exception*’).<sup>91</sup> The other possible justification comes from the Treaty itself. Article 101(3) of the Treaty provides that where its elements are satisfied, the provisions in Article 101(1) will not apply. These two justifications are analysed in Chapter Four.

---

<sup>89</sup> See *URBSFA v Bosman*, above n 76, at [286]. In Advocate General Lenz’s advisory opinion, he came to a similar conclusion. He found that there was no abuse of a dominant position, as the rules in question only affected the relationship between clubs and players, as opposed to market power that is exercised by the clubs in relation to competitors, customers, or consumers.

<sup>90</sup> Treaty on the Functioning of the European Union, above n 79, at Article 101(2).

<sup>91</sup> Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

#### *IV. Chapter Three.*

##### *A. Does UEFA Implementing the FFP Regulations Constitute a Decision or Agreement of an Undertaking or Association of Undertakings?*

The prohibition in Article 101(1) of the Treaty only applies to undertakings or to an association of undertakings. The European Court of Justice has defined the concept of an undertaking as encompassing “every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed”.<sup>92</sup> As indicated above, UEFA does engage in economic activity.<sup>93</sup> It is then necessary to consider whether UEFA is classified specifically as an undertaking by itself or an association of undertakings. Conceivably, UEFA could be classified as either, depending on the specific activity that is being challenged. For example, FIFA, the international governing body of world football has been classified as both on different occasions. In one Commission decision, they classified FIFA as a standalone undertaking when entering into contracts for television broadcasting rights.<sup>94</sup> However, in *Piau v Commission of the European Communities*, the General Court classified FIFA as an association of undertakings when a challenge was made to their player regulations.<sup>95</sup> This was on the basis that FIFA was composed of national federations that are made up of undertakings themselves (clubs). By implementing the FFP regulations, UEFA is acting in a similar way to FIFA enacting player regulations. Therefore, in the context of a challenge to these regulations, a court would likely follow *Piau* and conclude UEFA is an association of undertakings.

A counter argument to this conclusion is that UEFA and its members actually constitute a ‘group economic unit’. If UEFA and its members were classified as a ‘group economic unit’ then they are not capable of entering an agreement<sup>96</sup> or issuing a decision.<sup>97</sup> In the United States, the NFL unsuccessfully used this argument against a claim that their exclusive

---

<sup>92</sup> Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979 at [21].

<sup>93</sup> See Chapter Two at III.3.C.

<sup>94</sup> Case IV/33384 *Distribution of Package Tours During the 1990 World Cup* [1992] OJ L326/31 at [47]–[49].

<sup>95</sup> *Piau v Commission of the European Communities*, above n 85, at [71]–[72].

<sup>96</sup> See Goyder and Albors-Llorens, above n 56, at 80.

<sup>97</sup> Article 101(1) of the Treaty refers to “decisions by associations of undertakings”. To define UEFA as a single economic unit is mutually exclusive with being an association of undertakings. Hence, they could not issue a decision recognised by Article 101(1).

agreement with Reebok violated the Sherman Act.<sup>98</sup> However, the European Court of Justice has interpreted this concept far more narrowly than in the United States. Under European law, a group economic unit only covers wholly-owned subsidiaries that carry out the instructions of their parent companies, and have no real freedom to decide how to act in the market.<sup>99</sup> UEFA does not fall into this category, and thus competition law would apply to them as an association of undertakings.

Finally, the FFP regulations would meet either the definition of an agreement or a decision. Both of these terms have been given a broad interpretation by the courts.<sup>100</sup> Additionally, the overt nature of sporting regulations and commercial agreements make them easy to bring within these definitions.<sup>101</sup> Simon Gardiner and others have provided guidance on determining the eventual classification of sporting regulations:<sup>102</sup>

If it was the direct result of an agreement between the body and, for example, professional clubs, competition organisers and individual participants, that would be likely to be characterised as an agreement; whereas if the rule were promulgated by a sports federation under authority granted to it by its members, then this would likely fall into the category of a decision of an association of undertakings.

The Commission has determined in an earlier decision that one of UEFA's regulations was a decision of UEFA because the UEFA Executive Committee drew it up.<sup>103</sup> The FFP regulations also received approval from the UEFA Executive Committee, and they were created under authority granted to it by its members.<sup>104</sup> Thus, the implementation of these regulations would be considered a decision of UEFA.

---

<sup>98</sup> *American Needle Inc v National Football League* 560 US 183 (2010). This case revolved around the NFL's exclusive licensing agreement with Reebok. American Needle complained that this agreement represented a conspiracy to restrict other vendors' ability to obtain licences for each individual team's intellectual property (in their logos and trademarks). The Court of Appeals for the Seventh Circuit accepted the NFL's argument that the NFL teams were a single entity and could not have conspired to restrict trade. However, the Supreme Court disagreed and held that each NFL team is an individual entity with separate objectives.

<sup>99</sup> See generally Goyder and Albors-Llorens, above n 56, at 80; for a case example, see Case C-73-95P *Viho Europe v Commission* [1996] ECR I-5457.

<sup>100</sup> See Goyder and Albors-Llorens, above n 56, at 97.

<sup>101</sup> Simon Gardiner and others *Sports Law* (4th ed, Routledge, New York, 2012) at 178.

<sup>102</sup> At 178.

<sup>103</sup> Case 37806 *ENIC/UEFA* (European Commission, 25 June 2002) at [26]. The regulation in question here was UEFA's prohibition on owning multiple football clubs that are competing in the same UEFA competition.

<sup>104</sup> "UEFA EXCO approves financial fair play" (21 September 2009) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

### *B. Will the FFP Regulations Affect Trade Between Member States?*

The 1966 case *Société Technique Minière v Maschinenbau Ulm* set this element out clearly when the Court stated:<sup>105</sup>

... it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.

Firstly, it is not contentious that football-playing services are something that is traded between member states. Trade is defined broadly, and it is not restricted to mere manufacture and distributor relationships, but includes all cross-border economic activity.<sup>106</sup> The opinion of Advocate General Lenz in *URBSFA v Bosman* indicated that football players moving between states, constitutes trade.<sup>107</sup> Additionally, in Europe, football players are often transferred across different leagues in different member states. For example, Gareth Bale recently transferred from his English club Tottenham Hotspur to the Spanish club Real Madrid.<sup>108</sup> Thus, football-playing services are traded across member states.

Secondly, it is likely that the FFP regulations will affect this inter-state trade. As the 'break-even' rule in the regulations operates like a salary cap, clubs have an artificial limit placed on their expenditure. Because of this, there will likely be situations where a club cannot go through with a trade as the increased expenditure would cause the club to violate the 'break-even' rule. The NBA provides evidence that a salary cap device restricts player movement. There, several planned trades have failed to go through due to there being insufficient space under a team's salary cap.<sup>109</sup> Similar situations are likely to arise under the FFP regulations, and thus they are likely to have an influence on the potential pattern of trade between member states.

---

<sup>105</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 234 at 249.

<sup>106</sup> *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C101/81 at [19].

<sup>107</sup> See *URBSFA v Bosman*, above n 76, at [260]–[261].

<sup>108</sup> "Gareth Bale joins Real Madrid from Spurs in £85m world record deal" (1 September 2013) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>.

<sup>109</sup> Jeffrey Levine "The Legality and Efficacy of the National Basketball Association Salary Cap" (1992) 11 *Cardozo Arts & EntLJ* 71 at 91-92.

Thirdly, this element requires that the effect on trade must be appreciable.<sup>110</sup> An important factor under this analysis is the market position of the undertakings concerned.<sup>111</sup> The commission sets out a rebuttable presumption of agreements that will not appreciably affect trade.<sup>112</sup> This is where the market share of the relevant parties within the community is less than 5 per cent, and turnover of those parties is below €40 million.<sup>113</sup> UEFA have a far greater market share than this, and appear to operate as a practical monopoly over the organisation of professional football in Europe.<sup>114</sup> Furthermore, I have argued that most clubs will seek to comply with these regulations. Thus, with a majority of clubs seeking to comply with the regulations, it is likely the effect on interstate trade would be appreciable.

*C. Do the FFP Regulations Have as Their Object or Effect the Restriction of Competition?*

Under this element, the words ‘object or effect’ should not be read as cumulative requirements, and instead are considered alternatives.<sup>115</sup> When analysing this element, the first step to take is to consider whether the object of the agreement harms competition, as if this is satisfied, it is unnecessary to continue to examine the effect of the agreement.<sup>116</sup> To help interpret this element, Article 101(1) of the Treaty provides examples of agreements that are likely to restrict competition. They are:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

---

<sup>110</sup> *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, above n 106, at [44].

<sup>111</sup> At [45].

<sup>112</sup> At [52].

<sup>113</sup> At [52]. The relevant turnover is calculated slightly differently, depending on whether it is a horizontal or vertical arrangement.

<sup>114</sup> See Chapter Two at III.C.

<sup>115</sup> *Société Technique Minière v Maschinenbau Ulm*, above n 105, at 249.

<sup>116</sup> At 249.

### 1. Object analysis.

When determining whether the FFP regulations have the ‘object’ of harming competition, a court will examine the objective meaning and the purpose of the agreement considered in the economic context in which it is to be applied.<sup>117</sup> One of the primary objectives of the FFP regulations is to decrease pressure on salaries and transfer fees and limit inflationary effect. To achieve this objective, UEFA created the ‘break-even’ rule to place a limit on how much each club is able to spend on player salaries.

This objective, combined with the use of the ‘break-even’ rule gives the FFP regulations the appearance of a price fixing arrangement. Price fixing is one of the examples of an anticompetitive agreement in Article 101(1)(a) of the Treaty,<sup>118</sup> and is often characterised as having the object of restricting competition.<sup>119</sup> European courts have indicated price fixing includes any agreement that directly or indirectly restricts price competition,<sup>120</sup> with one example being setting maximum prices.<sup>121</sup> The FFP regulations appear to fall within this definition. The limit on spending in the ‘break-even’ rule can be interpreted as a maximum price mechanism that limits the ability of clubs to compete for players based on price. Additionally, other scholars have argued that a salary cap “by its very nature has the object of distorting and restricting competition.”<sup>122</sup> Therefore, as the regulations seem to operate as a price fixing arrangement, and they have the explicit aim of decreasing pressure on salaries, they appear to have an anti-competitive object.

Admittedly, there are price fixing arrangements that suppress price competition more than the FFP regulations. For example, if football clubs agreed to a ‘player salary cap’ then a club could not compete for a player on price above the capped level. However, under the FFP regulations, the limit is not as rigid and there is scope for a club to trade other players to enable them to make a more competitive salary offer. Occasionally, in some borderline cases of price fixing, a court will find that an agreement does not have an anti-competitive object,

---

<sup>117</sup> Case T-148/89 *Trefilunion v Commission of the European Communities* [1995] ECR II-1063 at [79].

<sup>118</sup> Treaty on the Functioning of the European Union, above n 79, at Article 101(1)(a).

<sup>119</sup> See generally Whish, above n 57, at 505-513 for horizontal arrangements, 653-654 for vertical.

<sup>120</sup> At 506 – 508. Here Whish sets out the various forms of agreements that have been classified as price fixing.

<sup>121</sup> See, for example, Case IV/400 *Agreement between European Glass Manufacturers* [1974] OJ L160/1.

<sup>122</sup> O’Leary, above n 67, at 79.

and instead relies on the agreement's anti-competitive effect.<sup>123</sup> Hence, if I am wrong and a court finds there is no anti-competitive object, it will be necessary to show that the FFP regulations have an anti-competitive effect.

## 2. *Effect analysis.*

In performing the effect analysis, it is necessary to establish what the state of affairs would be without the FFP regulations, and compare this to the situation with the regulations.<sup>124</sup> Importantly for the FFP regulations, this element can be satisfied based on likely anti-competitive effects, despite the fact the anti-competitive effects are yet to occur.<sup>125</sup> Thus, a court could still find that the FFP regulations violate Article 101(1), even though the exact effect of the regulations are not yet obvious.

Economic research undertaken on 'relative' salary caps similar to the FFP regulations suggests that these salary caps do reduce overall salary cost and hence have an anti-competitive effect.<sup>126</sup> Furthermore, Peeters and Szymanski have conducted research into the effects of the FFP regulations. That research indicates that if the FFP regulations had been in effect in the English Premier League for the 2009/2010 season, wage to turnover ratios would have fallen by as much as 15%.<sup>127</sup> Finally, there is some evidence that clubs are actually changing their behaviour in response to the introduction of the FFP regulations. According to the figures from 2012, clubs spent an estimated £60 million less on salaries than in 2011.<sup>128</sup> This evidence, taken together, indicates that the FFP regulations will cause salaries to decrease across the league, suggesting that the regulations are suppressing price competition. Therefore, even if a court did not accept that the object of FFP is to restrict competition; the effect of FFP clearly does just that.

---

<sup>123</sup> See, for example, Case 29373 *Visa International - Multilateral Interchange Fee* [2002] OJ L318/17 at [64] – [69]. This case involved several Visa system participants agreeing on a certain fee that would be paid by one party to another for each transaction with a Visa card. Despite the Commission concluding this restricted freedom of banks to decide their own pricing policy, the Commission found this was not an anti-competitive object.

<sup>124</sup> *Société Technique Minière v Maschinenbau Ulm*, above n 105, at 249.

<sup>125</sup> *Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C101/97 at [24].

<sup>126</sup> See generally Dietl and others, above n 46, at 6-7.

<sup>127</sup> Peeters and Szymanski, above n 10, at 28.

<sup>128</sup> "Football transfer dealings plummet in January window" (1 February 2012) CNN <<http://edition.cnn.com>>.

Additionally, the FFP regulations may have the anti-competitive effect of limiting investment.<sup>129</sup> As discussed earlier, the regulations set out a limit on how much funding from equity participants and/or related parties can be taken into account under the ‘break-even’ rule. Thus, the regulations directly limit the amount of investment that some parties are able to invest into a club. This may be a substantial amount for some investors, given Sheik Mansour has invested over £1 billion into Manchester City since taking over in 2008.<sup>130</sup> On the face of it, this also appears to be a restriction of competition under Article 101(1) of the Treaty.

Nonetheless, for these restrictions of competition to qualify under Article 101(1) of the Treaty they must satisfy a further requirement. The courts have developed the *de minimis* doctrine to prevent them having to deal with agreements or decisions that are of relatively minor importance.<sup>131</sup> The doctrine dictates that an agreement or decision will fall outside the prohibition in Article 101(1) unless its effect on competition or inter-state trade is “appreciable”.<sup>132</sup> Put another way, an agreement that has an insignificant effect on the market will not breach Article 101(1). The Commission has released guidance on the *de minimis* doctrine to help determine when something falls within Article 101(1).<sup>133</sup> This indicates that a decision is not considered insignificant where the parties involved collectively have 10 per cent or more of the relevant market.<sup>134</sup> While these guidelines are helpful, this analysis should not be conducted in a purely quantitative manner.<sup>135</sup> There may be cases where the market share of parties is less than this, but the effect on trade is still considered appreciable,<sup>136</sup> and vice versa.<sup>137</sup>

---

<sup>129</sup> This is one of the examples listed in the Treaty of agreements that are likely to restrict competition. See Treaty on the Functioning of the European Union, above n 79, at Article 101(1)(b).

<sup>130</sup> Conn, above n 30.

<sup>131</sup> This doctrine was first formulated by the European Court of Justice in Case 5/69 *Völk v Vervaecke* [1969] ECR 295.

<sup>132</sup> At 300; *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)* [2001] OJ C368/07 at [1].

<sup>133</sup> *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)*, above n 132.

<sup>134</sup> At [7].

<sup>135</sup> See Whish, above n 57, at 141–142.

<sup>136</sup> See generally, Case 30/78 *Distillers Co Ltd v Commission of the European Communities* [1980] ECR 229; Case 100/80 *Musique Diffusion Française v Commission of the European Communities* [1983] ECR 1825.

<sup>137</sup> See generally, Case 37576 *UEFA's Broadcasting Regulations* [2001] OJ L171/12.



The primary restriction on competition arising from the limit on spending is likely to have an appreciable effect on competition. Similar to the conclusion above, UEFA has a dominant position in their market and they fall well outside this 10 per cent safe harbour.<sup>138</sup> Further, the regulations are likely to affect a majority of clubs. Fifty five per cent of clubs made a loss in 2011, indicating they may be in danger of violating the ‘break-even’ rule.<sup>139</sup> This, coupled with the fact the majority of clubs are likely to attempt to comply with the regulations, suggests that the effect on competition will be appreciable.

However, the restriction of competition through limiting investment may be a different story. While UEFA has a dominant market share, this restriction may only have a small effect. The regulations only limit investors who are injecting funds solely to bankroll the club. Investors can still invest in other areas such as club infrastructure or youth development programs.<sup>140</sup> Additionally, this restriction of investment arguably does not apply to a wide group of people. The ‘acceptable deviation’ provision initially allows for €30 million of investment by equity participants. Thus, the only investors affected will be those who are looking to bankroll a club’s salary spending on a large scale, such as Manchester City owner Sheik Mansour or Chelsea owner Roman Abramovich. Given this is only likely to affect a small number of investors, and there are a vast number of investors in the sports market, this will not have a large effect on the overall sporting investment market.<sup>141</sup> Thus, if this was the only restriction of competition, it may not be enough to substantiate a claim under Article 101(1) of the Treaty.

The above analysis suggests the FFP regulations constitute a decision of an association of undertakings that appreciably restricts competition. In addition, the regulations appear as though they will affect trade between member states. Therefore, the regulations constitute a

---

<sup>138</sup> See Chapter Three at IV.B.

<sup>139</sup> “The European Club Licensing Benchmarking Report Financial Year 2011”, above n 2, at 15.

<sup>140</sup> See UEFA Club Licensing and Financial Fair Play Regulations, above n 15, at Article 58(2). This is the definition of relevant expenses which explicitly excludes several things from the ‘break-even’ calculation. Thus, investors’ money can be spent on this without it affecting a clubs ability to meet the ‘break-even’ rule.

<sup>141</sup> CAS 98/200 *AEK Athens and SK Slavia Prague/UEFA* (Court of Arbitration for Sport, 20 August 1999) at [106]. Here the Panel finds that there are “countless potential buyers of ownership interests in football clubs”.

violation of Article 101(1) of the Treaty. This dissertation will now consider if any justifications apply to the regulations to prevent a declaration that the regulations are void.<sup>142</sup>

---

<sup>142</sup> Treaty on the Functioning of the European Union, above n 79, at Article 101(2). This states that any agreement that is prohibited under Article 101(1) shall be automatically void.

## *V. Chapter Four.*

### *A. Overview of the Possible Justifications.*

This chapter will examine whether either the judicially created *Wouters* exception, or the statutory exception in Article 101(3) of the Treaty apply to the FFP regulations. If either of these applies, the FFP regulations will not breach Article 101(1).

It is important to note the key differences between these two exceptions. The *Wouters* exception makes it possible to balance non-competition objectives against restrictions in competition, and conclude that the former outweigh the latter.<sup>143</sup> This means that even if the regulations would otherwise restrict competition, they are not considered a restriction of competition incompatible with the common market.<sup>144</sup> Where that is the case, there is no violation of Article 101(1) of the Treaty because the final element, whether the agreement has the object or effect of restricting competition, is not satisfied.<sup>145</sup>

On the other hand, Article 101(3) of the Treaty is a statutory competition law exception. The focus of Article 101(3) is on weighing and balancing the pro and anti-competitive effects of the measure in question, and determining whether it is economically beneficial to allow the measure, despite its anti-competitive restrictions.<sup>146</sup> Where an agreement or decision satisfies the elements of Article 101(3), that Article provides that the agreement or decision in question may be exempt from Article 101(1).

### *B. Does the Wouters Exception Apply to the FFP Regulations?*

*Wouters* involved a lawyer, Mr Wouters, who was seeking to practice as a lawyer in a firm of accountants. However, a rule adopted by the Dutch Bar Council prohibited lawyers from the Netherlands entering into partnership with non-lawyers. Mr Wouters challenged the legality of this rule under European competition law, and it was referred to the European Court of Justice. The Court found that the prohibition on multi-disciplinary partnerships is liable to

---

<sup>143</sup> Whish, above n 57, at 127.

<sup>144</sup> *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, above n 91, at [97]; *Meca Medina v European Commission*, above n 76, at [45]. For a more general discussion of the *Wouters* exception, see Whish, above n 57, at 126 – 130.

<sup>145</sup> Thus, this justification is technically part of the element in Article 101(1) of the Treaty that examines whether there is a restriction of competition. However, for the purposes of this dissertation it is examined separately to improve the clarity of analysis.

<sup>146</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [11]; Case T-112/99 *Métropole télévision (M6) and others v Commission of the European Communities* [2001] ECR II-2459 at [74].

limit production and technical development under what is now Article 101(1)(b) of the Treaty, and that the rule had the required effect on trade between member states.<sup>147</sup> However, the Court then stated, “not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in [Article 101(1) of the Treaty].”<sup>148</sup> The Court explained further by indicating that the Article would not be infringed where the rule in question could “reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in [the Netherlands].”<sup>149</sup>

The European Court of Justice applied the *Wouters* exception to the sporting context for the first time in *Meca-Medina*.<sup>150</sup> Drawing from the *Wouters* decision, the Court set out a clear statement of the rule:<sup>151</sup>

... account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.

This case centred around two swimmers who had been banned for doping under anti-doping rules of the International Swimming Federation, for which the International Olympic Committee was ultimately responsible. The swimmers challenged the legality of the anti-doping rules under Article 81. However, in applying the *Wouters* exception, the Court held that the anti-doping rules pursued a legitimate objective of ensuring competitive sport was conducted fairly, athletes were healthy, and the integrity and objectivity of competitive sport was maintained.<sup>152</sup> The Court then held that the restrictions of competition were inherent in those rules and they were proportionate to them.<sup>153</sup>

The European Commission also used the *Wouters* exception in the sporting context when they dismissed a complaint by ENIC plc.<sup>154</sup> ENIC plc challenged the legality of UEFA rules

---

<sup>147</sup> See *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, above n 91, at [86],[90],[94] for the discussion on how the rule limited production and technical development. See [95] for how the rule affected trade between member states.

<sup>148</sup> At [97].

<sup>149</sup> At [107].

<sup>150</sup> *Meca Medina v European Commission*, above n 76.

<sup>151</sup> At [42].

<sup>152</sup> At [42] – [45].

<sup>153</sup> At [44] – [45], [47] – [56].

<sup>154</sup> *ENIC/UEFA*, above n 103.

that prevented a person owning shares in more than one football team competing in the same UEFA competition. However, the *Wouters* exception blocked the challenge. This time the Commission found the legitimate objective was protecting the integrity of the tournament by ensuring the uncertainty and genuine nature of results.<sup>155</sup>

### *1. Do the FFP regulations pursue legitimate objectives?*

The main aim of the FFP regulations is to ensure long-term financial stability in European football. To determine whether this is a legitimate objective, it is helpful to examine the context surrounding the introduction of the measure.<sup>156</sup> UEFA introduced the FFP regulations due to concern over the financial behaviour of football clubs. As indicated in the introduction, in 2011, 55 per cent of the clubs participating in the European top divisions were making a loss, and 38 per cent recorded negative equity. The figures for the previous year are similar, at 56 per cent and 36 per cent respectively.<sup>157</sup>

Even in the context of risky financial behaviour, some may argue that the aim of financial stability is not a legitimate objective. In regular business, companies would be left to manage their own financial affairs, even if they were conducting business in a risky manner. The argument follows that it is not the role of a regulator to prevent a business from digging its own grave. However, this argument fails to recognise that football clubs are not treated like any other business and ignores the special characteristics inherent in sport.

One of these characteristics is the mutual interdependence of sports teams.<sup>158</sup> Sporting clubs are not rivals in the normal sense of the market. While they work against each other to best one another on the field, the nature of sport means that the success of one team is dependent on the survival of other teams with which it can compete.<sup>159</sup> As Chris Davies identifies, clear difficulties would result if a football club collapsed mid-season.<sup>160</sup> The league's governing body would have to determine how to treat past results of the collapsed club that season, and

---

<sup>155</sup> At [32] – [40].

<sup>156</sup> See *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, above n 91, at [97]; *Meca Medina v European Commission*, above n 76, at [42].

<sup>157</sup> "The European Club Licensing Benchmarking Report Financial Year 2010" UEFA.com <www.uefa.com> at 77, 80.

<sup>158</sup> Umberto Lago, Rob Simmons and Stefan Szymanski "The Financial Crisis in European Football: An Introduction" (2006) 7 JSE 3, at 4; "Communication on Sport - Developing the European Dimension in Sport", above n 75, at [4.2]; "White Paper on Sport" (Accompanying document to the White Paper on Sport, July 11 2007), above n 69, at 36.

<sup>159</sup> Levine, above n 109, at 79-80; Lago, Simmons and Szymanski, above n 158, at 4.

<sup>160</sup> Davies, above n 51, at 447.

fixtures that the club was yet to complete. Whichever way it was decided, this would affect other clubs standing on the points table, and may influence future outcomes such as which club wins the league, and who is relegated. Any club that was adversely affected by that decision may then pursue legal action against the league.

Additionally, the judgement in *Meca-Medina* suggests that legitimate objectives of sporting rules will normally relate to the “organisational and proper conduct of competitive sport”.<sup>161</sup> UEFA would argue that ensuring that a football club is able to complete a season ensures that the organisation of a sports league runs smoothly. Furthermore, the European Commission seems to support the objectives behind FFP. Firstly, the Accompanying Document to the White Paper on Sport, while a non-binding document, specifically sets out financial stability as an example of what may be a legitimate objective.<sup>162</sup> Secondly, the UEFA Joint Statement with the European Commission on the FFP regulation appears to support this objective. That statement indicates:<sup>163</sup>

... the ‘break even’ rule reflects a sound economic principle that will encourage greater rationality and discipline in club finances and, in so doing, help to protect the wider interests of football.

Therefore, in this author’s view a court will conclude that the FFP regulations pursue a legitimate aim in long-term financial stability.

## *2. Are the restrictions from FFP inherent in the objective of financial stability?*

Here the court must decide whether the anti-competitive restriction on how much a club is able to spend is inherent in achieving the goal of long-term financial stability of the football industry.<sup>164</sup> The Accompanying Document to the White Paper on Sport provides guidance on this by stating, “rules inherent in the organisation and proper conduct of competitive sport also include the rules of the game”.<sup>165</sup> However, the issue in this case is not as simple as deciding that the rule limiting a game to 90 minutes is inherent in the ‘organisation and proper conduct of competitive sport’. Helpfully though, courts have taken a broader approach

---

<sup>161</sup> *Meca Medina v European Commission*, above n 76, at [45]–[46].

<sup>162</sup> “White Paper on Sport” (Accompanying document to the White Paper on Sport, July 11 2007), above n 69, at 68.

<sup>163</sup> UEFA and European Commission Joint Statement, above n 9, at 2.

<sup>164</sup> See *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, above n 91, at [97]; *Meca Medina v European Commission*, above n 76, at [42].

<sup>165</sup> “White Paper on Sport” (Accompanying document to the White Paper on Sport, July 11 2007), above n 69, at 68.

to this element. In *Meca-Medina*, the Court concluded that the restrictions that arose out of the anti-doping penalties were inherent for the proper conduct of competitive sport and the healthy rivalry of athletes.<sup>166</sup> Similarly, the Commission found that the prohibition on the ownership of two or more sports clubs that were competing in the same UEFA competition was inherent for ensuring the uncertainty of results.<sup>167</sup>

If long-term financial stability of a football league in a market with risky financial practices is the goal, then logically there will need to be limits placed on the finances of football clubs. This conclusion does not appear to be any more controversial than saying anti-doping penalties are necessary to ensure that competition between athletes is fair. A counter argument to this is that the goal in question here could have been achieved through a method that controls the finances of clubs without restricting the amount that a club spends. However, as is set out later in this dissertation, these alternatives are not adequate to deal with the objective of financial stability.<sup>168</sup> Thus, a court will likely conclude that the restrictions on spending in the FFP regulations are inherent in achieving the aim of long-term financial stability.

### *3. Are the restrictions arising from the FFP regulations proportionate to the objective?*

The final stage of the *Wouters* exception involves an examination of the proportionality doctrine.<sup>169</sup> The proportionality doctrine originates from German law, where it was used to challenge whether policing measures were excessive or unnecessary in relation to the objective being pursued.<sup>170</sup> Now the doctrine is well established throughout European law, and can be used to challenge European Union action, and Member State action that falls within the sphere of European law.<sup>171</sup> The standard formula of whether a measure complies with the proportionality requirement is to establish whether the means the measure employed to achieve the aim corresponds to the importance of the aim and whether the measure is necessary for its achievement.<sup>172</sup> There is some debate about whether this inquiry consists of

---

<sup>166</sup> *Meca Medina v European Commission*, above n 76, at [43]-[45].

<sup>167</sup> *ENIC/UEFA*, above n 103, at [32] – [40].

<sup>168</sup> See Chapter Four at V.B.3.

<sup>169</sup> See *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, above n 91, at [97]; *Meca Medina v European Commission*, above n 76, at [42].

<sup>170</sup> Paul Craig and Grainne De Burca *EU Law* (5th ed, Oxford University Press, New York, 2011) at 526.

<sup>171</sup> At 526.

<sup>172</sup> Case 66/82 *Fromançais v Forma* [1983] ECR 395 at [8]; Case 47/86 *Roquette Freres v ONIC* [1987] ECR 2889 at [19].

two or three discrete stages.<sup>173</sup> However, it appears that those who set out the test as consisting of two stages envelop the third stage into the second.<sup>174</sup> Thus, the reality is that there is no difference between the two and three stage formulations. Furthermore, the courts will address an argument that is targeted at the so-called third stage.<sup>175</sup> Hence, for the purposes of this dissertation, I will treat the test as three separate stages. Those are:<sup>176</sup>

1. Whether the measure was suitable to achieve a legitimate aim.
2. Whether it was necessary to achieve that aim.
3. Even if there are no less restrictive means, whether the measure has an excessive effect on the applicant's interests (proportionality *stricto sensu*).

Equally important as the elements of proportionality is how intensively the court will examine those elements.<sup>177</sup> The intensity of the proportionality examination depends upon the context of the inquiry, as it is applied on a case-by-case basis.<sup>178</sup> The court may take an approach which shows a large amount of deference to the decision maker (UEFA in this case), or alternatively make a "rigorous and searching examination" of the reasoning behind the thing that is being challenged.<sup>179</sup> Two important factors a court may consider when determining the appropriate intensity include the nature and importance of the objective sought to be achieved, and the nature and importance of the interest claimed by the applicant. Additionally, a court will also take note of the "relative expertise, position, and overall competence of the court as against the decision-making authority in assessing those factors."<sup>180</sup>

The FFP regulations do not appear to involve interests that clearly point to a certain intensity of examination. The interest infringed by the regulations does not demand a strict proportionality inquiry. Generally, a strict inquiry is required where a measure infringes upon an important right or community interest, such as a fundamental civil liberty of a person.<sup>181</sup> The FFP regulations merely infringe the ability to act in a market without competitive

---

<sup>173</sup> Craig and De Burca, above n 170, at 526; Takis Tridimas *The General Principles of EC Law* (Oxford University Press, New York, 1999), at 92.

<sup>174</sup> Craig and De Burca, above n 170, at 526; Tridimas, above n 173, at 92; Catherine Barnard *The Substantive Law of the EU* (3rd ed, Oxford University Press, New York, 2010) at 172.

<sup>175</sup> Craig and De Burca, above n 170, at 526.

<sup>176</sup> At 526; Tridimas, above n 173, at 92.

<sup>177</sup> Craig and De Burca, above n 170, at 526.

<sup>178</sup> Grainne De Burca "The Principle of Proportionality and its Application in EC Law" (1993) 13 YEL 105 at 114.

<sup>179</sup> At 111-112.

<sup>180</sup> At 111-112.

<sup>181</sup> At 148.



restraints. However, European law regularly infringes upon this interest, and an Article of the Treaty specifically allows this.<sup>182</sup> Equally, the interest that the FFP regulations aim to protect is not one that demands a large degree of deference to the decision maker. Examples of measures that do demand such deference include those that deal with matters of public health<sup>183</sup> or public security<sup>184</sup>, as these are seen as important interests to protect.<sup>185</sup> Yet, the FFP regulations do not appear to touch any area of public importance such as those. Thus, neither of the interests involved with the regulations clearly indicate the appropriate intensity of a proportionality inquiry.

However, there are other good reasons that suggest a court should not undertake a rigorous examination of the FFP regulations. UEFA will argue that due to the special characteristics inherent in sport, and UEFA's relative expertise in this area, a court should be hesitant to interfere with their decision-making. In support of this, UEFA would point out that the Treaty contains formal recognition of the respect that is shown to the area of sport. Article 165 of the Treaty explicitly recognises that the European Union should embrace the 'specific nature of' sport in their decision-making. Additionally, Stephen Weatherill suggests that the previous case law in this area shows a history of courts showing hesitance to interfere with the decisions of sporting bodies.<sup>186</sup> Therefore, surely UEFA is in a better position to determine what is best for European football than any judicial body.

Furthermore, UEFA could argue that the court should not undertake a rigorous examination of proportionality, as the affected parties were extensively consulted in drafting the measure. UEFA developed the FFP regulations over an extensive consultation period, involving the whole football family.<sup>187</sup> Additionally, during this consultation process it is understood that

---

<sup>182</sup> See Treaty on the Functioning of the European Union, above n 79, at Article 101(3). As discussed, this Article provides that an anti-competitive measure may be allowed after the weighing up of the pro-competitive benefits it creates. This provision is commonly argued in any competition law challenge.

<sup>183</sup> See Case C-331/88 *Fedesa and Others v Council of the European Communities* [1990] ECR I-4023.

<sup>184</sup> See Case C-120/94 *Commission of the European Communities v Greece (FYROM case)* [1996] ECR 1513.

<sup>185</sup> Tridimas, above n 173, at 122

<sup>186</sup> Stephen Weatherill "Financial Fair Play and the law Part III: Guest post by Professor Stephen Weatherill" (14 May 2013) Soccernomics <[www.soccernomics-agency.com/?p=469](http://www.soccernomics-agency.com/?p=469)>.

<sup>187</sup> See "Financial Fair Play", above n 19. Also see "EPFL welcomes financial fair play" (12 March 2010) UEFA.org <[www.uefa.org](http://www.uefa.org)>; "Financial Fair Play Regulations are approved", above n 17. These sources indicate that the European Club Association and the Association of European Professional Football Leagues were involved in creating the regulations.

these parties were able to gain several concessions.<sup>188</sup> Finally, all of the key stakeholders in European football supported the UEFA Executive Committee approving the regulations.<sup>189</sup>

The exact strictness of a proportionality inquiry that a court will take is not entirely clear. Courts and commentators have set out many apparently different standards of the proportionality inquiry, depending on the particular context.<sup>190</sup> These range from the ‘normal control’ test to the ‘not manifestly inappropriate test’.<sup>191</sup> Nevertheless, this author submits that due to the recognition that sport is a ‘special’ area, UEFA’s relative expertise in this area, and the consultation process that took place, a court will be quite hesitant to make a finding that the regulations are disproportionate.

(a) Are the FFP regulations a suitable measure to achieve financial stability?

Whether a measure is suitable or appropriate to achieve its desired objective is a test that looks at the relationship between the means and the ends.<sup>192</sup> As Tridimas explains, the measure employed must be reasonably effective at achieving its aim,<sup>193</sup> an examination which looks at the actual effects of the measure.<sup>194</sup> The evidence suggests that the FFP regulations will have the desired effect of decreasing salaries. Economic analysis into the effects of the regulations indicates that implementing the regulations into the English Premier League for the 2009/2010 season would have caused wage to turnover ratio to drop by up to 15 per cent.<sup>195</sup> This study provides an indication that the FFP regulations will be effective in reducing costs for football clubs. Hence, this will go some way towards the main objective of FFP which is achieving long-term financial stability.

A complainant against the FFP regulations could derive an argument from the *Fedesa and Others v Council of the European Communities* case to show that the measure is not suitable.

<sup>196</sup> There the applicants argued that the measure in question was an inappropriate and ineffective measure because it was impossible to apply in practice, and it would lead to the creation of a dangerous black market.<sup>197</sup> A similar argument could be made against the FFP

---

<sup>188</sup> See Geey, above n 31, at [37].

<sup>189</sup> “Financial Fair Play Regulations are approved”, above n 17.

<sup>190</sup> De Burca, above n 113.

<sup>191</sup> At 113.

<sup>192</sup> Tridimas, above n 173, at 91.

<sup>193</sup> De Burca, above n 178, at 117.

<sup>194</sup> Tridimas, above n 173, at 96.

<sup>195</sup> Peeters and Syzmanski, above n 10 at 28.

<sup>196</sup> *Fedesa and Others v Council of the European Communities*, above n 183.

<sup>197</sup> At [12].

regulations in that they will lead to football clubs constantly searching for loopholes in the regulations, making them very difficult to apply. There is already evidence of this occurring, with the Manchester City sponsorship by Etihad Airways a prime example.<sup>198</sup> In that example, Manchester City attempted to inflate their revenue figures through an artificially high sponsorship payment by Etihad Airways, a party that is owned by a closely related party to the wealthy owner of the club.<sup>199</sup> While UEFA has provisions in the FFP regulations to reduce suspiciously high value transactions such as this back to ‘fair value’, determining fair value is not necessarily that easy.<sup>200</sup> The Manchester City example demonstrates this, as they structured the sponsorship payment to make some of it appear to be going toward excluded expenditure.<sup>201</sup>

Nevertheless, while potential loopholes like this will create a few challenges, it is unlikely that it would make the regulations ‘unsuitable’. Football clubs are likely to try to exploit loopholes in any regulations that UEFA implements. Unless those loopholes are so extensive as to leave the regulations largely unworkable, a court is likely to find that the FFP regulations are suitable to achieve their desired end.

(b) Are the FFP regulations necessary to achieve financial stability?

The essential question when addressing whether the measure is ‘necessary’ is whether there are other less restrictive means available that are capable of achieving the same result.<sup>202</sup> The following analysis will propose several alternatives to the FFP regulations and determine how a court is likely to treat them.

---

<sup>198</sup> Matt Slater "Uefa boss to scrutinise Manchester City's Etihad deal" (16 August 2011) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>.

<sup>199</sup> Above n 198. Etihad Airways is owned by the Abu Dhabi government, which is controlled by Sheikh Khalifa bin Zayed Al Nahyan, the half-brother of Manchester City's owner Sheikh Mansour.

<sup>200</sup> “UEFA Club Licensing and Financial Fair Play Regulations”, above n 15, at Article 58, Annex X(E)(7).

<sup>201</sup> Slater, above n 198; Flanagan, above n 11, at 152. The sponsorship deal is primarily payment for sponsorship of Manchester City's shirt and stadium. Yet, part of the deal is meant to fund an Etihad Campus, which involves improving the club's infrastructure and the youth academy. This type of expenditure is the sort that is excluded from the definition of ‘relevant expenditure’ under the ‘break-even’ rule. Thus, it is important to determine the exact portion of the money that is spent on the Etihad Campus, as this will have implications for Manchester City's ‘break-even’ calculation. However, reports indicate that this may not be a straightforward task.

<sup>202</sup> Barnard, above n 174, at 172. Tridimas, above n 173, at 92.

### (i) Luxury tax

One possible alternative to the FFP regulations is a luxury tax.<sup>203</sup> A luxury tax differs from a salary cap, in that instead of an absolute level clubs must not exceed, it aims to discourage excessive spending by taxing salary expenditure over a pre-determined limit.<sup>204</sup> The tax taken from this measure is often distributed among the weaker teams in the league.<sup>205</sup> An example of a luxury tax can be seen in the NBA, where teams have to pay a 100 per cent tax to the league for each dollar they spend over the limit.<sup>206</sup>

The first inquiry is whether a luxury tax would be a less restrictive measure than the FFP regulations. By placing a large disincentive on spending over a certain level, a luxury tax would still restrict competition to some degree. Nevertheless, as a club can still choose to spend over this level, the restriction on competition in the player market will not be as severe as if there was a fixed upper limit to spending. Additionally, unlike the FFP regulations, a luxury tax does not restrict competition by limiting investment. Therefore, the restriction on competition that is likely to result from a luxury tax is less than under the regulations.

However, this lesser restriction of competition comes at the cost of achieving the FFP regulations main objective. Typically, a luxury tax is implemented with the aim of improving the financial and competitive balance in a league.<sup>207</sup> Hence, preventing overspending by sports clubs does not appear to be a specific aim of such a measure. As a luxury tax has no set limit on how much a club can spend, they are still able to spend far beyond their means. In fact, research suggests that while a luxury tax may achieve greater competitive balance in a league; this is at the expense of increased total salary payments.<sup>208</sup> This suggests the ability to undertake risky financial practices is not eliminated; it has just been made more expensive. A luxury tax may be a less restrictive measure, but does not one that adequately achieves UEFA's objective.

---

<sup>203</sup> This is one of the measures that Jean-Louis Dupont (the lawyer bringing the current legal proceedings against FFP) has suggested. See Dupont, above n 76; Thompson, above n 77.

<sup>204</sup> Stefan Szymanski "The Economic Design of Sporting Contests" (2003) 41 JEL 1137, at 1172.

<sup>205</sup> Helmut Dietl, Markus Lang and Stephan Werner "The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues" (Working Paper No 08-23, Institute for Strategy and Business Economics, University of Zurich, 2008) at 2, 13.

<sup>206</sup> At 2.

<sup>207</sup> At 2, 13.

<sup>208</sup> At 3, 14.

(ii) Solvency mechanism.

In light of the criticisms of the aforementioned luxury tax, a better alternative to the FFP regulations may be found by focussing on a measure that specifically aims to achieve financial stability. The obvious possibility is instilling a simple solvency test that European football clubs must meet. An example of such a measure is found in section 4 of the New Zealand Companies Act 1993. That section provides:

(1) For the purposes of this Act, a company satisfies the solvency test if—

(a) the company is able to pay its debts as they become due in the normal course of business; and

(b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

The first requirement of this solvency test is already included in the FFP regulations. Articles 49 and 50 provide that a club is to have no overdues payable towards football clubs, employees, and social/tax authorities. The legality of such a regulation is not in question.

To understand the second aspect of this test, one must understand the terms assets and liabilities. An asset is defined as “a resource controlled by the entity as a result of past events and from which economic benefits are expected to flow to the entity.”<sup>209</sup> Importantly, this could include cash injections that were made by an equity participant. On the other hand, a liability is defined as “a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits.”<sup>210</sup> This definition would only include player salaries once they were owed to a player. Hence, in its current state, the mechanism would not be effective at ensuring a club did not take on larger salaries than they could cover with revenue. However, UEFA could simply amend this definition to include the value of all contractual commitments for that financial year.<sup>211</sup> Thus, clubs would have to take the value of all their

---

<sup>209</sup> "The Conceptual Framework for Financial Reporting" (September 2010) IFRS Foundation <<http://eifrs.ifrs.org/eifrs/bnstandards/en/2013/conceptualframework.pdf>> at 4.4(a). The IFRS Foundation was the body responsible for publishing this Framework. They are a body that helps develop international accounting standards through the International Accounting Standards Board.

<sup>210</sup> At 4.4(b).

<sup>211</sup> This author chose the period of a year arbitrarily. However, it is likely this definition would be limited to a set period. Otherwise, the obligation to have assets to cover all contractual commitments that currently bind the club would be too onerous. Many clubs would have entered into large multi-

contractual liabilities that year into consideration, not just those that are currently due. This would create a solvency mechanism similar to the ‘break-even’ rule as it would prevent clubs from taking on contracts that their incoming funds could not cover. However, the difference between this and the ‘break-even’ rule is that equity contributions could be considered as part of the incoming funds.

The first inquiry is whether this measure would be less restrictive than the FFP regulations. As stated, the main difference between the two measures is that the solvency test does not limit investment. Primarily, this would mean that the restriction of competition arising out of the limit on investments would not exist. Additionally, allowing these investments would mean the restriction on spending would not be as severe, as clubs would now have the freedom to offer salaries to whatever level an equity participant will fund. Nevertheless, while the solvency mechanism appears to be less restrictive, it may not be a drastic change. As I argued earlier, the restriction on investment under the FFP regulations does not amount to a large restriction of competition. Therefore, removing this restriction on investment will in turn mean that this solvency mechanism is not much less restrictive than the FFP regulations themselves.

The next step is to examine the solvency mechanism to determine if it would adequately meet the objective of long-term financial stability. UEFA would contend that without the restriction on investment this mechanism leaves clubs open to financial collapse. This is because a club may sign a highly valued player on the basis that they will have financial support for the duration of the contract. However, there is a risk that the financial backer will stop funding the club part way through that contract, leaving the club unable to afford those players. This is a legitimate concern, and a court may deem this fatal to this solvency mechanism being considered a feasible alternative. Nevertheless, a simple measure could be proposed to alleviate this concern. UEFA could require equity participants who are injecting funds into a club to provide a bank guarantee for any contracts signed while they are funding the club.<sup>212</sup> This move would go some way towards ensuring that a club did not have financial obligations that it could not meet.

---

year contracts with players, and a requirement to hold assets to cover the full value of these is unrealistic.

<sup>212</sup> Jean-Louis Dupont has suggested that this measure could be used to create a less restrictive alternative. See Thompson, above n 77.

A solvency mechanism appears to be a slightly less restrictive method of achieving UEFA's objective of financial stability. However, as discussed, a court is likely to show hesitance before finding that the FFP regulations are disproportionate. Therefore, this author finds it unlikely that a court would declare FFP disproportionate, based on an alternative that offered only a minor reduction in competitive restrictions.

(iii) Banking regulations.

In order to convince a court to declare the FFP regulations disproportionate, any alternate measure will require larger reductions in the restrictions on competition. One way to do this is to implement a measure that does not limit the spending of a club. Such a measure could be found by examining the financial regulations of industries that share the same aim of financial stability.

The banking industry is one that shares similar concerns to those seen in a football league. Football clubs are mutually interdependent on each other to ensure their continued success. Similarly, the interconnected system of loans that the banking sector operates, would also lead to difficulties in the industry if one bank collapsed.<sup>213</sup> Hence, both of these industries involve competitors that have an interest in the financial success of their rivals. An examination of the solvency measures used in the banking industry may provide an insight into a measure that could be used for football.

The core banking regulations are derived from the Basel Committee, which is the main global standard-setter for the prudential regulations of banks.<sup>214</sup> Recently, the Basel Committee released Basel III, their latest set of measures designed to strengthen the regulation, supervision, and risk management of the banking sector.<sup>215</sup> These regulations include, amongst other things, complex requirements for banks to meet certain capital and liquidity levels to ensure that the banking industry is able to survive through a variety of economic conditions.<sup>216</sup> UEFA could feasibly devise requirements of the same nature for football clubs, requiring them to protect themselves if they get into financial trouble.

---

<sup>213</sup> Lago, Simmons and Szymanski, above n 159, at 4.

<sup>214</sup> "About the Basel Committee" (10 June 2013) Bank For International Settlements <[www.bis.org](http://www.bis.org)>.

<sup>215</sup> "International regulatory framework for banks (Basel III)" Bank For International Settlements <[www.bis.org](http://www.bis.org)>.

<sup>216</sup> "Basel III: A global regulatory framework for more resilient banks and banking systems" (December 2010) Bank For International Settlements <[www.bis.org/publ/bcbs189.pdf](http://www.bis.org/publ/bcbs189.pdf)>; For a helpful

However, while the banking industry has the same mutual interdependence as football clubs, the risks they face are different. The banking sector earns revenue through making loans to a wide variety of parties and earning interest off these. Yet, it is inevitable that some of these parties will not be able to pay back their loans. Thus, banks face the risk that because of these bad debtors, they will be unable to pay clients who have deposited money with them. The capital and liquidity requirements address this concern by requiring banks to hold a certain level of capital to ensure they can always pay their clients.

The risk to football clubs is that they will take on player contracts with salaries that they do not have the revenue stream to pay for. Therefore, requiring clubs to maintain a certain level of capital will not directly address this concern. This is essentially waiting at the bottom of the cliff, so that when a club collapses due to unsustainable outgoings, the club is able to pay their creditors. As such a measure would not reduce the risk of financial collapse in the football industry, it could not be considered a valid alternative to the FFP regulations.

(iv) Addressing overinvestment.

The mechanisms suggested so far focus on achieving financial stability by placing different forms of financial regulation on football clubs. However, a better mechanism could be devised by focussing on changing behaviour, not controlling it. The FFP regulations are based on the theory that clubs are overspending on player salaries, that this will ultimately drive them into bankruptcy, and that external intervention is necessary to prevent this.<sup>217</sup> Thus, examining what causes these clubs to overspend may provide the answer.

Dietl and others investigated the theory behind overinvestment in sports leagues. They concluded that ruinous competition between clubs leads to overinvestment in playing talent, and the dissipation of league revenues.<sup>218</sup> The article then proceeds to investigate and set out factors that enhance the incentive to overinvest (hereinafter referred to as the ‘overinvestment factors’). Those are:<sup>219</sup>

A stronger correlation between talent investments and league performance; a more unequal distribution of the league’s revenue; an additional exogenous prize awarded to the winner of

---

explanation of the banking industry and the Basel III regulations work, see MultiMediaStudioBrussels "Basel III for dummies" (2013) Vimeo <<http://vimeo.com/59895335>>.

<sup>217</sup> Chaplin, above n 7.

<sup>218</sup> Helmut Dietl, Egon Franck and Markus Lang "Overinvestment in Team Sports Leagues: A Contest Theory Model" (2008) 55 SJPE 353 at 366.

<sup>219</sup> At 366.



the domestic championship; a system of promotion and relegation; increased inequality between first and second division of a domestic league.

These factors are all present in European football leagues. Firstly, studies have indicated that there is a relationship between spending on player talent and league performance.<sup>220</sup> Secondly, there is evidence of unequal revenue distribution in football leagues, namely through the distribution of broadcasting revenues.<sup>221</sup> Thirdly, ranking highly in a domestic league qualifies a club to compete in UEFA competitions, something that constitutes an exogenous prize.<sup>222</sup> Fourthly, European football operates on an open league system involving promotion and relegation.<sup>223</sup> Finally, there is often a massive difference in the financial capabilities of first and second divisions.<sup>224</sup>

Arguably, European football represents the perfect storm for overinvestment. Hence, a measure that address some of these factors may go some way to achieving UEFA's objective of long-term financial stability. An idea that might help in this regard is Akerlof's 'rat race' metaphor which he introduced into economic literature in 1976.<sup>225</sup> A 'rat race' is a situation where there are several participants competing against each other for a prize, and when the participants increase their effort or input, that prize available grows by a disproportionately small amount, or not at all.<sup>226</sup> Egon Franck has applied this metaphor to the sporting context

---

<sup>220</sup> Szymanski, above n 204, at 1153-1154.

<sup>221</sup> "The European Club Licensing Benchmarking Report Financial Year 2011", above n 2, at 98. This analysis compares the average spending of the top four clubs in each league to the average of the rest of the clubs in that league. Across Europe, the results show that on average, the top four club spend 4.1 times more than the other clubs.. The ability to do so seems to come from an uneven distribution of revenue. Evidence for this comes from the unequal way that broadcasting revenues are distributed throughout Europe. See Ami Sedghi "Premier League broadcasting revenue: how is it distributed?" (12 October 2011) *The Guardian* <[www.theguardian.com](http://www.theguardian.com)>.

<sup>222</sup> "Clubs benefit from Champions League revenue", above n 21. This indicates that all 32 participants in the UEFA Champions League were entitled to a minimum of €8.6 million in the 2012/2013 season.

<sup>223</sup> See Szymanski, above n 204, at 1152; Davies, above n 51, at 443. A league that operates on a system of promotion and relegation is also known as an open league. It is open because the clubs change in that league from season to season, based on performance. The opposite of an open league is a closed league. That involves a system where the teams involved do not routinely change each season. North American leagues often operate on this closed league model.

<sup>224</sup> Riach, above n 1. This article indicates the total revenue for Championship clubs (the second division of English football) was £476 million. This is contrasted to the equivalent figure in the Premier League of £2.4 billion. While this is only an English league comparison, the article notes that the Championship is the biggest second division league in Europe.

<sup>225</sup> George Akerlof "The Economics of Caste and of the Rat Race and Other Woeful Tales" (1976) 90 *Q J Econ* 599.

<sup>226</sup> At 603. For further explanation in the football context see JC Müller, Joachim Lammert and Grogor Hovemann "The Financial Fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability at European Club Football?" (2012) 7(2) *IJSF* 117 at 121.

and provides some instruments that deal with overinvestment.<sup>227</sup> Two of the suggestions that could be an alternative to the FFP regulations are:<sup>228</sup>

1. Redistribute the ‘cheese’: Implement more revenue sharing measures in order to reduce the income differentials within and between leagues.
2. Bring back ‘luck’: Introduce knock out instead of group stages, stop seeding [et cetera] in order to make the outcome more a result of lucky circumstances.

These measures would go some way to addressing the overinvestment factors. Franck’s first suggestion of revenue sharing is where funds earned by high revenue clubs are reallocated to low revenue clubs. If such a measure was used effectively this could counteract two of the overinvestment factors. Firstly, this measure would improve the spread of the revenue distribution within a league, relating to the second overinvestment factor. Secondly, such a measure could be designed so that it distributed revenue between divisions of football leagues. This would mitigate the inequality between divisions, which is the final overinvestment factor.

The second instrument suggested by Franck involves changing the structure of UEFA competitions to increase the unpredictability of results and hence the competitive balance of the competition. The first suggestion of changing to a knock out system disadvantages consistently high performing teams, as they are more likely to be eliminated in a single game where they perform poorly, as opposed to when the best teams are chosen after several games.<sup>229</sup> Additionally, removing seeding means that high-ranking teams may meet each

---

<sup>227</sup> Egon Franck "Private Firm, Public Corporation or Member's Association - Governance Structure in European Football" (Working Paper No 106, Institute for Strategy and Business Economics, University of Zurich, 2009).

<sup>228</sup> At 30. Along with these two instruments, Egon Franck suggested a third possible measure. That involved handicapping the rats through measures such as salary caps to “limit the ‘calories’ which can be invested in the race”. However, this author has not considered this when searching for a less restrictive alternative, as it is too similar to the ‘break-even’ rule in question.

<sup>229</sup> See Jeroen Schokkaert and Johan Swinnen "It is Harder, not Easier, to Predict the Winner of the Champions League" (Discussion Paper 329/2013, LICOS Centre for Institutions and Economic Performance, University of Leuven, 2013) at 1-2, 9. Schokkaert and Swinnen investigate the predictability of results under the old UEFA European Cup competition and the new UEFA Champions League. The European Cup was solely a knockout tournament, whereas the Champions League combines a round robin group stage with a knock out finals stage. This study concludes that it is more likely for a specific highly ranked team from one of the highest ranked leagues to qualify for the round of 16 and quarterfinal stages under the new system. Hence, this research suggests that results up to this stage are more predictable under the new system, and a change back to a full knock out competition would increase the competitive balance of a league. See also *AEK Athens and SK*

other early in a competition, leading to the eliminating one another. Thus, these two ideas mean that progression in a tournament would be more dependent on luck of the draw and one off performances than having a consistently high performing team. Hence, having a good team filled with expensive players is less of a guarantee of performing well in such a tournament. This addresses the first overinvestment factor by decreasing the relationship between player investment and sporting success.

In addition to Franck's suggestions, a third instrument that could be developed is to decrease the exogenous prize available for winning domestic competitions.<sup>230</sup> Currently, clubs that finish in top positions in domestic leagues become eligible to participate in the prestigious UEFA Champions league. Qualification for this competition comes with a massive up front financial bonus, and the further you progress in the tournament the greater the prize money received.<sup>231</sup> If the financial remuneration for this competition was decreased, this would help mitigate the effects of the third overinvestment factor.

A combination of these three measures could be proposed as a less restrictive alternative to the FFP regulations. These measures do not restrict competition in the same way as the FFP regulations, as they do not contain any control on salary or investment. However, it is unlikely a court would consider these as an appropriate alternative to the FFP regulations for two reasons. Firstly, there does not appear to be sufficient evidence to conclude they would satisfy UEFA's objective of long-term financial stability. Without firm evidence that the incentive to overinvest is greatly reduced, a court would be unlikely to accept this measure as a viable alternative. Secondly, this would be a very radical measure for a court to substitute in place of the FFP regulations. Suggesting that a different competition and pay structure is a viable alternative to the FFP regulations would be a bold move by a court, especially given UEFA's relative expertise in this area. Additionally, league participants competing in an open league model such as European football would not consider revenue sharing an attractive

---

*Slavia Prague/UEFA*, above n 141, at [14]. This decision points out that typically clubs that invest more tend to dislike knockout competitions because one unlucky match can end a competition.

<sup>230</sup> Lindholm, above n 11, at 209. Here Johan Lindholm moots reducing club compensation as a potential standalone alternative to the FFP regulations.

<sup>231</sup> See "Clubs benefit from Champions League revenue", above n 21. In the 2013 UEFA Champion League, each participant received at least €8.6 million. Additionally in the group stage, a team received €1 million for every win and €500,000 for every draw. UEFA then distributed extra sums for every round that a club progressed. Those sums were €3.5 for the round of 16, €3.9 million for making the quarterfinals, and €4.9 million for making the semi-finals.

option.<sup>232</sup> Therefore, while these measures may go some way to achieving financial stability, a court is unlikely to consider them a realistic alternative to the FFP regulations.

(c) Do the FFP regulations have an excessive effect on the applicant's interests?

This inquiry involves accepting that the FFP regulations may be the least restrictive measure available to achieve the aim of financial stability, but questions whether the restrictive measure places an excessive burden on the applicant's interests.<sup>233</sup> This analysis will often focus on the financial losses the applicant will suffer because of the measure, and these losses will be balanced against the objective that is sought.<sup>234</sup>

An argument that has been used under this element is that the risk in the industry is not serious enough to justify the imposition on the applicant's interest. In *Pfizer Animal Health SA v Council of the European Communities*, the applicants challenged the proportionality of a measure that withdrew the authorisation for the use of specific additives in certain feeding stuffs.<sup>235</sup> Pfizer argued that this measure could only be proportionate where there was a serious risk causing great uncertainty and where there was evidence that indicated what the cause of the risk was. Further, they argued that this measure would have a substantial negative financial effect on their business, and would likely cause job losses. However, that argument was rejected, with the Court stating that the importance of the objective here, being public health, could justify substantial adverse effects on traders.<sup>236</sup>

In a similar vein, one could make an argument that the risk of financial collapse is not great, and thus the impact on the claimant's interests is disproportionate. This argument is based on economic research which points out that despite European clubs appearing to have financial problems; they rarely collapse because of them.<sup>237</sup> The exact financial loss that may result

---

<sup>232</sup> Szymanski, above n 204, at 1175. This research indicates that revenue sharing is a more attractive option for closed sporting leagues compared to open ones. This is because the threat of relegation in an open league means that clubs are less willing to help their rivals than they would be in a closed league.

<sup>233</sup> Paul Craig *EU Administrative Law* (2nd ed, Oxford University Press, New York, 2012) at 603.

<sup>234</sup> At 603.

<sup>235</sup> Case T-13/99 *Pfizer Animal Health SA v Council of the European Communities* [2002] ECR II-3305.

<sup>236</sup> At [456].

<sup>237</sup> Stefan Szymanski "Insolvency in English professional football: Irrational Exuberance or Negative Shocks?" (Working Paper No 12-02, Department of Kinesiology, University of Michigan, 2013) at 16–17. This paper weighs up two theories of why clubs suffer financial failure. The first is that financial failure results from clubs living beyond their means and spending irrationally. The second is that failure occurs due to random, negative productivity shocks. The study concludes that there is little

would depend on who the claimant was. If it was a player, the claim may be based on the impact the regulations have on their salary. Alternatively, a club could claim that due to the restrictions they are no longer able to perform as well as before the regulations, and as a result have suffered a decrease in revenues.

However, for three reasons it is unlikely a court will overturn the FFP regulations on this ground. Firstly, even if UEFA saw the risk as quite low, the interdependent nature of sports leagues means that any financial collapse can cause significant disruptions. Given UEFA's relative expertise in determining what is best for European football, a court would be hesitant to override their concerns. Secondly, while this author cannot confirm this, it is assumed that in all but extreme cases the damage to a claimant's interest arising from the regulations will be relatively small. A pay cut for a player or slight reduction in revenue for clubs is unlikely to be so disproportionate here to force a court's hand. Finally, at this stage of the proportionality analysis, a court will already have declared the measure both necessary and suitable. Therefore, while they will still balance this aspect up, the odds may be stacked against the claimant by this stage.<sup>238</sup>

Based on the above analysis, it is this author's view that the FFP regulations will satisfy the *Wouters* exception. The regulations seek to achieve a legitimate objective, namely long-term financial stability. Furthermore, the restrictions arising from the regulations appear to be inherent in that objective, and proportionate to it. Thus, this exception provides that the FFP regulations do not restrict competition in violation of Article 101(1) of the Treaty. This dissertation will now consider whether the Article 101(3) exception in the Treaty would also be satisfied.

### *C. Do the FFP regulations satisfy Article 101(3) of the Treaty?*

Article 101(3) of the Treaty contains four elements that must be satisfied, with the first two requiring a positive answer and the last two a negative one. Firstly, the decision in question must lead to relevant efficiency gains.<sup>239</sup> Secondly, consumers must be allowed a fair share of

---

evidence of financial irrationality leading to insolvency, and instead negative shocks are the significant cause of insolvency.

<sup>238</sup> Craig, above n 233, at 603.

<sup>239</sup> The Treaty on the Functioning of the European Union, above n 79, at Article 101(3). This sets out this element as "the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress." Simply put, this is an investigation into the efficiency gains arising from the agreement or decision. While this element only expressly refers to

the resulting gains. Thirdly, the decision must not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives. Finally, the decision must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. These four conditions are cumulative, and all must be satisfied before an exemption order will be granted.<sup>240</sup>

The European Commission has published guidelines on how to apply these elements.<sup>241</sup> This dissertation will draw extensively from those in the following analysis.

### *1. Do the FFP regulations give rise to qualifying efficiencies?*

The guidelines set out that for an efficiency to be counted under this provision, the following four items must be verified:<sup>242</sup>

- (a) The nature of the claimed efficiencies;
- (b) The link between the agreement and the efficiencies;
- (c) The likelihood and magnitude of each claimed efficiency; and
- (d) How and when each claimed efficiency would be achieved.

In order for an efficiency to qualify under this Article, it must be objective, and not exist solely from the subjective point of view of the parties.<sup>243</sup> Generally, the two main types of efficiencies recognised under this provision are cost efficiencies and qualitative efficiencies.<sup>244</sup> The FFP regulations do not appear to create any cost efficiencies. While the regulations are cost cutting, a cost saving of this type is not objective and hence is irrelevant for the purposes of this exemption. This is analogous to the example given in the guidelines of a subjective efficiency where companies agree to fix prices or share markets and hence lower output and production costs.<sup>245</sup> While this may reduce cost, they do not produce any pro-competitive effects on the market and merely allow increased profit takings. Similarly,

---

goods, it applies by analogy to services. See *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [48]–[51].

<sup>240</sup> Case T-213/00 *CMA CGM v Commission of the European Communities* [2003] ECR II-913 at [226]

<sup>241</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125.

<sup>242</sup> At [51].

<sup>243</sup> At [49].

<sup>244</sup> At [59]–[62].

<sup>245</sup> At [49].

the FFP regulations are merely an agreement by the clubs to spend less while having the same revenues.<sup>246</sup>

Alternatively, UEFA may claim that the FFP regulations lead to a higher quality of European football leagues. This higher quality arises due to the increased financial stability of football leagues, leading to a reduction in the number of clubs collapsing financially. UEFA could argue this represents an increase in product quality for three reasons. Firstly, reducing the risk of a club going into liquidation mid-season helps to avoid the complications arising from financial collapse detailed earlier.<sup>247</sup> Secondly, a reduction in the number of financial collapses under the FFP regulations represents an increase in product variety compared to a football league without the regulation. This increase in variety derives from the fact a greater number of football clubs would be competing in the leagues. Additionally, the FFP regulations may lead to greater geographic product variety. The regulations would ensure that clubs from all regions have sustainable financial practices, not just those from affluent areas that may have better access to financial support. Thus, this will help ensure the long-term survival of clubs in poorer regions, resulting in a better geographic spread of clubs. Thirdly, product quality may rise due to a better consumer viewing experience. This is due to the incentives the FFP regulations place on investing in infrastructure such as football stadiums.

Next, UEFA is required to show there is a clear and direct link between the FFP regulations and the claimed efficiencies. The guidelines provide an example of an indirect link. The example is where an agreement leads to increased profit, which then allows for greater investment in research and development, eventually benefiting consumers.<sup>248</sup> This suggests that a link will be indirect if the efficiencies require an extra step to be taken after the measure is implemented before they arise. Under the FFP regulations, the efficiencies can be traced directly to the objectives of increased financial stability and encouraging investment in infrastructure.<sup>249</sup> Further, the efficiencies arise out of the greater financial stability the regulations create, and no extra steps are required for these to be realised. Thus, it appears that the link is sufficiently direct.

---

<sup>246</sup> Peeters and Szymanski, above n 10, at 25-28. This indicates that the restriction on revenues will be very small, yet the wage to turnover ratio will decrease by up to 15%.

<sup>247</sup> See Chapter Four at V.B.1.

<sup>248</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [54].

<sup>249</sup> See Chapter One at II.A.

However, despite the above argument, the efficiencies claimed appear to be quite speculative. In order for a court to accept these efficiencies exist, UEFA must show convincing arguments and evidence that the agreement will lead to the efficiencies claimed.<sup>250</sup> To do so, UEFA would have to carry out economic analysis. Without this, it is difficult to conclude on the likelihood that the efficiencies will eventuate, the magnitude of the efficiencies, and when the efficiencies would be achieved.

## *2. Would consumers get a fair share of the benefit resulting from the FFP regulations?*

Even if the above efficiencies are established, the negative impact of the restrictions under the FFP regulations may outweigh them. Specifically, when determining whether a 'fair share' has been passed on it is necessary to examine whether the pass-on benefits at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101(1) of the Treaty.<sup>251</sup> In other words, this condition is not fulfilled if consumers are worse off following the agreement.<sup>252</sup>

Opponents of the FFP regulations will point out that the FFP regulations will damage the competitive balance within football leagues.<sup>253</sup> Consequently, it is arguable that this will reduce the quality of the league from a consumer's perspective. This argument is based on the theory that a more competitive sports league is more desirable for fans.<sup>254</sup> However, this theory does not have universal support in economic literature.<sup>255</sup> Again, economic testing is necessary to determine the exact effect a decrease in competitive balance would have on European football. If this research indicated that a decrease in competitive balance reduces

---

<sup>250</sup> Case T-168/01 *GlaxoSmithKline Services Ltd v Commission of the European Communities* [2006] ECR II-2969 at [235].

<sup>251</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [85].

<sup>252</sup> At [85].

<sup>253</sup> Markus Sass "Long-term Competitive Balance under UEFA Financial Fair Play Regulations" (Working Paper No 5/2012, Faculty of Economics and Management, University of Magdeburg, March 2012) at 2, 10; Henning Vöpel "Is Financial Fair Play Really Justified? An Economic and Legal Assessment of UEFA's Financial Fair Play Rules" (HWWI Policy Paper No 79, Hamburg Institute of International Economics, 2013) at 14.

<sup>254</sup> Walter Neale "The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition" (1964) 78 Q J Econ 1 at 2; Szymanski, above n 204, at 1153, 1155. Neale pioneered this theory in 1964 when he argued that quality athletes desire quality opponents, and uncertainty of results is what arouses interest in a contest. Nowadays, this theory is known as the uncertainty of outcome hypothesis.

<sup>255</sup> See Szymanski, above n 204, at 1156-1158. This article compiles all of the studies that had examined the uncertainty of outcome hypothesis at that time. It shows that of the 22 cases cited there, ten offer clear support for the hypothesis, seven offer weak support, and five contradict it.



consumer interest in European football, this would be a detriment arising from the FFP regulations.

Concluding whether this element is satisfied is impossible on the present information. It remains unclear whether a court will accept the existence of the qualitative efficiency gains and losses discussed. Additionally, the exact magnitude of these efficiencies is difficult to quantify.<sup>256</sup> Because of this, only further research will shed light on what the end result for consumers will be under the FFP regulations. However, it is worth noting that the party seeking to rely on Article 101(1), UEFA in this case, is the party that must substantiate that consumers obtain countervailing benefits.<sup>257</sup>

*3. Are the restrictions arising from the FFP regulations indispensable to the attainment of these objectives?*

To satisfy this element the FFP regulations must meet the following two-fold test:<sup>258</sup>

First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

The first test requires that “there are no other economically practicable and less restrictive means of achieving the efficiencies.”<sup>259</sup> This test requires a similar analysis to the proportionality doctrine under the *Wouters* exception.<sup>260</sup> However, the tests differ in one regard. The *Wouters* exception examined alternative means of achieving the legitimate objective of financial stability. On the other hand, this test examines alternative means of achieving efficiencies arising from the FFP regulations. Nevertheless, this author’s view is that these two examinations amount to the same thing here. The potential efficiencies arising from the regulations are an increase in product quality due to improved financial stability in European football. Thus, there is a direct link between these efficiencies and the legitimate objective of the regulations. Therefore, if there are no practicable and less restrictive means of achieving financial stability, logically none will exist that achieve efficiencies that flow directly from financial stability.

---

<sup>256</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [103].

<sup>257</sup> At [103].

<sup>258</sup> At [73].

<sup>259</sup> At [75].

<sup>260</sup> Goyder and Albors-Llorens, above n 55, at 152.

Similar logic can be applied to the second test. As the efficiencies claimed under the FFP regulations flow from financial stability, the second test can be phrased as to whether the individual restrictions are necessary to achieve financial stability. With regard to the restriction of price competition under the FFP regulations, this arises from the limit on spending under the regulations. Under the *Wouters* exception, this author proposed two measures that did not involve such spending restrictions.<sup>261</sup> However, this author concluded that both of these measures failed to achieve the goal of financial stability. Thus, this restriction is necessary for the attainment of the efficiencies. With regard to the limit on investment, this arises due to the limit on funds that equity participants can use to bankroll 'relevant expenditure'. Under the *Wouters* exception, this author also examined measures without this restriction.<sup>262</sup> This author concluded that there was a reduced chance of achieving the objective of financial stability under these alternative measures. Thus, because this is not a large restriction in the first place, the fact it leads to a small reduction in the chance of achieving financial stability would likely be enough to conclude that it is also a necessary restriction. Hence, this second step test would also be satisfied, leading to the conclusion that the regulations are indispensable under this element.

#### *4. Do the FFP regulation eliminate competition in respect of a substantial part of the products concerned?*

This condition recognises that while a measure which has pro-competitive gains is beneficial, this cannot be at the expense of protecting rivalry and the competitive process.<sup>263</sup> The analysis "requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint."<sup>264</sup>

In Natalie Clarke's article, she argued out that a numeric or percentage salary cap will not eliminate competition completely in violation of this element.<sup>265</sup> This argument was based on the fact that this type of salary cap still allows for some competition on salary. A club is limited in their decision making to some extent; however, they are still able to consider different options such as selling other players to create room under the cap in order to

---

<sup>261</sup> See Chapter Four at V.B.3(c)(iii), V.B.3(c)(iv).

<sup>262</sup> See Chapter Four at V.B.3(c).

<sup>263</sup> *Guidelines on the application of Article 81(3) of the Treaty*, above n 125, at [105].

<sup>264</sup> At [108].

<sup>265</sup> Natalie Clarke "The Beauty and The Beast: Taming the Ugly Side of the People's Game" (2011) 17 Colum J Eur L 601 at 637.

compete on price. This was contrasted to a player salary cap, where the ability to compete on price is significantly eliminated due to their being an absolute maximum a club can offer a player.

However, the FFP regulations are more complex than a simple percentage salary cap because they restrict the ability of football clubs to increase their revenue. Clinton Long argues that this appears to eliminate competition as it prevents clubs with smaller revenues from being able to “compete with larger clubs for the best players and with each other on the field.”<sup>266</sup> He concludes that because of the number of clubs affected by the regulations, they appear to eliminate competition in respect of a substantial part of the products concerned.<sup>267</sup> Thus, while a club could juggle their player spending to create more room under their cap for a certain player, they are limited in their ability to purchase any player that is outside their current revenue levels.

This author agrees with Long’s reasoning. While Clarke is correct that clubs can still compete to some extent by making internal trade offs, the FFP regulations impose an upper limit that is relatively immovable. Furthermore, the elimination of competition is even broader than Long suggests. His focus appears to be solely on those clubs that would increase their revenue to allow them to bid for marquee players. Yet the elimination of competition will not just be at the top level. It is unrealistic to assume all football clubs are aiming to jump right to the top of a league. Rather, some may be hoping to invest enough to boost them from a bottom of the table ranking, to a more mid table level. However, these clubs also face the restriction on increasing their revenues. Hence, competition for players will be eliminated at both the marquee player level, and in lower levels of player quality. Therefore, the FFP regulations appear to eliminate competition in respect of a substantial part of the products in question, those being football-playing services.

Because of this conclusion, it is this author’s view that FFP regulations do not activate the exception in Article 101(3) of the Treaty. As stated above, in order to activate this exception, all four element need to be satisfied.

---

<sup>266</sup> Clinton Long "Promoting Competition or Preventing it? A Competition Law Analysis of UEFA's Financial Fair Play Rules" (2012) 23 Marq Sports L Rev 75 at 99.

<sup>267</sup> At 100.

## *VI. Conclusion*

This dissertation is aimed at determining whether UEFA's FFP regulations would violate European competition law. The answer is, probably not. Despite the regulations clearly restricting competition, they pursue a legitimate objective that no other less restrictive measure adequately achieves.

Chapter One set out that UEFA sought to introduce these regulations in light of the risky financial practices of many football clubs. The regulations contain several objectives, which were summarised to be the pursuit of long-term financial stability in European football. The chapter detailed the fine print of the regulations, and analysed how the controversial 'break-even' rule operates by restricting the expenditure of a club to the amount the club earns in revenue.

Chapter Two began with a general overview of different salary cap measures and explained how these come into conflict with the competitive process. The chapter then briefly looked at the various parties who may bring a legal challenge, and outlined the legal challenge that player agent Daniel Striani is currently bringing. After confirming that the FFP regulations can be challenged under European law, the appropriate framework for a legal challenge was laid out. This section indicated that a challenge under Article 102 of the Treaty would not be successful, as UEFA did not abuse their dominant market position by implementing the regulations.

Chapter Three began the legal analysis by concluding that the regulations are a prima facie breach of the elements of Article 101(1) of the Treaty. This author concluded that UEFA is an association of undertakings, and the FFP regulations constitute a decision of that association. Further, the FFP regulations will appreciably affect trade between member states based on the reduced trading of players between states that is likely to occur due to the FFP regulations. Finally, I concluded that the FFP regulations potentially have a restriction of competition as their object. This is due to one of the objectives of FFP indicating a desire to place downward pressure on player salaries, arguably constituting a form of price fixing. Even if a court did not find that this was their objective, the regulations undoubtedly have the effect of appreciably restricting competition. Economic research into the effects of the regulations indicated that they will in fact decrease salaries. Furthermore, the limit on

investment from equity participants may also have the effect of restricting competition to a small degree.

Chapter Four analysed whether there are any possible justifications that would prevent Article 101(1) being violated. The *Wouters* exception would most likely apply and deem the restriction of competition found in Chapter Three to be compatible with the common market. This is because that restriction of competition is inherent in, and proportionate to the legitimate objective that the FFP regulations pursue, namely long-term financial stability. This analysis proposed several alternative measures to the FFP regulations and examined whether they were less restrictive viable alternatives. However, this author concluded that none of these would be acceptable alternatives for two main reasons. Firstly, several of the alternative measures would not adequately achieve the aim of financial stability. Secondly, any measures that would reduce competitive restrictions would not give rise to sufficient reductions for a court to declare the FFP regulations disproportionate. Finally, it is difficult to make a certain conclusion on several elements of Article 101(3) of the Treaty without detailed economic analysis. However, under the final element the regulations appear to eliminate competition in respect of a substantial part of the products in question. Thus, the FFP regulations cannot be justified under Article 101(3).

Therefore, this author submits that the FFP regulations are here to stay. However, the ultimate decision lies with the inevitable judicial process. Only time will tell.

## VII. Bibliography

### A Cases

#### 1 European Courts

Case T-213/00 *CMA CGM v Commission of the European Communities* [2003] ECR II-913.

Case C-120/94 *Commission of the European Communities v Greece (FYROM case)* [1996] ECR 1513.

Case 30/78 *Distillers Co Ltd v Commission of the European Communities* [1980] ECR 229.

Case C-331/88 *Fedesa and Others v Council of the European Communities* [1990] ECR I-4023.

Case 66/82 *Fromançais v Forma* [1983] ECR 395.

Case T-168/01 *GlaxoSmithKline Services Ltd v Commission of the European Communities* [2006] ECR II-2969.

Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 461.

Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979.

Case C-519/04 P *Meca Medina v European Commission* [2006] ECR I-6991.

Case T-112/99 *Métropole télévision (M6) and others v Commission of the European Communities* [2001] ECR II-2459.

Case 100/80 *Musique Diffusion Française v Commission of the European Communities* [1983] ECR 1825.

Case T-13/99 *Pfizer Animal Health SA v Council of the European Communities* [2002] ECR II-3305.

Case T-193/02 *Piau v Commission of the European Communities* [2005] ECR II-209.

Case 47/86 *Roquette Freres v ONIC* [1987] ECR 2889.

Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 234.

Case T-148/89 *Trefilunion v Commission of the European Communities* [1995] ECR II-1063.

Case C-415/93 *URBSFA v Bosman* [1995] ECR I-4921.

Case C-73-95P *Viho Europe v Commission* [1996] ECR I-5457.

Case 5/69 *Völk v Vervaecke* [1969] ECR 295.

Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405.

Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

## 2 *European Commission*

Case IV/400 *Agreement between European Glass Manufacturers* [1974] OJ L160/1.

Case IV/33384 *Distribution of Package Tours During the 1990 World Cup* [1992] OJ L326/31.

Case 37806 *ENIC/UEFA* (European Commission, 25 June 2002).

Case 37398 *Joint selling of the commercial rights of the UEFA Champions League* [2003] OJ L291/25.

Case 37576 *UEFA's Broadcasting Regulations* [2001] OJ L171/12.

Case 29373 *Visa International - Multilateral Interchange Fee* [2002] OJ L318/17.

## 3 *United States*

*American Needle Inc v National Football League* 560 US 183 (2010).

*Wood v National Basketball Association* 809 F 2d 954 (2d Cir 1987).

## 4 *Court of Arbitration for Sport*

CAS 98/200 *AEK Athens and SK Slavia Prague/UEFA* (Court of Arbitration for Sport, 20 August 1999).

# C **Legislation**

## 1 *New Zealand*

Companies Act 1993.

## 2 *European*

Treaty Establishing the European Community [2002] OJ C325/33.

Treaty on the Functioning of the European Union [2010] OJ C83/47.

## 3 *United States*

Sherman Antitrust Act 15 USC § 1.

# D **Books**

Catherine Barnard *The Substantive Law of the EU* (3rd ed, Oxford University Press, New York, 2010).

Paul Craig *EU Administrative Law* (2nd ed, Oxford University Press, New York, 2012).

Paul Craig and Grainne De Burca *EU Law* (5th ed, Oxford University Press, New York, 2011).

Eilís Ferran and others *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press, New York, 2012).

Simon Gardiner and others *Sports Law* (4th ed, Routledge, New York, 2012).

Joanna Goyder and Albertina Albors-Llorens *Goyder's EC Competition Law* (5th ed, Oxford University Press, New York, 2009).

Alina Kaczorowska *European Union Law* (2nd ed, Routledge, New York, 2011).

Robert Siekmann *Introduction to International and European Sports Law* (TMC Asser Press, The Hague, 2012).

Takis Tridimas *The General Principles of EC Law* (Oxford University Press, New York, 1999).

PC Weiler and GR Roberts *Sports and the Law: text, cases, problems* (3rd ed, Thomson/West, New York, 2004).

Richard Whish *Competition Law* (6th ed, Oxford University Press, New York, 2009).

## **E Journal Article**

Rex Ahdar "Professional Rugby, Competitive Balance and Competition Law" (2007) 1 ECLR 36.

George Akerlof "The Economics of Caste and of the Rat Race and Other Woeful Tales" (1976) 90 Q J Econ 599.

Steven Biddle "Less Restrictive Alternatives for Achieving and Maintaining Competitive Balance in Professional Sports" (1988) 30 Ariz L Rev 889.

Brian Bodansky "Kicking the Penalty: Why The European Court of Justice Should Allow Salary Caps in UEFA" (2013) 36 Fordham Int'l LJ 163.

Grainne De Burca "The Principle of Proportionality and its Application in EC Law" (1993) 13 YEL 105.

Natalie Clarke "The Beauty and The Beast: Taming the Ugly Side of the People's Game" (2011) 17 Colum J Eur L 601.

Pablo Colomo "The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the *Meca Medina* and *Piau* cases" (2005) 3(2) ESLJ 1.

Pablo Colomo "Rules of Purely Sporting Interest and EU Competition Law: Why the Wouters Exception is not Necessary" (2012) 8 CL Int 54.

Chris Davies "The Financial Crisis in the English Premier League: is a Salary Cap the Answer?" (2010) 31 ECLR 442.

Helmut Dietl, Egon Franck and Markus Lang "Overinvestment in Team Sports Leagues: A Contest Theory Model" (2008) 55 SJPE 353.

Eilís Ferran "New Regulation of Remuneration in the Financial Sector in the EU" (2012) 9 ECFR 1.



Christopher Flanagan "A Tricky European Fixture: an Assessment of UEFA's Financial Fair Play Regulations and their Compatibility with EU Law" (2013) 13 ISLJ 148.

Daniel Geey "The UEFA Financial Fair Play Rules: A Difficult Balancing Act" (2011) 9(1) ESLJ 50.

Andrew Howarth and TA Robinson "The Impact of the Salary Cap in the European Rugby Super League" (2008) 3(6) IJBM 3.

Umberto Lago, Rob Simmons and Stefan Szymanski "The Financial Crisis in European Football: An Introduction" (2006) 7 JSE 3.

Jeffrey Levine "The Legality and Efficacy of the National Basketball Association Salary Cap" (1992) 11 Cardozo Arts & EntLJ 71.

Johan Lindholm "The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play" (2010) 12 Tex Rev Ent & Sports L 189.

Clinton Long "Promoting Competition or Preventing it? A Competition Law Analysis of UEFA's Financial Fair Play Rules" (2012) 23 Marq Sports L Rev 75.

Paul Madden "Welfare Economics of "Financial Fair Play" in a Sports League with Benefactor Owners" (2012) 26 JSE 1.

JC Müller, Joachim Lammert and Grogor Hovemann "The Financial Fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability at European Club Football?" (2012) 7(2) IJSF 117.

Ryan Murphy "Playing Fair in the Boardroom: An Examination of the Corporate Structures of European Football Clubs" (2011) 19 Mich St U Coll L J Int'l L 409.

Walter Neale "The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition" (1964) 78 Q J Econ 1.

Leanne O'Leary "Price-fixing Between Horizontal Competitors in the English Super League" (2008) 3-4 ISLJ 77.

Aurelien Portuese "Principle of Proportionality as Principle of Economic Efficiency" (2013) 19 ELJ 612.

Stephen Ross "The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws" 1997 UIILRev 519.

Stephen Ross "Player Restraints and Competition Law Throughout the World" (2004) 15 Marq Sports L Rev 49.

Stephen Ross and Stefan Szymanski "Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations" (2006) 16 Marq Sports L Rev 213.

Thomas Schiera "Balancing Act: Will The European Commission Allow European Football to Reestablish the Competitive Balance that it Helped Destroy?" (2007) 32 BrookJInt'lL 709.

Rasmus Storm "The Need for Regulating Professional Soccer in Europe" (2012) 2(1) Sports, Business and Management: An International Journal 21.

Stefan Szymanski "The Economic Design of Sporting Contests" (2003) 41 JEL 1137.

Stefan Szymanski and Stefan Kesenne "Competitive Balance and Gate Revenue Sharing in Team Sports" (2004) 52 J IND ECON 165.

Elizabeth Toomey "Anti-Competitive Practice in the Sporting-Areana: Commercial Watchdogs Adapt their Game" (2007) 26 UQLJ 117.

## **F      Theses**

Andreas Stroucken "UEFA Financial Fair Play: the Savior of Football or the Road to the Next Bosman-ruling?" (Graduate Thesis, Lund University, 2013).

## **G      Working Papers and Research Papers**

Helmut Dietl, Markus Lang and Stephan Werner "The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues" (Working Paper No 08-23, Institute for Strategy and Business Economics, University of Zurich, 2008).

Helmut Dietl and others "Welfare Effects of Salary Caps in Sports Leagues with Win-Maximizing Clubs" (Working Paper No 08-25, Institute for Strategy and Business Economics, University of Zurich, 2008).

Egon Franck "Financial Fair Play in European Club Football – What is it all about?" (Working Paper No 46, Department of Business Administration, University of Zurich, 2013).

Egon Franck "Private Firm, Public Corporation or Member's Association - Governance Structure in European Football" (Working Paper No 106, Institute for Strategy and Business Economics, University of Zurich, 2009).

Egon Franck and Markus Lang "A Theoretical Analysis of the Influence of Money Injections on Risk Taking in Football Clubs" (Working Paper No 46, Center for Research in Sports Administration, University of Zurich, 2013).

Thomas Peeters and Stefan Szymanski "Vertical Restraints in Soccer: Financial Fair Play and the English Premier League" (Research Paper 2012-028, Department of Economics, University of Antwerp, 2012).

Markus Sass "Long-term Competitive Balance under UEFA Financial Fair Play Regulations" (Working Paper No 5/2012, Faculty of Economics and Management, University of Magdeburg, March 2012).

Jeroen Schokkaert and Johan Swinnen "It is Harder, not Easier, to Predict the Winner of the Champions League" (Discussion Paper 329/2013, LICOS Centre for Institutions and Economic Performance, University of Leuven, 2013).

Stefan Szymanski "Insolvency in English professional football: Irrational Exuberance or Negative Shocks?" (Working Paper No 12-02, Department of Kinesiology, University of Michigan, 2013).

Henning Vöpel "Is Financial Fair Play Really Justified? An Economic and Legal Assessment of UEFA's Financial Fair Play Rules" (HWWI Policy Paper No 79, Hamburg Institute of International Economics, 2013).

## **H Internet Resources**

### *1 Websites*

"About the Basel Committee" (10 June 2013) Bank For International Settlements <[www.bis.org](http://www.bis.org)>.

"International regulatory framework for banks (Basel III)" Bank For International Settlements <[www.bis.org](http://www.bis.org)>.

"Gareth Bale joins Real Madrid from Spurs in £85m world record deal" (1 September 2013) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>.

"Football transfer dealings plummet in January window" (1 February 2012) CNN <<http://edition.cnn.com>>.

Mark Chaplin "Financial Fair Play Protects Football's Stability " (May 27 2010) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

Mike Collett "Platini wins EC backing for financial fair play regulations" (22 March 2012) The Independent <[www.independent.co.uk](http://www.independent.co.uk)>.

David Conn "Manchester City: a tale of love and money" (18 May 2012) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

David Conn "Platini launches inquiry into level of club debts" (29 August 2008) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

"Platini wants EU cover" (25 September 2011) The Daily Star <<http://archive.thedailystar.net>>.

Jean-Louis Dupont "Football's Anticompetitive Streak" (2013) The Wall Street Journal <<http://online.wsj.com>>.

Christopher Elser "Rangers Administrators Will Consider Three Bids for Soccer Team" (April 6 2012) Bloomberg <[www.bloomberg.com](http://www.bloomberg.com)>.

"Communication on Sport - Developing the European Dimension in Sport" (05 July 2013) European Commission <<http://ec.europa.eu>>.

"UEFA and European Commission Joint statement on UEFA's Financial Fair Play rules and EU State aid policy" (21 March 2012) European Commission <<http://ec.europa.eu>>.

"Financial Fair Play in The Football League" (25 April 2012) The Football League <[www.football-league.co.uk](http://www.football-league.co.uk)>.

"Financial Fair Play Media information" (25 January 2012) Financial Fair Play <[www.financialfairplay.co.uk/resources/FFP%20Press%20Kit%20EN\\_FINAL\\_en%20\\_1\\_.pdf](http://www.financialfairplay.co.uk/resources/FFP%20Press%20Kit%20EN_FINAL_en%20_1_.pdf)>.

Roddy Forsyth "Rangers in crisis: the final whistle sounds on Rangers' 140 years of history" (12 June 2012) The Telegraph <[www.telegraph.co.uk](http://www.telegraph.co.uk)>.

Neale Harvey "Top clubs may fight salary cap in court" (4 September 2012) The Rugby Paper <[www.rugbypaper.co.uk/](http://www.rugbypaper.co.uk/)>.

"The Conceptual Framework for Financial Reporting" (September 2010) IFRS Foundation <<http://eifrs.ifrs.org/eifrs/bnstandards/en/2013/conceptualframework.pdf>>.

Chris McLaughlin "Rangers: Newcastle's Mike Ashley ready to buy Ibrox share" (11 August 2012) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>.

MultiMediaStudioBrussels "Basel III for dummies" (2013) Vimeo <<http://vimeo.com/59895335>>.

Tariq Panja "Liverpool, Chelsea Are Concerned Amid Billionaires' Soccer Spree" (23 July 2013) Bloomberg <[www.bloomberg.com](http://www.bloomberg.com)>.

"Premier League clubs agree new financial rules" (7 February 2013 ) Premier League <[www.premierleague.com](http://www.premierleague.com)>.

"Salary Cap" Premiership Rugby <[www.premiershiprugby.com](http://www.premiershiprugby.com)>.

Jon Pritchett "What Can We Learn From the Financial Meltdown of Glasgow Rangers FC?" (10 August 2012) Forbes <[www.forbes.com](http://www.forbes.com)>.

James Riach "Revenue made by English football clubs tops £3bn for the first time" (6 June 2013) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

Stephen Ross "Financial Fair Play and the Law part II: guest post by Professor Steve Ross" (14 May 2013) Soccernomics <[www.soccernomics-agency.com/?p=466](http://www.soccernomics-agency.com/?p=466)>.

Martin Samuel "Fair play? To the Premier League's gang of four, that means a ban on dreamers like Jack Walker" Mail Online <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

Jeroen Schokkaert "Financial Fair Play, Alternative Instruments and Competitive Balance" (27 February 2013) Football Perspectives <<http://footballperspectives.org>>.

Ami Sedghi "Premier League broadcasting revenue: how is it distributed?" (12 October 2011) The Guardian <[www.theguardian.com](http://www.theguardian.com)>.

Matt Slater "Uefa boss to scrutinise Manchester City's Etihad deal" (16 August 2011) BBC <[www.bbc.co.uk](http://www.bbc.co.uk)>.

Stefan Szymanski "Financial Fair Play and the Law Part I: Introduction" (14 May 2013) Soccernomics <[www.soccernomics-agency.com/?p=464](http://www.soccernomics-agency.com/?p=464)>.

Stefan Szymanski "Stability and insolvency in European football" (3 May 2013) Soccernomics <[www.soccernomics-agency.com/?p=448](http://www.soccernomics-agency.com/?p=448)>.

Ed Thompson "Further legal challenge to FFP by Striani and Dupont" (20 June 2013) Financial Fair Play <[www.financialfairplay.co.uk](http://www.financialfairplay.co.uk)>.

Ed Thompson "Legal challenge to UEFA FFP rules by 'Bosman' Lawyer" (9 May 2013) Financial Fair Play <[www.financialfairplay.co.uk](http://www.financialfairplay.co.uk)>.

Rhodri Thompson, Christopher Brown and Andrew Smith "Fair or foul? Competition law and the financial regulation of football - Part 1" (10 July 2013) Law In Sport <[www.lawinsport.com](http://www.lawinsport.com)>.

Rhodri Thompson, Christopher Brown and Andrew Smith "Fair or foul? Competition law and the financial regulation of football - Part 2" (15 July 2013) Law In Sport <[www.lawinsport.com](http://www.lawinsport.com)>.

"CFCB adjudicatory chamber decisions" (21 December 2012) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"Clubs benefit from Champions League revenue" (23 July 2013) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"Focus on club licensing and financial fair play" (26 May 2010) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"Financial Fair Play" UEFA.com <<http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/index.html>>.

"Overview" (25 May 2013) UEFA.com <<http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html>>.

"UEFA" UEFA.com <<http://www.uefa.com/index.html>>.

"UEFA EXCO approves financial fair play" (21 September 2009) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"EPFL welcomes financial fair play" (12 March 2010) UEFA.org <[www.uefa.org](http://www.uefa.org)>.

"Financial Fair Play Regulations are approved" (27 May 2010) UEFA.org <[www.uefa.org](http://www.uefa.org)>.

Stephen Weatherill "Financial Fair Play and the law Part III: Guest post by Professor Stephen Weatherill" (14 May 2013) Soccernomics <[www.soccernomics-agency.com/?p=469](http://www.soccernomics-agency.com/?p=469)>.

Chris Wheeler "Fergie doubts whether Financial Fair Play will curb Premier League's big spenders" (8 February 2013) Mail Online <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

## 2 *Podcasts*

Sean Cottrell "Financial Fair Play Seminar Birkbeck Sports Business Centre 18 June 2013" (Podcast, 18 June 2013) Law in Sport <<http://www.lawinsport.com/podcast/item/financial-fair-play-seminar-birkbeck-sports-business-centre-18-june-2013>>.

## I **Other**

### 1 *UEFA publications*

"Club Licensing Here to Stay" (22 November 2010) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"The European Club Licensing Benchmarking Report Financial Year 2010" (12 January 2011) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"The European Club Licensing Benchmarking Report Financial Year 2011" (25 January 2012) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"Procedural Rules Governing the UEFA Club Financial Control Body" (18 May 2012) UEFA.com <[www.uefa.com](http://www.uefa.com)>.

"UEFA Club Licensing and Financial Fair Play Regulations" (2012) UEFA.com <[http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf)>.

## 2 *Commission of the European Communities Publications*

*Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)* [2001] OJ C368/07.

*Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty* [2004] OJ C101/65.

Commission Of The European Communities "White Paper on Sport" (Accompanying document to the White Paper on Sport, July 11 2007).

Commission Of The European Communities "White Paper on Sport" COM(2007) 391 final (July 11, 2007).

*Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C101/97

*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C101/81.

## 3 *Miscellaneous*

"Basel III: A global regulatory framework for more resilient banks and banking systems" (December 2010) Bank For International Settlements <<http://www.bis.org/publ/bcbs189.pdf>>