



# FACULTY OF LAW

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### Sport's Specific Nature, an Excuse for Anti-Competitive Agreement and Abuse of Dominance

An Examination on the Validity of UEFA Financial Fair Play Regulation  
and  
The Potential Abuse of Dominant Position on the European Football Market

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# Abstract

The development of sports within the European Union (EU) has been blooming the latest century, especially in the football sector, which has been transformed into a multi-billion industry. The development of European football has attracted investors outside the EU into heavy investing in football clubs across Europe. This has enabled purchases of new talents and high profile players for astronomical transfer fees in order to gain a competitive edge. Before the adoption of financial fair play (FFP) in 2009, UEFA, the governing body of European football, lacked rules regarding football clubs expenditures. This resulted in financial problems for some clubs spending more money than they earned. The introduction of FFP enforced by the UEFA has proven to successfully improve the financial state of football clubs across Europe.

However, football clubs across the EU are continually breaching FFP, most recently in France and England, which sparked the interest of the author to research within this field. Ever since the introduction of FFP in 2009 there has been previous breaches of FFP in Spain, Italy, Portugal and Bulgaria. The breaches have affected European football in several Member States (MS). This thesis seeks to understand the interplay between FFP enforced by UEFA and EU competition law, but also to explore if football clubs may be subject to article 102 TFEU. Due to multiple breaches of FFP it seems that the consequences of the breach are insufficient, whereas an alternative could be the application of article 102 TFEU. Consequences of breaching article 102 TFEU could be more effective to solve the inequalities which European football competition currently experience. Another potential solution would be to alter or maybe abolishing the break-even requirements connected to revenue and spending. This paper will explore the benefits and disadvantages of FFP, but also if FFP could potentially create an oligopoly of dominant actors in professional European Football abusing their dominant position.

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# Abbreviations

Big-5	Premier league, Serie A, Ligue 1, La Liga and Bundesliga
CAS	Court of Arbitration for Sports
CFCB	UEFA Club Financial Control Body
CIES	Centre International d'Etude du Sport
CJEU	European Court of Justice
CL	Champions League
The Commission	EU-Commission
EC	European Community
EEC	European Economic Community
EU	European Union
EUMR	European Merger Regulation
FA	Football Association
FFP	UEFA Financial Fair Play
FIFA	Fédération Internationale de Football Association
FINA	Fédération Internationale de Natation
M&A	Mergers and Acquisitions
MS	Member States
NCA	National Competition Authorities
PSG	Paris Saint Germain
SGB	Sporting Governing Body
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UCI	Union Cycliste Internationale
UEFA	Union of European Football Association
UK	United Kingdom

# 1. Introduction

## 1.1 Background and Issue

Football has changed its structure from playing with locals into a multi-billion industry worth an estimated 25.5 billion euros, and the industry is not showing any signs of deteriorating. By generating an estimate of almost 15 billion euros in revenues only in Europe season 2016/2017 it is evident that football has become an interesting area to invest in.<sup>1</sup> This lucrative business has sparked the interest of investing heavily in European football, investments are generally connected to star player transfers and their high wages. Further, this development could potentially distort competition, not only nationally, but also in international competitions such as Champions League (CL). The structural changes of sports affecting European economy has caught the interest from European institutions resulting in cases falling under their scrutiny to address legal matters in order to comply with EU law.<sup>2</sup>

FFP introduced in 2009 has as its objectives to solve the financial status of many European clubs. The idea behind FFP was to, through its break-even requirements, improve the economic and financial capability of clubs, introduce more discipline and rationality to their finances and to encourage clubs to operate on the basis of their own revenues.<sup>3</sup> In essence, the break-even regulation limits clubs from overinvesting with a few exemptions.<sup>4</sup> The introduction of the break-even requirement aimed to promote the financial health of European clubs. However, it may at the same time be viewed as an anti-competitive agreement between clubs creating high barriers to entry international competitions. Due to the dramatically increased transfer fee of players during the last decade, this has become an issue of European football today.<sup>5</sup>

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<sup>1</sup> Deloitte, Annual Review of Football Finance 2018, Sports Business Group June 2018, p. 8.

<sup>2</sup> C-415/93 "Bosman", ECLI:EU:C:1995:463, judgment of the Court of 15 December 1995, see also C-325/08, Olympique Lyonnais SASP vs. Olivier Bernard, judgment of the Court of 16 March 2010, ECLI: EU:C:2010:143.

<sup>3</sup> UEFA Clubs Licensing and Financial Fair Play Regulation ed. 2018, art. 2.

<sup>4</sup> Ibid, art. 61.

<sup>5</sup> Statistics on transfers brought from transfermarkt:

[https://www.transfermarkt.com/transfers/transferekorde/statistik/top/plus/0/galerie/0?saaison\\_id=2008&land\\_id=&ausrichtung=&spielerposition\\_id=&altersklasse=&leihe=&w\\_s=](https://www.transfermarkt.com/transfers/transferekorde/statistik/top/plus/0/galerie/0?saaison_id=2008&land_id=&ausrichtung=&spielerposition_id=&altersklasse=&leihe=&w_s=) accessed 2 May 2019, Comparing season 07/08 with 17/18 there has been an increase in over 470% on the record transfer fee, from EUR 38m to EUR 220m.

Due to the increasing transfer fees this may hinder midsize clubs to compete for the signing of new players in order to be competitive in international competitions. The development of European football and the introduction of break-even requirement may have the effect of cementing the position of financially stronger clubs in international competitions to the detriment of less financially strong clubs. Dominant actors in European football have recently breached FFP by overspending on player transfers and through overestimated-sponsorship deals trying to circumvent FFP.<sup>6</sup> The fact that some clubs try to circumvent FFP by over-estimate their sponsorship, may result in higher revenues, which enables expensive transfers. This may be considered an abuse of their dominant position. Furthermore, the parallel behaviour by dominant clubs of increasing prices on player transfers in order to keep out competition, may also be seen as an abuse of their dominant position due to their financial strength.

The issue at hand is the inflated transfer fees currently limiting competition in European football and the potential indirect financial cap by the break-even requirement in FFP, used by dominant clubs to keep out competition in an abusive manner subject to article 102 TFEU. In order to maintain a sustainable competition in European football while maintaining objectives of the EU, the commercialization of football may enable application of both article 101 and 102 TFEU.<sup>7</sup> The break-even requirements may create an “oligopoleague”<sup>8</sup> where only the biggest and richest clubs compete for European success. However, the adoption of FFP and the break-even requirements has not prevented the intention of some dominant clubs to circumvent FFP by overestimate their sponsorships. The disciplinary measures of breaching FFP may result in inter alia, point deduction, exclusion from future competitions or withdrawal of a title.<sup>9</sup> This has however not discouraged clubs from breaching FFP, thus it is necessary to question the validity of FFP and the effectiveness of its disciplinary measures.

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<sup>6</sup> “How can PSG pay €200m for Neymar? What happened to financial fair play?” The Guardian: <https://www.theguardian.com/football/2017/aug/02/psg-200m-neymar-barcelona-financial-fair-play> accessed 22th of January 2019, also see “UEFA investigators set to seek Manchester City’s ban from Champions League” NY Times: <https://www.nytimes.com/2019/05/13/sports/manchester-city-champions-league-uefa.html> accessed 15th May 2019.

<sup>7</sup> S. Weatherill, *European Sports Law*, Asser Press 2<sup>nd</sup> ed. 2014, p. 4-5. Objectives of the EU see art. 3 TEU.

<sup>8</sup> N.Petit, “Financial Fair Play” or “Oligopoleague” of Football clubs? A preliminary Review under European Union Competition (June 14 2014).

<sup>9</sup> Procedural rules governing the UEFA Club Financial Control Body- ed. 2015, art. 29.

## 1.2 Purpose

The purpose of this thesis is to examine the current FFP rules, especially if the break-even requirement might breach EU competition law. Since FFP applies irrespective of clubs financial status, FFP could in fact create an oligopoly where dominant actors could maintain or strengthen their dominant position due to their financial strength. This thesis also intends to explore the possibilities of applying article 102 TFEU to football clubs individually or collectively. This in order to see if application of article 102 TFEU is a more effective way than the repercussions found in FFP. The outcome of this thesis is to see if FFP is necessary and proportionate to obtain its objectives, or if there is reason to question the validity of FFP, but also if dominant football clubs may be subject to article 102 TFEU. Furthermore, the purpose is to explore if EU competition law is better suited than FFP to regulate an area that is considered to have a specific nature, in order to create a more competitive European football.

## 1.3 Research Question

- 1) Does sport's specific nature exempt application of EU competition law in terms of anti-competitive agreements and abuse of domination?
- 2) Could FFP rules be considered a horizontal anti-competitive agreement between European football clubs subject to article 101 TFEU?
- 3) Does FFP create an oligopolistic market allowing for collective dominance subject to article 102 TFEU to abusive behavior by dominant football clubs?

## 1.4 Delimitations

This paper will not examine the application of article 101 TFEU on sales of TV-rights nor cartels subject to article 101 TFEU, due to the scope of the thesis. State aid rules found in article 107 TFEU in regards to aid less financial European football clubs will also be excluded from this thesis since the thesis will focus on FFP and abuse of dominance by professional clubs. FFP consist of a wide range of licensing and financial regulation, however, focus will be on the break-even requirement and possible sanctions, excluding the UEFA club licensing part of FFP.

## 1.5 Methodology

In order to answer the research questions it is necessary to not only assess article 101 and 102 TFEU but also analyzing EU law in light of EU objectives. Thereby an EU legal method is used where EU law is examined from a teleological perspective, frequently used by the EU courts.<sup>10</sup> Sources used in this thesis will be case law from the Court of Justice (CJEU) and decisions from the EU-Commission (the Commission) to clarify the application of article 101 and 102 TFEU. Case law illustrates how the CJEU and Commission assess cases under article 101 and 102 TFEU in order to see if this may apply on FFP and a potential abuse of dominance by football clubs. Literature on EU competition law linked to article 101 and 102 TFEU and competition policy will be used. Legal principles used by judges of the CJEU allow for analogy application on article 101 and 102 TFEU not only to one specific legal area but several different ones, including sports.<sup>11</sup>

Case law from the CJEU has shown that a legal solution in one case may be applied analogously in another case based on other factual circumstances, however due to different interpretation of certain terms from courts of the EU it is not an easy task drawing an analogy from general cases to the sport sector.<sup>12</sup> Before the introduction of article 165 TFEU there was no treaty article applicable to sports, however this has not excluded sports from being subject to the CJEU.<sup>13</sup> The case law developed in the relationship between sports and EU law will be useful guidance to assess FFP with EU competition law and also examine whether article 102 TFEU may apply to dominant football clubs. EU competition law is commonly connected with economical theory, therefore it is not only dependent on legal aspects but also economical aspects, which is necessary to applying article 101 and 102 TFEU. Hence, market statistics will be used in moderation to illustrate the situation on the transfer market in Europe. Any sources from the Internet will only be purely informational in terms of alleged violations of FFP or the situation on the transfer market.

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<sup>10</sup> J. Hettne & I. Otoken Eriksson, *EU-rättslig metod-Teori och genomslag i svensk rättstillämpning*, Norstedts juridik andra upplagan 2011, p. 168.

<sup>11</sup> See C-309/99, *Wouters*, judgment of the Court 19 February 2002, ECLI:EU:C:2002:98, p 97 and C-519/04, *Meca-Medina and Majen v Commission*, judgment of the Court 18 July 2006, ECLI:EU:C:2006:492, p 42. On the use of the legal principle "proportionality principle".

<sup>12</sup> J. Hettne & I. Otoken Eriksson, *EU-rättslig metod*, p. 166.

<sup>13</sup> C-415/93, *Bosman*, C-519/04, *Meca Medina*.



## 1.6 Outline

Chapter two consists of explanations of how FFP and break-even requirements apply to football clubs across Europe. Chapter two will also set out the economical aspect of European football in order to keep the reader up to date on the topic subject to this thesis.

The third chapter will illustrate the need for EU competition law and the entry of EU law into the sport sector. Chapter three is not exclusively connected to football, but to sports in general and how the sport policy has been developed through case law and if the specific treaty 165 TFEU has made a change to European sports law. Chapter three will also assess the possibility of applying EU law in the sport sector in order to create a fundamental understanding of the relationship between EU law and sports, and to assess whether or not sport still is as specific in nature as stated in the treaties.

The fourth chapter aims to provide for a deeper understanding of article 101 and how the EU institutions assess cases subject to anti-competitive agreements. Chapter four assess article 101 TFEU in order to find if FFP may breach article 101 TFEU. Chapter four explores if FFP is necessary, suitable and proportionate in order to maintain healthy economy for European football.

Chapter five will assess if there is an abuse of a dominant position in European football. This chapter will examine if FFP creates an oligopoly of dominant football clubs, which might abuse their financial strength in international competitions to the detriment of normal clubs. Chapter five will also evaluate if FFP is an effective tool to deter any abuse of a dominant position or if article 102 TFEU is a more effective way to restore competition in Europe.

Chapter six contains of an analysis and in the end a conclusion if EU competition law could solve the situation in European football for the benefit of European football, the internal market and finally the EU.

Chapter seven contains the bibliography of material used in this thesis.

## 2. European Football and the EU

### 2.1 UEFA Financial Fair Play Rules

Anderson, Parrish and Garcia argue that the EU's interest in sports is three folded, the economic interest, the non-economic e.g. social dimension of sports and health benefits of sports and lastly to mitigate aspects that could damage its integrity and hinder its development e.g. doping and poor governance.<sup>14</sup> The economic and non-economic aspects of sports and how these aspects co-exist with values of the EU will be subject of this chapter, focusing on FFP and the transfer market.

FFP was introduced with the purpose of improving the financial health, transparency and credibility of European football clubs.<sup>15</sup> FFP was approved in 2010 and since its adoption clubs across the EU has to prove that they have a healthy economy in order to participate in UEFA competitions. UEFA introduced the break-even requirement in 2013, requiring clubs to balance their outcome with their income in order to restrict football clubs to accumulate heavy debts, usually connected to player transfers and wages. UEFA Club Financial Control Body (CFCB) controls the break-even requirement.<sup>16</sup> In practice this allows clubs to spend up to €5 million more than their income per assessment period. However, it may be exceeded to a certain limit through direct contribution from the owners of the clubs or a related party preventing building up an unsustainable debt.<sup>17</sup> Sanctions for non-compliance of the break-even requirements are decided by the CFCB and potential consequences of breaching FFP could be inter alia warnings, fines, deduction of points, withholding of revenues from a UEFA competition, exclusion in UEFA competitions, prohibition on registering new players and probably the most severe: the withdrawal of a title or award.<sup>18</sup>

Revenue, taken into account in terms of break-even, include inter alia, gate receipts, sponsorship, sales of players and prize money.<sup>19</sup> Expenditure balanced against the revenue in order to fulfill the break-even requirements is associated costs to player

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<sup>14</sup> J. Anderson, R. Parrish & B. Garcia, *EU sports Law and Policy*, EE Elgar 2018, p. 3.

<sup>15</sup> *UEFA Clubs Licensing and Financial Fair Play Regulation* ed. 2018, art. 2.

<sup>16</sup> *Ibid*, annex XI.

<sup>17</sup> *Ibid*, art. 61.

<sup>18</sup> *Procedural rules governing the UEFA Club Financial Control Body-* ed. 2015, art 29.

<sup>19</sup> *UEFA Clubs Licensing and Financial Fair Play Regulation* ed. 2018, annex X.

transfers and wages.<sup>20</sup> Income from related parties above fair market value and income from non-football operations not related to the club must be decreased from the relevant income by the club. This is to ensure that owners of the clubs are prevented of financially “doping” the revenue of their club in order to pass FFP.<sup>21</sup>

It has previously been known that the owners of clubs or a related party inject money into their clubs through overestimated sponsorship deals.<sup>22</sup> A related party is a person or entity that is related to the entity that is preparing its financial statements (the reporting club).<sup>23</sup> Furthermore a related party may also be a person or a close member of that person’s family who may be expected to influence, or be influenced by, that person in his dealings with the entity is considered a related party to a reporting entity if that person has significant influence over the reporting entity.<sup>24</sup> A related party is also any entity that alone or together with other entities linked to the same owner or government representing more than 30% of the club’s total revenue are automatically considered a related party, in order to limit overinvesting.<sup>25</sup> To keep the injection of money to a certain balanced amount by owners and any related party, such transactions are investigated by CFCB and, when necessary, the controlling body adapts fair calculations in accordance with market prices. Breaching the investment guidelines in FFP by a club may result in exclusion from participation in international competitions set up by UEFA. Furthermore, such exclusion from competitions will have a negative financial impact on the club due to the millions in loss from competition revenues. Only the qualification for the group stage generates over €15 million, where every win in the initial stage is worth €2.7 million.<sup>26</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Supra note 6. Also see “How Oil Money Distort Global Football”, SPIEGEL: <https://www.spiegel.de/international/world/financial-fair-play-manchester-city-and-psg-pact-with-the-sheikhs-a-1236414.html> accessed 8th May 2019. For further reading there is also “Man City Accused of Using Shadow Firms to Flout Rules”, SPIEGEL: <https://www.spiegel.de/international/world/manchester-city-accused-of-using-shadow-firms-to-flout-rules-a-1255796.html> accessed 22th May 2019.

<sup>23</sup> UEFA Clubs Licensing and Financial Fair Play Regulation ed. 2018, Annex X, 1F.

<sup>24</sup> Ibid, Annex X, 2F.

<sup>25</sup> Ibid, p. 8.

<sup>26</sup> “How clubs’ 2018/19 UEFA Champions League revenue will be shared” UEFA homepage: <https://www.uefa.com/uefachampionsleague/news/newsid=2562033.html> accessed 29th of January.

Whether FFP is in line with EU competition law is unclear, however the Commission has previously supported FFP through a joint statement, stating inter alia: “These are objectives which UEFA, as governing body for football in Europe, will promote in a balanced and proportionate way, acting in accordance with all applicable legal rules and, in particular, within the framework of EU law”.<sup>27</sup> The intention of adopting FFP and requirements of break-even was to promote the economic health of European football clubs. However, the adoption of FFP and break-even rules has created a permanent gap between the top teams and the smaller teams in international competitions. The intention of FFP was not to make all clubs equal in size and wealth, but to encourage clubs to build for success rather than continually seeking for a short-term solution. However, this is a situation evident on today’s transfer market by rich teams. Normal teams may struggle financially, desperately trying to acquire new players, whereas top teams may enjoy the benefit of paying inflated transfer fees within their reported revenue. FFP and the break-even requirements may potentially be to the detriment of normal clubs where the top teams potentially already enjoy a dominant financial position and may be unaffected by FFP.<sup>28</sup>

The goal of break-even regulation is that there should no longer be a possibility of European clubs to financially manipulate their revenue in order to attain top players or to be able to pay inflated wages. The limit on external investment might benefit already rich clubs from mid-level and smaller clubs by closing the bridge of external investment prior FFP. There was no limit on how much money owners could invest into their clubs prior FFP, which resulted in the creation of some of the richest and most powerful clubs in European football.<sup>29</sup> Benchmarking report from UEFA shows that the 12 clubs with the highest UEFA revenues reached the knockout stages of CL, indicating that high revenue is connected with success in international competition.<sup>30</sup>

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<sup>27</sup> Joint Statement on Financial Fair Play (FFP) European Commission, 21 March 2012, this joint statement was issued between the previous president Michel Platini and vice-president Joaquin Almunia, quote from this joint statement, p. 1. Note that this is the only reference to EU Law in the joint statement.

<sup>28</sup> Bullseye Football Money League, Deloitte Sports Business Group January 2019, p. 2-3. The combined revenue of the top 20 clubs in Europe sets a new record of EUR 8.3 billion.

<sup>29</sup> Bullseye Football Money League, Deloitte Sports Business Group January 2019, p. 5 Real Madrid recorded record revenue of EUR 750m. Note that 3 out of the 10 richest clubs, Manchester City, Paris Saint Germain and Chelsea were taken over, 2008, 2011 and 2003 respectively.

<sup>30</sup> “The European Club Footballing Landscape” Club Licensing Benchmarking Report Financial Year 2017 UEFA, p. 61.

Successes in international competition leads to revenue growth, which could enable high transfer fees and inflated wages for players.<sup>31</sup> The fact that external investment might result in breaching of FFP, has in fact been giving some European clubs an enormous competitive advantage prior to the adoption of the break-even requirement. While FFP intends to pursue an objectively legitimate purpose of maintaining a healthy economy for European football clubs, there is reason to question the validity of FFP and if the rules might be proportionate to its purpose. Furthermore it is necessary to examine if FFP might have an anti-competitive effect, while maintaining or creating an oligopoly for financially dominant clubs, contrary to EU competition law.

The financial disparity between European football clubs and the regulation of break-even illustrates the potential problem international football face today. Football, and in fact all sports, is based on competition where competitors are necessary, however FFP tends to create an oligopolistic market for international football where only the rich compete. The commercialization of sports and the billions in revenue to gain has incentivized clubs to operate into a more business minded way in order to maintain or to gain a competitive advantage. FFP applies to all clubs participating in European competitions, thereby not only affecting football as a sport, but also its submarkets such as sponsorships, TV-rights, ticket sales. According to Farzin, this leads to the assumption that sport might not be as specific in nature as stated in the treaties. This might be the case, since football clubs tend to operate in a more business minded way due to the possible financial gains on the market.<sup>32</sup>

The Commission has previously stated that: “The rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not, in principle, caught by the treaty’s competition rules” .<sup>33</sup> Hence, FFP might create inequality and certainty to results, while harming the proper functioning of competition and integrity of football, which might open up the possibility to apply EU competition law when it comes to FFP.

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<sup>31</sup> Ibid, p. 65 and p. 72.

<sup>32</sup> Leah Farzin, On the Antitrust Exemption for Professional Sports in the United States and Europe, Jeffrey S. Moorad Sports Law Journal, 2015, Vol. 22: Iss. 1, Article 2, p. 75, 79.

<sup>33</sup> Press Release, European Commission, Limits to application of treaty competition rules to sport: Commission gives clear signal, IP/99/965, Brussels 9 December 1999.

In the previous press release the Commission also had the intention to draw a line between sporting actions falling either outside or in the scope of article 102 TFEU. Furthermore the Commission also stated that they aim to determine which sport actions might be exempted from EU competition law. The determination would in that case be done on a case-by-case basis.<sup>34</sup> The press release stated inter alia that the Commission would only investigate cases with a Community dimension significantly affecting trade between MS. With a pan-Europe dimension significantly affecting trade between all MS, FFP could be subject to EU competition law. This will be discussed in chapter 4, however, this illustrates that there is a possibility to challenge FFP due to the potential negative effect it may have on European competition. Furthermore, the commercialization of sports might indicate that sport is not as specific in nature as stated in the treaties.

Football is built on competition and is dependent on competitors competing on equal terms, the balance of competition between teams must be as balanced as possible in order to gain certain unpredictability on the outcome of games. This chapter intended to illustrate the current situation in football and the financial inequality that exists. This has led to inflated prices on transfer fees where there is a concentration of resources to a small number of football clubs across Europe frustrating competition on an international level. The economic aspect of sport may have to be revised in order to create a more balanced competition in European football thus creating a more unpredictable outcome of games. However, by creating case-by-case decisions could lead to legal uncertainty, creating a gray area between sports and EU competition law, and can also frustrate the fruitful relationship between UEFA and the Commission.<sup>35</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> B.García, "UEFA and the European Union: From Confrontation to Co-operation?", *Journal of Contemporary European Research*, Vol 3. No 3, 2007.

## 2.2 Player Transfers in the EU

The commercial development of football has incentivized clubs across Europe to invest heavily in new players in order to be successful in the domestic league and also in international competitions such as CL. With successes follows better sponsors deals. In an attempt to market their brand to a broader public, the sponsors offer deals worth billions.<sup>36</sup> Sponsorships results in higher revenues, which enables the clubs to sign new players and high profile players bringing successes to the club by their performances in games throughout the season. The transfer of football players from one club to another is a complex economic and legal construct due to the difficulties of distinguish between sporting and economic matters behind the transfer. However, it is done on a daily basis during the transfer window.<sup>37</sup>

FFP is designed to preserve the fairness in competition and to sustain a healthy economy for European football clubs. However, the volume and level of transfer amounts have steadily increased throughout the years. Transfer report by FIFA illustrate that during the year of 2018 a total of 16,533 player transfers were finalized at a spending of USD 7.03 billion that marked an increase of 10.3% from the previous year. From the USD 7.03 billion of spending on transfers, UEFA clubs were responsible of 87.7% of all transfer fees amounting to USD 6.2 billion.<sup>38</sup> Transfer market analysis by the Centre international d'Etude du sport (CIES) shows that the increase from summer in 2016 to summer transfers in 2017 by 38% from EUR 3.7 billion to EUR 5.1 billion came from the big-5 league clubs (Premier league, Serie A, Ligue 1, La Liga and Bundesliga).<sup>39</sup>

Only 41 clubs in the big-5 leagues made a profit on player transfers summer 2017, the club AS Monaco recorded a net profit of +EUR 289 million, while the main competitor in the same league Paris St-Germain (PSG) showed a negative balance of

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<sup>36</sup> Bullseye Football Money League, Deloitte Sports Business Group January 2019, p. 5. For statistics on sponsor deals and commercial revenue see the chart on commercial where Real Madrid maintain first sport on EUR 356.2m.

<sup>37</sup> The transfer window marks the period under which European transfers are allowed, this is the period where players may switch teams.

<sup>38</sup> FIFA TMS, Global transfer market report 2018 men's football, a review of all international football transfers in 2018, p. 7.

<sup>39</sup> Transfer market analysis: tracking the money (2010-2017), CIES Football Observatory Monthly Report issue 27, by Drs R. Poli, L. Ravenel and R. Besson, September 2017.

–EUR 343 million.<sup>40</sup> Another clear deficit in the analysis is the negative balance of the Premier League by spending EUR 1,771 million while recording an income of EUR 936 million, resulting in a negative balance of –EUR 835 million, not really in line with FFP.<sup>41</sup>

The astronomic numbers are connected inter alia to the inflation of transfer fees, an illustrative example is the transfer fee of Kylian Mbappé with an estimated transfer value of EUR 92.6 million, went from AS Monaco to PSG for a world record fee of EUR 180 million. The transfer value of Ousame Dembélé was estimated to EUR 95.8 million, however FC Barcelona acquired the services of the young player for an estimated EUR 147 million, an increase of 51.2% from the valued transfer. Another inflated price was also from AS Monaco to Manchester City regarding the player Benjamin Mendy, who had an estimated transfer value of EUR 28.5 million but was transferred for the sum of EUR 57.5 million. Common features of all these clubs are their dominant position in European football. The transfers allowed them to strengthen their dominant position, not only in their domestic league but also on an international level, regardless of the transfer fees.<sup>42</sup>

The report from CIES also indicates a concentration of resources to a small number of football clubs across the big-5 leagues. This could result in a lasting gap between rich and normal clubs in international as well as in domestic competitions. The heavy spending could potentially distort competition on an EU level, due to the fact that there is little or no possibility for competitors to finalize inflated transfer fees in order to keep up with the competition. The legal issue at hand is that the break-even requirement in FFP might create a barrier to entry in competitions brought by UEFA, while potentially concentrating the success of top teams in Europe due to their financial position.<sup>43</sup> The indirect investment restriction by the break-even rules might create an everlasting gap in European football, where only the rich compete.

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<sup>40</sup> Ibid, ch. 3. Note that since 2013 PSG has won Ligue 1 (the domestic league) five out of six times.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid, ch. 4. Described as damaging Euro football by the La Liga chief Tebas due to the inflated market so clubs have to pay ridiculous sums to keep their players. Also that this skews the balance of the entire European football structure, “Man City & PSG are playthings of a state, they’re ruining everything-La Liga chief Tebas”, GOAL: <https://www.goal.com/en/news/man-city-psg-are-playthings-of-a-state-theyre-ruining-everything-/133wkd5tp3qyv19ew7jch0j8ur> accessed 22th May 2019.

<sup>43</sup> See supra note 30.



## 3. EU law and Sport

### 3.1 The Need of European Competition Law

This chapter will underline the need for EU competition law and its purpose generally and within sport. This will be followed by the application of EU law to sports and how the CJEU applies EU competition law to sports. The cases referred to below are considered to be the starting point of the application of EU law to sports. By examining these cases the reader will come to understand the complexity of applying EU competition law to sports. Furthermore the cases will show how the CJEU has changed its policy when it comes to applying EU law to sports. The specific nature stated in article 165 TFEU will also be examined in order to clarify to what extent sports enjoy autonomy or semi-autonomy of the application of EU law.

EU competition law may be viewed as a vital tool in order to protect the competition in a free market economy. Free market economy is defined by an economic system where the allocation of resources is determined by supply and demand, contrary to an economic market controlled by the government. The free market economy may bring benefits to the society in terms of innovation, quality and prices, in order to achieve this a certain level of competition between companies is needed. However, when companies start to outgrow competitors thereby being able to act independently of its competitors, or start dividing up markets with close competitors, could ultimately result in less innovation and higher prices. According to Jones and Surfin, EU competition law is a vital tool to ensure effective competition within the internal market. Furthermore they argue that EU competition law is an important tool to ensure that competition on the market is not distorted.<sup>44</sup> While this is mainly the case of “traditional” competition between companies in a strict commercial industry, there is arguably room for application of EU competition law in a similar way to sports. Especially considering the developing commercial purpose between professional football clubs.

EU competition law is used as a vital tool in order to regulate market imperfection and failures in order to promote competition, which may seem contrary to the

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<sup>44</sup> A. Jones, B. Surfin, *EU Competition Law, Text, Cases, and Materials*, Oxford University Press 6th ed. 2016, p. 2.

freedom of companies to compete as they wish. However, the purpose is to see to the greater good of many instead of the individual gain by a few. Thus, by remediate market imperfections and failures, EU competition law seeks to eliminate behaviour such as abuse of dominant position and anti-competitive agreements between firms. This is necessary for the functioning of the internal market while also having competitors and end-consumers in mind.<sup>45</sup>

The market structure of European football is highly concentrated as a result by rules set up by UEFA, which determines the conduct of clubs across Europe. This conduct determines the market performance in terms of profitability, growth and success. The concentrated market structure might result in high barriers to entry or success by smaller clubs against already dominant actors in European football.<sup>46</sup> The structure of FFP and the break-even requirement might determine the conduct of clubs resulting in different market performances based on financial strength contrary to EU competition law. One of the aims of the EU is to establish an internal market that works for inter alia a sustainable development of Europe based on balanced economic growth and a highly competitive social market economy<sup>47</sup>, including a system ensuring that competition is not distorted.<sup>48</sup> The aim to include a system ensuring that competition is not distorted, has previously been subject for EU competition law, reaffirming that Article 3.3 TEU includes a system where competition is not distorted, without explicitly stating it in the treaty.<sup>49</sup>

Protocol no. 27 is in line with early case law from CJEU, stating inter alia that article 85 and 86 EEC (101 and 102 TFEU) aim to achieve the goal on different levels, mainly the maintenance of effective competition within the common market (Internal

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<sup>45</sup> Ibid, p. 3. See art. 3 (b) TFEU, art. 26 TFEU, and art. 3.3 TEU.

<sup>46</sup> Ibid, p. 13. Also known as the S-C-P paradigm or "Harvard School" of thought, a theory used in competition analysis relevant to competition law, marking the importance of market definition, barriers to entry and market power. Contrary to the S-C-P is the "Chicago school" where the pursuit allocative efficiency should be the sole goal of competition law, placing a greater trust in the market, where any imperfections and failures will be self-correcting by the market itself.

<sup>47</sup> Art. 3.3 TEU.

<sup>48</sup> See art. 51 TEU, that protocols and annexes to the treaties form an integral part thereof. Protocol no. 27 on the internal market and competition, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 309) entails that art. 3 TEU includes a system ensuring that competition is not distorted.

<sup>49</sup> C-52/09, TeliaSonera Sverige, judgment of the Court of 17 February 2011, ECLI:EU:C:2011:83, p. 20-22.

market).<sup>50</sup> In terms of Mergers and Acquisitions (M&A), the EU Merger Regulation (EUMR) uses the criteria of “effective competition” when determining the compatibility of M&A within the Internal market. M&A activity that would impede effective competition in the common market or result in the creation or strengthening of a dominant position shall be declared incompatible with the common market.<sup>51</sup> This illustrates objectives of EU competition law in different areas, from M&A to anti-competitive agreements and abuse of dominant position, where the result remains the same, the internal market promotes a system that ensures that effective competition is not distorted.

While effective competition is necessary for the functioning of the internal market, the goals of EU competition law have not always been agreed upon. However, goals of EU competition law relevant for sports and this thesis are economic freedom and the process of competition. According to Jones and Surfin this involves the protection of market participants (clubs) from the economic power of others where focus lies in structure and process of the market rather than the outcome.<sup>52</sup> This inevitably leads to the protection of competitors, where EU competition law may have as goal to protect smaller firms (clubs) from financially dominant ones, in order to allow a certain degree of fair competition between smaller firms and dominant ones.<sup>53</sup> Considering how dependent sport is of competitors, it legitimizes the question why modern sports should enjoy any exemption or autonomy to principles and goals of EU competition law.

### 3.2 The Starting Point of European Sports Law

The first ruling from the CJEU in 1974 regarding issues involving sports, *Walrave and Koch v UCI*, can be viewed as the birth of European sports law.<sup>54</sup> In essence the CJEU stated that certain decisions and activities in sports were purely of a sporting

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<sup>50</sup> C-6/72, *Continental Can*, judgment of the Court of 21 February 1973, ECLI:EU:C:1972:101, p. 25.

<sup>51</sup> Council Regulation (EC) no 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), article 2.3.

<sup>52</sup> A. Jones, B. Surfin *EU Competition Law* 2016, p. 27.

<sup>53</sup> *Ibid*, p.27-28. Competition art. 101, 102 and 106 TFEU lack reference to any competition policy, however the preamble of TFEU recognizes fair competition.

<sup>54</sup> C-36/74, *Walrave and Koch v Association Union Cycliste Internationale and Others*, judgment of the Court of 12 December 1974, ECLI:EU:C:1974:140.

nature and did not constitute an economic activity, and EU law could not be applied, thereby creating the first exemption sports enjoyed under EU law.

It was not until a Belgian football player challenged the transfer rules of UEFA that sports came under scrutiny of EU law once again.<sup>55</sup> *Bosman* gave more substance to European sports law, however the decision did not provide any constitutional basis to handle the relationship between sports and EU law, instead the case addressed issues regarding free movement law and transfer rules set up by UEFA. *Meca Medina* followed *Bosman*, where the CJEU assessed the purely sporting rule adopted in *Walrave and Koch*, and the economic effects sports has in order to apply EU competition law on a case-by-case basis.<sup>56</sup>

### 3.2.1 Walrave and Koch, the Issue with Purely Sporting Interest

*Walrave and Koch* concerned the nationality of the pacemaker, a motor-powered assistant to the bicyclist. The legal issue was that it was required from the cycling's governing body (UCI) that the pacemaker was to be of the same nationality as the cyclist in the world championships.<sup>57</sup> The requirement of having a specific nationality on the pacemaker was seen as discrimination based on nationality contrary to EU law, the plaintiffs of Dutch origin were affected by these internal rules set up by the UCI. The CJEU concluded that in regards on the objectives of the Community, sport is subject to community law only if it constitutes an economic activity.<sup>58</sup> Even though sport itself was not mentioned in the previous treaties, the CJEU connected EU law to sports, regardless of the lacking competence conferred in the previous treaties. This was done in order to attain the objectives of the community, which was to promote the harmonious development of economic activities.<sup>59</sup>

However, with the entrance into the sports area, the CJEU concluded that the composition of sports teams, was a question of purely sporting interest and has

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<sup>55</sup> C-415/93, *Bosman*.

<sup>56</sup> C-519/04, *Meca-Medina and Majen v Commission*.

<sup>57</sup> C-36/74 *Walrave and Koch*.

<sup>58</sup> Art. 2 EEC (Art. 3.3 TEU), p. 4 of the judgment.

<sup>59</sup> Art. 5.1 TEU, principle of conferral, art. 5.2 TEU, "the union shall act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein".

nothing to do with economic activity, thus enabling nationality based discrimination in sports between international teams.<sup>60</sup> The decision did not provide much clarification on the application of EU law on sports. The argument that the formation of national teams is a purely sporting interest and does not constitute an economic activity could be considered inadequate, based on inter alia, that participants in international competitions enhance their profile to a broader audience thereby increasing potential earnings as a result of their exposure on the international stage. However, according to Weatherill the policy of EC at the time, emphasized on the economic activity that brought sports under the scrutiny of EU law despite the lack of any treaty reference.<sup>61</sup> The court confirmed this position in the following case, *Donà*<sup>62</sup>, and it was not until *Bosman* that European sports law was revised.

### 3.2.2 Bosman, a Challenge of UEFA's Transfer Rules

The decision in *Bosman* involved transfer rules set up by UEFA that created an obstacle to freedom of movement for workers, a case where professional football fell under the scrutiny of EU law.<sup>63</sup> The rules set up by UEFA concerned free agent players (players without a contract with any club), the rules entailed that free agent players could only sign to new football clubs if the new club paid a fee to the previous club, a term violating free movement of workers. The CJEU concluded that the rules were contrary to fundamental rights resulting from constitutional traditions between MS and decided that it was not necessary to rule on the interpretation of article 85 and 86 of the treaty.<sup>64</sup> The court addressed the possibility of exempting sports from EU law but was not convinced that the rules set up by UEFA should be exempted.<sup>65</sup>

*Bosman* reaffirmed previous case law stating that EU law applies to sports as far as economic activity is concerned, but the case also addressed sports specific character by considering the social importance of sporting activities and football in the community. The need of preserving a certain degree of equality and uncertainty to the

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<sup>60</sup> C-36/74, Walrave and Koch, p. 8.

<sup>61</sup> J. Anderson, R. Parrish & B. Garcia, EU sports Law and Policy, EE Elgar 2018, chapter 1 by S. Weatherill, Sources and origins of EU Sports Law, p. 7-9.

<sup>62</sup> C-13/76, *Donà v Mantero*, judgment of the Court of 14 July 1976, ECLI:EU:C:1976:104, p. 12.

<sup>63</sup> C-415/93, *Bosman*.

<sup>64</sup> *Ibid*, p. 138. Art. 85 and 86 currently art. 101 TFEU and 102 TFEU. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 11.

<sup>65</sup> C-415/93, *Bosman*, p. 73-87 and p.114-120.

sport by encouraging recruitment and training of young players must be accepted as legitimate, illustrating a creative approach from the court to conditional autonomy to sports without any treaty reference.<sup>66</sup>

The court further assessed, what may be seen as a parallel reasoning, that the treaty provisions concerning freedom of movement for persons does not prevent adoption of rules excluding foreign players from certain games for reasons that are not economic in nature relating to the particular nature and context of such games that are of sporting interest only.<sup>67</sup> The distinction between economic nature and sports specific nature appears rather blurry and the opportunity from the court to clarify the gray area of applying EU law to sports was lost for now, leaving application of EU law to sports still unclear.

### 3.2.3 Meca Medina, EU Competition Law and Sports

*Meca Medina* is a landmark case when it comes to application of EU competition law to sports. The court clarified to a certain point, how to assess the term “purely sporting rule”.<sup>68</sup> Meca Medina and Majcen were professional long distance swimmers who had failed a drug test administered by the governing body Fédération Internationale de Natation (FINA). As a result they were banned from competition during two years, the decision from the Court of First Instance was appealed.<sup>69</sup>

The CJEU stated that sports are subject to community law in so far as it constitutes an economic activity.<sup>70</sup> The court seemed to reiterate the legal reasoning in *Walrave and Koch*, that treaty prohibitions do not affect rules concerning questions of purely sporting interest and, as such have nothing to do with economic activity. However, the court in *Meca Medina* went further in order to clarify community law (EU law) application to sports.<sup>71</sup>

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<sup>66</sup> Ibid, p. 73 and 106, also see joint case Deliége C-51/96 and Pacquée, C-191/97, judgment of the Court of 11 April 2000, ECLI:EU:C:2000:199, on the conditional autonomy to sports due to its nature, p. 42.

<sup>67</sup> C-415/93, Bosman p. 127.

<sup>68</sup> C-519/04, Meca-Medina and Majcen v. Commission.

<sup>69</sup> T-313/02, Meca-Medina and Majcen v. Commission, ECLI:EU:T:2004:282 judgment of the Court of First Instance 30 September 2004.

<sup>70</sup> C-519/04, Meca-Medina, p. 22.

<sup>71</sup> Ibid, p. 23-25.

The court added, “The mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the treaty the person engaging in the activity governed by that rule or the body which has laid it down”.<sup>72</sup> The CJEU reinforced the assessment on application of community rules to sports by stating that ” [...] account must first of all be taken of the overall context in which the decision of the association of undertaking 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”.<sup>73</sup> This formula created in *Wouters*, enabled legal assessment of practices which restrict competition by effect to also include the assessment of their sporting objective. The anti-doping rules in *Meca Medina* were justified by a legitimate objective, thus the rules did not constitute a restriction of competition incompatible with the common market.

The court adopted a new approach by not stating that rules in sports are generally considered to be purely sporting rules, but instead assessed the rules set up in the sports sector by its effect and purposes, in order to see if community law could apply to sports. The sporting rules concerned in *Meca Medina* involved anti-doping rules which were objectively justified, but were economic in purpose as well as in effect, due to the fact that a “honest” sport will enjoy more interest and a higher revenue for the sports and the people performing it. This formula was adopted in *Meca Medina* by the court to test the purely sporting rules against EU law, where it may exert economic effect. *Meca Medina* establishes that few sporting rules are purely sporting rules and, not economic in nature, thereby eliminating the purely sports exemption pre *Meca Medina* according to Weatherill.<sup>74</sup> The proportionality test used in *Meca-Medina*, inspired from *Wouters* (a non sports case) to the sports sector indicates that sports may no longer enjoy semi autonomy application from EU law through a general sporting exemption that was given in *Walrave & Koch* and *Bosman*. Thus making all sports rules subject to EU law where they may be exempted if they are proportionate and not commercially motivated.

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<sup>72</sup> Ibid, p. 27, see also p. 31-33.

<sup>73</sup> Ibid, p. 42. This is a recitation from: C-309/99, *Wouters*, p. 97.

<sup>74</sup> J. Anderson, R. Parrish & B. Garcia, *EU sports Law and Policy*, EE Elgar 2018, ch. 1 by S. Weatherill, *Sources and origins of EU Sports Law*, p. 10.

Many welcomed the judgment by the court as it clarified previous case law of *Bosman* and *Walrave and Koch*. However, it did also create a legal uncertainty for sporting organizations since the court would now assess sporting rules on a case-by case basis instead of stating any clear legal rules that could result in more EU competition law claims against sports bodies.<sup>75</sup> CJEU had to assess sports and community law without any real competence provided in the treaties, which could be the reason why the court initially tried to exempt sports from community law seen in *Walrave & Koch* and *Bosman*. It was not until the incorporation of the Lisbon treaty, in 2009, that the EU was conferred competence in the area of sports. The competence was embodied through article 165 TFEU.<sup>76</sup>

### 3.3 White Paper on Sports

After *Meca Medina*, the EU institutions really took the role of sports in Europe seriously. Years of consolidating with the sports community lead to a White paper on sports, addressing the role of sports in Europe from the Commission.<sup>77</sup> Though not legally binding, the White paper explains the specificity of sports where the legal analysis is found in the staff working document and its annexes.<sup>78</sup> The staff working document follows the reasoning in *Meca Medina* by stating that it is necessary to examine the specific requirements of article 81 and 82 EC (now 101 and 102 TFEU) in each individual case, by ending with the words “a general exemption of sporting rules or of activities of sports associations is therefore neither possible nor warranted”.<sup>79</sup>

The exemption developed in the *Meca Medina* appears in the staff-working document by the following structure: firstly, is the sports association that adopted the rule to be considered an undertaking or an association of undertakings, it is considered an

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<sup>75</sup> L. Farzin, On the Antitrust Exemption for Professional Sports in the United States and Europe, p.103.

<sup>76</sup> Principle of Conferral, art. 5.2 TEU states “the Union shall act only within the limits of the competence conferred upon it by Member states in the Treaties to attain the objectives set out therein”.

<sup>77</sup> White Paper on sport, COM (2007) 391 final, Brussels July 11th 2007.

<sup>78</sup> Ibid, ch. 4.1. See Commission staff working document- The EU and Sport: Background and context- Accompanying document to the White Paper on sport COM (2007) 391, Commission staff working document: <http://eur-lex.eu.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN> accessed 6<sup>th</sup> February 2019.

<sup>79</sup> Ibid, annex 1: sport and EU competition rules, p.2.



undertaking to the extent it carries out an economic activity, based on previous case law from the CJEU. Association of undertakings is determined if the members of the sports associations carry out an economic activity, if there is no economic activity the competition rules does not apply. Secondly, if the rules adopted by the sports associations are proportionate in light of the objectives pursued developed in *Wouters*, and if trade between Members States are affected by the rules, this assessment may be seen as the application or exemption of EU competition law to sports.<sup>80</sup> The second step opens up a case-by case assessment of sporting practices with EU law that may result in a less transparent and predictable way of applying law to sports. The exemption to sporting rules promoting sporting objectives that could have anticompetitive effects was developed in *Wouters* and adopted in *Meca Medina*, thereby bringing sports into the “European rule of reason”.<sup>81</sup>

The European rule of reason entails that, where a regulation is contrary to article 101 TFEU the court decided that the regulation was not unlawful under the same article “on the ground of a non-economic argument”, without applying the exemption rules found in 101.3 TFEU, this is known as the “European rule of reason” according to Farzin.<sup>82</sup> The court balanced the pro-competitive features against its anticompetitive effects in order to decide if the rules should be prohibited. The exemption of article 101 TFEU created in *Wouters* and applied in *Meca Medina* enabled the expansion of the European rule of reason into the sports area, illustrating the court’s willingness to expand its application to cases involving sports. This creates a certain leeway for sports association to justify their rules based on special circumstances even though the rules might have anticompetitive effects, which could potentially strengthen the conditional autonomy of sports from EU competition law. While *Meca Medina* stated that all treaties might apply to sports, the principles developed in *Wouters* enables justification of anticompetitive regulation in the sports sector.<sup>83</sup>

What connects *Walrave and Koch*, *Bosman* and *Meca Medina* is the lack of any treaty reference regarding sports, all of which are based on EU internal market law. Through

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<sup>80</sup> Ibid, p.3.4 (Anti-Trust).

<sup>81</sup> C-309/99, *Wouters*, p. 97 and C-519/04, *Meca-Medina*, p. 42.

<sup>82</sup> L. Farzin, On the Antitrust Exemption for Professional Sports in the United States and Europe, p. 32.

<sup>83</sup> *Meca-Medina*, p. 47. See Also COMP 37.806 ENIC/UEFA, IP/02/942, 27 June 2002, p. 31-42 and Decision 2003/778, *Champions League (2003)* OJ L 291/25, p. 125-131, exemption was granted due to the facts of the case, however, illustrating the specific nature of sports.

conferred competence on the internal market, the EU could cover issues regarding sports without any conferred powers regulating sports.<sup>84</sup> The constitutional change that came with the Lisbon treaty December 2009 was a game changer for European sports law. The revised treaties empowered the Union with competence to carry out actions to support, coordinate or supplement actions of the MS in areas inter alia sports.<sup>85</sup> The Lisbon treaty explicitly refer to sports through a new article dedicated to sports, creating a constitutional basis in the treaty resulting in an area where the EU now has conferred competence to act.<sup>86</sup> With a constitutional basis and conferred power, surely the EU could now clarify the situation of European sports law.

### 3.4 Constitutional Basis for Sports through Article 165 TFEU

A constitutional basis for sports in the EU treaties came with the Lisbon treaty through article 165 TFEU. The new article states inter alia, that the Union shall contribute to promoting of European sporting issues, while taking account of the specific nature of sports, its structures based on voluntary activity and its social and educational function. Followed by 165.2 TFEU, the Union action shall be aimed at “Developing the European dimension in sports, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen”. 165.3 TFEU states the responsibility to foster cooperation with third countries and competent international organizations in the field of sports by the Union and MS. 165.4 TFEU states that “ In order to contribute to the achievement of the objectives referred to in this article: The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the MS, the council, on a proposal from the Commission, shall adopt recommendations”.<sup>87</sup>

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<sup>84</sup> Principle of Conferral, art. 5.1 and 5.2 TEU.

<sup>85</sup> Treaty of Lisbon amending the treaty on European Union and the Treaty establishing the European Community, signed at Lisbon 13 December 2007, OJ C 306, 17.12.2007, see article 6 (E) TFEU.

<sup>86</sup> Art. 165 TFEU.

<sup>87</sup> Art. 165 TFEU, note that what is written in this paragraph is only focusing on sports.

The text of article 165 TFEU has been drafted rather vague, however the article creates a constitutional basis for sports in the treaty with certain restraint. According to Weatherill the powers given to the EU show limited powers granted by the MS, revealing that what may seem to be a strong constitutional basis, that could further develop European sports law and policy, may be proven to be less useful in practice.<sup>88</sup> The EU/EC has pre-Lisbon already influenced the area of sports due to its economic impact, however it was not granted any legislative competence until 2009. Previous acceptance from the EU bodies that sport is special has opened the door for cooperation with different governing sports bodies across the EU, especially with UEFA that likely had an impact on the new treaty provisions according to Garcia.<sup>89</sup>

The adoption of sports into the Lisbon treaties was in order to clarify the relationship between the EU and sports and was not introduced in order to empower the position of the EU to regulate area of sports. Wording of article 6 (E) TFEU suggest that the treaty only provides a supporting competence for the EU, while article 165 TFEU address that the EU shall only contribute to the promotion of European sporting issues. The adopted legislation is very limited to adopting incentive measures, excluding any harmonisation of the laws and regulations of the MS. The cautious way of drafting the treaties regarding sports lies, according to Weatherill, in making sure that the EU will not take on the role as a sports regulator. Instead the EU should merely assist in promoting and developing the European dimension of sports with the help of cooperating with sporting bodies.<sup>90</sup>

The impact of sports on the internal market legitimizes this role in the field of sports, due to sports impact on various legal areas on the internal market. The need for EU's involvement in sports is necessary but with a strike of balance due to sports specific nature. The conferred powers given by the Lisbon treaty are still unclear. To what extent may the EU be involved in sports, or could the EU intervene in a way that goes beyond what was originally thought when the treaty were drafted. Involvement in the sector of sports should be when it breaches certain rules of EU law, e.g. free

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<sup>88</sup> S. Weatherill, *European Sports Law*, 2014, p. 507.

<sup>89</sup> B.García, "UEFA and the European Union: From Confrontation to Co-operation?", pp. 202-223.

<sup>90</sup> S. Weatherill, *European Sports Law*, 2014, p. 519. See also Commission decision of 14.10.2014, "adopting the arrangement for cooperation between the European Commission and the Union of European Football Associations (UEFA), Brussels, 14.10.2014 C (2014) 7378 final.

movement rules or EU competition law. According to Weatherill the restriction of application and to keep any intervention as specific as possible is vital to maintain the integrity of sports due to sports specific nature while maintaining EU's legitimacy in the field of sports.<sup>91</sup>

However, sports are now explicitly addressed in the treaty, enabling future development of the framework of sports, policymaking and legislation on a constitutional basis. This was confirmed in the first post-Lisbon case concerning sports where the CJEU confirmed its own case law.<sup>92</sup> The social and educational function of sports in general and football in particular was addressed by AG Sharpston to be encouraged rather than discouraged, thereby illustrating the EU's intention of contributing to the development of European sports dimension.<sup>93</sup>

The court in *Bernard* merely confirmed previous case law that sports was special and referred to article 165 TFEU, thereby giving little substance to a new post-Lisbon sports policy.<sup>94</sup> This creates the impression that article 165 TFEU, for now, may have little impact on the field of sports and was referred to in *Bernard* only to confirm that previous involvement of the EU in the field of sports was legitimate prior to the Lisbon treaty. As of today, EU law permits sports a conditional autonomy due to its special nature rather than trying to override its inherent sports law. It remains to see whether the treaty of Lisbon will be a game changer to the field of sports or merely confirming existing practice based on previous case law. The introduction of the internal market by the Lisbon treaty, working for the sustainable development of Europe based on balanced economic growth and a highly competitive social market economy, creates both an economic and non-economic purpose within the EU.<sup>95</sup> The economical and social impact football has on the internal market today opens up the possibility to revise the treatment of European sports to the benefit of a more sustainable internal market in the EU.

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<sup>91</sup> S. Weatherill, *European Sports Law*, 2014, p. 520.

<sup>92</sup> C-325/08, *Bernard*, p. 40.

<sup>93</sup> Opinion of Advocate General Sharpston, C-325/08, *Bernard*, delivered on 16 July 2009, p. 30 and 47.

<sup>94</sup> Mainly confirming *Bosman* C-415/93. See p. 38-42 in *Bernard*.

<sup>95</sup> Art. 3.3 TEU.

The governance of sports, especially professional football, includes a complex set up of different actors and stakeholders, evident by FFP. The main purpose of FFP is that football clubs shall not spend more than they earn over a certain period (break-even requirements), this in order to keep the economy of European football clubs healthy. If a club fails to follow the rules set up by UEFA they may face different sanctions e.g. exclusion from European competition or point reduction. The structure of FFP reminds of a horizontal anti-competitive arrangement between football clubs where FFP restrain spending of European football clubs through severe sanctions. In other words FFP could enable current dominant actors in European football to retain their dominant position while placing high barriers to entry on smaller clubs, with the desire to spend its way to success by attracting external investors that could make the club more competitive against dominant actors in international competitions.<sup>96</sup>

The legality of FFP is not clear and the application of EU law in regards to FFP could be possible through the legal reasoning developed in *Meca Medina*.<sup>97</sup> The structure of being a potential anti-agreement on a horizontal level could be defended if FFP are shown to be necessary to address certain problems arising in European football. FFP limit the investment of football clubs that could be subject of EU law, which may also contradict “sporting on the merits” where already rich clubs retain their dominant position, enabling inflated transfers while smaller clubs may never enjoy the benefit of acquiring wanted players in order to strengthen competition.<sup>98</sup> FFP has previously been defended by UEFA and recognized as consistent with the aim and objectives of EU policy in the field of state aid, however the joint statement only addresses the problem with European football clubs overspending and how this was resolved through state aid incompatible with EU state aid law.<sup>99</sup> The joint statement merely

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<sup>96</sup> J. Anderson, R. Parrish & B. Garcia, *EU sports Law and Policy*, ch. 1. S. Weatherill, Sources and origins of EU Sports Law, p. 21. One might find foreign investors/owners in dominant European clubs such as: Paris Saint Germain and Manchester City and Chelsea FC.

<sup>97</sup> C-519/04, *Meca-Medina and Majcen v. Commission*, p. 42.

<sup>98</sup> The term “sporting on the merits” is in this paragraph compared to “competition on the merits” term brought from competition policy which “implies that a dominant enterprise can lawfully engage in conduct that falls within the area circumscribed by that phrase, even if the consequence of that conduct is that rivals are forced to exit the market or their entry or expansion is discouraged”. However, this term has been used in a non-uniform way thereby resulting in a lack of any clear principle or standard embodying a sound competition policy. Organisation for Economic Cooperation and Development (OECD), “What is competition on the merits?” Policy Brief June 2006.

<sup>99</sup> European Commission Press Release, “State aid: Vice President Almunia and UEFA President Platini confirm Financial Fair-Play rules in professional football are in line with EU state aid policy”, IP/12/264, 21 March 2012.

states how FFP may prevent unwanted state aid, not addressing potential distortion on competition by FFP in terms of cementing dominant clubs position in international competitions while creating high barriers to entry on smaller teams.

While the joint statement is not legally binding, the recognition stated in the joint statement illustrates that UEFA, together with leading football clubs in the EU, are in the good graces of the Commission. The statement further address the concern UEFA and the Commission acknowledge with clubs that in the short term pay inflated wages when their financial position does not allow them to. Furthermore, that FFP ensures prudent economic management serving the interests of clubs and players as well as the European football sector in its entirety. This is however questionable, how will the financial restriction in FFP serve to protect the interest of the European football sector, where less financial clubs is restricted to compete with financially stronger clubs in international competitions. Furthermore, how will the EU's intention of contributing to the development of European sports dimension through article 165 TFEU be done, when a potential horizontal agreement restricting competition is in place and has been acknowledged to be in line with EU law.<sup>100</sup>

### 3.5 Striani, a Disallowed Goal

In 2015 the CJEU had the chance to clarify the legality of FFP, but deemed it inadmissible due to insufficient information regarding the legal and factual context in the case.<sup>101</sup> Striani was an agent handling football transfers who brought a complaint to the Commission stating that FFP restricted his freedom to provide services in the EU, mainly because of the budget cap that was imposed by FFP.<sup>102</sup> Striani argued that FFP did not enabled clubs in Europe to fully invest in the player market and that FFP would limit the total amount of transfers. Furthermore this would result in lower profit for players' agents. In addition, Striani argued that FFP would potentially affect free movement rights, EU competition law and fundamental rights.<sup>103</sup> The fact that the preliminary ruling was deemed inadmissible was due to the inadequate drafting

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<sup>100</sup> See supra note 27.

<sup>101</sup> C-299/15, Striani and others, order of the Court (ninth chamber) of 16 July 2015, ECLI: EU:C:2015:519.

<sup>102</sup> Art. 57 TFEU regarding to freedom to provide services. This could have also been connected to the functioning of the internal market found in art. 26 TFEU.

<sup>103</sup> Charter of fundamental Rights of the European Union.

from the referring court, however this missed opportunity to clarify on the rules of FFP by the CJEU was disappointing according to Molé.<sup>104</sup>

Break-even requirements in FFP could restrict the movement of players if a transfer becomes conditional on the financial restraints imposed by FFP on the purchasing club. This situation has previously been clarified in the CJEU where EU law is direct applicable between private parties and regulations of sports bodies.<sup>105</sup> The restriction of the freedom to provide services for agents might be of less importance according to Molé. Molé argues that the negative effect of FFP firstly has an impact on the transfer market behaviour of the clubs, secondly on the players and ultimately on the agents. Therefore the restriction may be considered too remote to have any success in a European Court.<sup>106</sup>

FFP could also be qualified as a decision by associations of undertakings, which may affect trade between MS and have their object or effect the prevention, restriction or distortion of competition within the internal market.<sup>107</sup> Mainly due to the fact that FFP could be viewed as an indirect fixing agreement among clubs across Europe and that FFP restrict competition in the market of football players. FFP could distort European competition due to the natural nexus between financial gains and success allowing rich clubs, to acquire the best players or keep them through high salaries impossible for normal clubs due to the financial cap. Thus creating a situation that may be subject of article 102 TFEU where clubs may abuse their dominant position. One of FFP main objectives “long term viability and sustainability of European club football”<sup>108</sup> may never be reached, since FFP may contradict one of its main objectives by the financial cap, to the detriment of normal clubs while also affecting fundamental rights.<sup>109</sup>

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<sup>104</sup> R. Molé, “The Curious case of Daniel Striani (C-299/15): A missed opportunity”, 21/09/15.

<sup>105</sup> A potential restriction of art. 45 TFEU. See C-415/93, *Bosman*. Direct effect of invoking EU Law in a national or European court by individuals (horizontal direct effect of EU Law) if the acts are precise, clear and unconditional and that they do not call for additional measures, see C-26/62, *Van Gend en Loos*, judgment of the Court of 5 February 1963, ECLI:EU:C:1963:1, regarding direct effect of EU-Law in national courts of the Member States, p. 12-13.

<sup>106</sup> R. Molé, “The Curious case of Daniel Striani (C-299/15): A missed opportunity”. See also the unsuccessful claim brought by Mr. Piau, T-193/02, judgment of First Instance of 26<sup>th</sup> January 2005, ECLI:EU:T:2005:22.

<sup>107</sup> Art. 101 TFEU.

<sup>108</sup> UEFA Club Licensing and Financial Fair Play Regulations, ed. 2018, art. 2 (F).

<sup>109</sup> Charter of fundamental Rights of the European Union, art. 16 and 17.

The close cooperation between the Commission and UEFA becomes almost evident in the Commission's letter to Mr. Dupont, Striani's lawyer in the Striani case.<sup>110</sup> The letter related to the conduct of proceedings by the Commission pursuant to article 81 and 82 of the EC treaty<sup>111</sup> (article 101 and 102 TFEU) stated that on the basis of the information it received that there was insufficient grounds for acting on the complaint according to Bastianon.<sup>112</sup> The main reasons were that Striani lacked a legitimate interest and that the national judge of Brussels was considered well placed to handle the matter. Article 5 (1) of regulation no 773/2004 requires that natural and legal persons show a legitimate interest in order to be entitled to lodge a complaint to the Commission.<sup>113</sup> This underlines that the Commission does not consider a legitimate interest as stated in regulation 1/2003 article 7(2) an interest of persons or organizations with a general interest ("Pro bono publico") without showing that they are directly affected by the infringement.<sup>114</sup>

The claim may have been viewed as a "Pro bono publico" since the break-even requirements limits investments and cements the existing market structure on player transfers. This results in indirect damage where Striani may lack a legitimate interest since the regulations are referring to clubs primarily and not to agents. However, the lack of legitimate interest does not automatically close the door for the Commission to investigate the matter on its own initiative "ex officio", especially due to the Community interest of FFP.<sup>115</sup> The fact that the Commission stated that the court in Brussels was well placed to handle the complaint by Striani is in line with the Commission notice, the notice allows the Commission to reject complaints based on the possibility to bring the action before national court.<sup>116</sup> However, since break-even rules in FFP apply to all European clubs competing in international competitions, one

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<sup>110</sup> The same lawyer represented by Jean-Marc Bosman in C-415/93.

<sup>111</sup> Commission Regulation (EC) no 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to art. 81 and 82 EC Treaty.

<sup>112</sup> Stefano Bastianon, "The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout", *The Competition Law Review* Vol. 11 issue 1pp 7-39 July 2015, p. 18.

<sup>113</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in art. 81 and 82 of the Treaty, art. 7(1). For legitimate interest according Regulation no 773/2004 see case, T-273/09 Associazione "Giulemanidallajuve" vs. EU-Commission order of the General Court 19 March 2012, ECLI:EU:T:2012:129, p. 6-7.

<sup>114</sup> Commission Notice on the handling of complaints by the Commission under art. 81 and 82 of the EC treaty (2004/C 101/05), OJ 27 April 2004, p. 38.

<sup>115</sup> Regulation 1/2003, art. 7(1).

<sup>116</sup> Commission Notice on the handling of complaints by the Commission under art. 81 and 82, p. 17 and 44.



might have a hard time grasping the argument that FFP lacks a Community interest since it basically affects all Members States having a football club competing in international competitions.

The Commission's notice on co-operating within the Network of Competition Authorities (NCA) further states that the Commission is better suited to handle cases if one or several agreements have the effect on competition in more than three MS.<sup>117</sup> The Commission's reason seems rather questionable, the commission stated that the national court of Brussels is well placed to determine the complaint by Striani involving FFP. However, the FFP affects every participant of European football competitions, thereby guaranteeing that competition in at least three MS are affected. The previous support of FFP regulations by the Commission may be the explanation of the unwillingness from the Commission of handling the complaint brought by Striani, instead the Commission argued that the complaint lacked Community interests passing the ball back to Brussels.<sup>118</sup>

UEFA was quick to issue a "satisfied" statement short after the judgment of *Striani*, stating that the outcome was logical and took the opportunity to reaffirm its confidence in the legality of FFP.<sup>119</sup> The case was never subject to assessment of the CJEU leaving article 165 TFEU on the sidelines. This was an opportunity where article 165 could have played a crucial role in the Unions contribution to the development of the European dimension in sports by promoting fairness and openness. The cooperation between UEFA and Commission has so far been beneficial for the sporting governing body. Especially in regards to the possibility of addressing the issue of FFP breaching EU competition law, thereby it is safe to say that UEFA was saved by the bell, at least for this time.

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<sup>117</sup> Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) OJ C 101, 27 April 2004, p.14.

<sup>118</sup> A. Vassiliou, Financial Fair Play helping to preserve the real values of football, says Commissioner, Informal meeting of EU sport Ministers, Rome 21 October 2014. Also see supra note 27 and 99.

<sup>119</sup> "UEFA welcomes European Court of Justice ruling on financial fair play", UEFA homepage: <https://www.uefa.com/insideuefa/mediaservices/newsid=2267061.html?redirectFromOrg=true> , accessed 13th of February 2019.

## 4. Is FFP Compatible with EU Competition Law

### 4.1 Financial Fair Play or Financial Foul Play

This chapter aims to explore if FFP rules might be incompatible with EU competition law, especially article 101 TFEU. FFP will be assessed through the *Wouters* test, used in *Meca Medina* in order to determine if FFP could be saved through this exemption rule.<sup>120</sup> Furthermore, FFP will be assessed through the exemption rule of article 101.3 TFEU if FFP might be considered to be incompatible with EU competition law.

In the landmark sport case *Meca Medina*, the CJEU rejected the argument that EU competition law could not be applied to “purely sporting rules”.<sup>121</sup> Thus enabling application of EU competition law to sports, an area that has previously enjoyed a semi-conditional autonomy from application of EU law. The aftermath of *Meca Medina* entailed that any sporting rules could now be subject to EU competition law and that the legal argument of purely sporting interest developed in *Walrave and Koch* had expired.<sup>122</sup> Sporting activity must now be assessed in the light of the treaty provisions, and if the activity could restrict trade between MS. This includes sports rules adopted by an undertaking restricting competition or if an undertaking may abuse its dominant position, an opportunity yet to present itself to clarify the relationship between FFP and EU law.<sup>123</sup>

Article 101 TFEU sets out that all agreements between undertakings, decisions by associations of undertakings affecting trade between MS having as their object or effect the prevention, restriction or distortion of competition within the internal market shall be automatically void. This in particular when it comes to situations that directly or indirectly fix purchase or selling prices or any other trading conditions.<sup>124</sup> At first sight this might seem obvious, however article 101 TFEU requires elaboration on terms such as undertaking, associations of undertakings and agreements in order to confirm if football clubs and the governing body of UEFA are included. The definition of agreements under article 101 TFEU will be examined to see if FFP may

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<sup>120</sup> C-309/99, *Wouters*, p. 97 and C-519/04, *Meca-Medina*, p. 42.

<sup>121</sup> C-519/02, *Meca Medina*.

<sup>122</sup> C-36/74, *Walrave and Koch*.

<sup>123</sup> See sub-chapter 3.3.1 “Striani, a disallowed goal”.

<sup>124</sup> Art. 101(2) and 101(A) TFEU.

restrict competition by effect and if trade between MS is affected. Finally, it is necessary to look at the possibility if FFP fulfills the criteria set in article 101(3) TFEU. To keep in mind is that the CJEU has previously stated, in *Wouters*, that not every agreement between undertakings, or decision of an association of undertakings, falls within the prohibition of article 101(1), even though it might have anti-competitive features.<sup>125</sup>

In the White paper on sports from 2007 the Commission reaffirmed that some organizational sporting rules based on their legitimate objectives are not likely to breach EU competition law.<sup>126</sup> Provided that the anti-competitive effects by the rules adopted are inherent and proportionate to objectives pursued, e.g. length of games, number of players on the field or rules preventing multiple ownership. These rules may be considered necessary to maintain uniform sporting rules across the world. However, the Commission continued that “In respect of the regulatory aspect of sport, the assessment whether a certain sporting rule is compatible with EU competition law can only be made by a case-by-case basis” in line with *Meca Medina*.<sup>127</sup> The statement by the Commission enables FFP to be subject for review by the Commission and EU courts, if the criteria in article 101 TFEU are met.

Previous case law from the CJEU held that “the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”.<sup>128</sup> The general court has also previously held that practices by football clubs are considered an economic activity for the purpose of article 101 TFEU.<sup>129</sup> National associations that group the clubs together are considered to be associations of undertakings. Furthermore FIFA is considered to be an association grouping together the national associations is considered associations of undertakings in line with article 101 TFEU.<sup>130</sup> The reasoning in *Piau* strongly suggest that UEFA is considered an association of undertakings, since members of UEFA are national football associations and within them clubs that are considered undertakings within the meaning of article 101 TFEU.

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<sup>125</sup> Based on principles set out in the decision of *Wouters*, C-309/99, p. 97.

<sup>126</sup> White Paper on sports 2007, p. 13.

<sup>127</sup> *Ibid*, p. 14.

<sup>128</sup> C-41/90, *Höfner*, judgment of the Court 23 April 1991, ECLI:EU:C:1991:161, p. 21.

<sup>129</sup> T-193/02, *Piau*, p. 69, 72. Similar reasoning may be found in C-519/04 *Meca Medina*, p. 38.

<sup>130</sup> *Ibid*.

The concept of an agreement within article 101 TFEU centers around the existence of a concurrence of wills between at least two parties where the form in which it is manifested to be unimportant as long as it constitutes the parties intention.<sup>131</sup> Thus FFP fulfills the term decision by associations of undertakings in line with article 101 TFEU while affecting trade between MS.<sup>132</sup>

It has previously been discussed in this thesis if FFP potentially distorts the competition of European football, especially given that the break-even requirement found in FFP may cement the success between teams due to their financial gains.<sup>133</sup> Moreover, the break-even rule might also amount to a salary cap and a restriction of investments by clubs due to the fact that the higher revenue a club gains the more it may spend on players. FFP is likely to protect bigger clubs by a high barrier to entry for small clubs, due to the fact that there is a strong relationship between financial gains and success.<sup>134</sup> Thereby FFP may be considered an anti-competitive agreement restricting competition. However, FFP has as its objective as to promote and improve the standard of all aspect of football in Europe, improve the financial capability of clubs, protection of creditors and encourage responsible spending within clubs own means.<sup>135</sup> Thus, making it hard to prove that these objectives pursued by FFP are not legitimate objectives in terms of EU law.

Case law from the EU courts has made clear that except in cases where the object of an agreement is anti-competitive, the application of article 101 TFEU cannot be done by taking into account its formal terms.<sup>136</sup> The agreement must be assessed by its entire factual, legal and economic context, where the anti-competitive effect must be demonstrated to enable application of article 101(1) TFEU.

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<sup>131</sup> T-41/96, Bayer vs. Commission, judgment of 26 October 2000, ECLI:EU:T:2000:242, p. 69.

<sup>132</sup> C-56/65, Société Technique Minière, judgment of the Court of 30 June 1966, ECLI:EU:C:1966:38, p. 249.

<sup>133</sup> See sub-chapter 2.3 “UEFA Financial Fair Play”.

<sup>134</sup> See supra note 30.

<sup>135</sup> UEFA Financial Fair Play Regulation 2018, art. 2.

<sup>136</sup> C-56/65, Société Technique Minière, p. 249; C-23/67, Brasserie De Haecht v. Wilkin Janssen, judgment of the Court of 12 December 1967, ECLI:EU:C:1967:54, p. 415; C-234/89, Delimitis v. Henninger Bräu, judgment of the Court of 28 February 1991, ECLI:EU:C:1991:91, p. 13-15; T-461/07, Visa Europe Ltd vs. Com, judgment of the General Court 14 April 2011, ECLI:EU:T:2011:181, p. 67.

In order to assess whether FFP restrict competition by effect, principles developed in *Wouters* and used in *Meca Medina* by the CJEU may be of great guidance.<sup>137</sup> The overall context in which the rules of FFP are adopted must be assessed to determine if any anti-competitive effect that restricts competition are inherent in the pursuit of FFP objectives and whether the rules are proportionate in light of the objective pursued. FFP applies to all clubs wishing to participate in competitions brought by UEFA, thereby making FFP a horizontal agreement between independent undertakings in international competitions, the most obvious target for EU competition law according to Wish and Bailey.<sup>138</sup>

The break-even requirements, found in FFP, may amount to a horizontal agreement connected to indirect price fixing among professional clubs as buyers. This is due to the fact that clubs compete in the market of acquiring the best players in order to win games but also in terms of financial reasons since there is a strong relationship between financial success and sporting success.<sup>139</sup> FFP may have an indirect negative impact on money spent on wages and could be viewed as having the function as price fixing agreements between competing buyers. This is likely to achieve a distortion on the competitive balance of European football since richer/bigger clubs may spend more on transfers/wages than smaller/mid-level clubs, thus increasing competitive imbalance, distorting competition within the internal market.

Another negative effect that could arise from FFP is the limit on investment due to the fact that external investment is not considered as revenue in terms of FFP.<sup>140</sup> Although FFP does not limit all investments, where relevant expenses may be decreased if investment is done e.g. to youth development and infrastructure,<sup>141</sup> FFP limits investments where spending exceeds revenues thereby limiting investment in terms of EU competition law. An infringement of article 101(B) TFEU, is seen as hard-core by the Commission<sup>142</sup> but also by the CJEU stating that an agreement limiting investment “may be regarded as having a restricting object even if it does not

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<sup>137</sup> C-309/99, *Wouters*, p. 97 and C-519/04, *Meca-Medina*, p. 42.

<sup>138</sup> R. Wish & D. Bailey, *Competition Law*, 8th ed. 2015 Oxford University press, p. 546.

<sup>139</sup> See supra note 30.

<sup>140</sup> Art. 101(B) TFEU. See annex X of UEFA Financial Fair Play under 1(J)-1(N).

<sup>141</sup> UEFA Financial Fair Play Regulation 2018, Annex X, art. 2(G)-2(M).

<sup>142</sup> Decision of the Commission of 29 September 2004, COMP/C.37750/B2 – Brasseries Kronenbourg, Brasseries Heineken, OJ L 184 of 15 July 2005, p. 66 and 75.

have the restriction of competition as its sole aim but also pursues other legitimate objectives”.<sup>143</sup> The limit on investment imposed by FFP might in addition have a spillover effect on fundamental freedoms such as free circulation of football players<sup>144</sup> and freedom to provide services.<sup>145</sup> The restriction of free movement for players can arise if a transfer becomes conditional on the financial restraints imposed by the break-even requirements, but also when a player is a “free agent”, where the club would be unable to pay for the demanded wage due to the indirect financial cap by FFP. Thus, making FFP subject of potentially breaching fundamental freedoms as well as EU competition law.

However, by applying the *Wouters* test to FFP, UEFA has to prove that the objectives pursued through FFP cannot be attained by means of less restrictive means. In other words, UEFA has to show that the rules imposed through FFP cannot be attained by any other way and that the rules are proportionate. The list of objectives of FFP is long but for the relevance of this thesis and application of the *Wouters* tests, the following objectives are of importance to consider; to improve the economic and financial capability of the clubs, place the necessary importance on the protection of creditors, encouraging clubs to operate within their own revenues, encouraging responsible spending for the long-term benefit of football and to protect long-term viability and sustainability of European clubs football.<sup>146</sup> These objectives may in the general opinion be legitimate and reasonable, however there is reason to ask if there is no less restrictive way to achieve this while fulfilling the objectives of FFP

## 4.2 Proportionality test, the Achilles Heel of FFP

As stated above it is clear that FFP on several points seem to have an effect as to distort and restrict competition on the internal market, contrary to article 101(1) TFEU. In order to fulfill the criteria in *Wouters*<sup>147</sup> FFP must demonstrate that the rules pursue a legitimate aim, which is hard to argue against since FFP has been proven to

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<sup>143</sup> C-209/07, Beef Industry judgment of the Court of 20 November 2008, ECLI:EU:C:2008:467, p. 21.

<sup>144</sup> Art. 45 TFEU.

<sup>145</sup> Art. 56 TFEU. Argued in the case C-299/15, Striani and others.

<sup>146</sup> UEFA Financial Fair Play Regulation 2018, art. 2.

<sup>147</sup> C-309/99, *Wouters*, p. 97.

improve the financial health of European clubs.<sup>148</sup> Furthermore, FFP rules need to be proportionate to achieve the objectives of their legitimate aim. In order to satisfy the proportionality test three requirements must be fulfilled according to Craig and De Búrca, firstly if FFP is an effective way of achieving the aims (test of suitability), secondly if FFP is necessary to achieve the aim (test of necessity) and finally if FFP imposes a burden that is excessive in relationship to the objectives (proportionality *stricto sensu*).<sup>149</sup> If FFP fulfills the criteria of being proportionate and if the anti-competitive effects discussed above are inherent in the pursuit of these objectives, any anti-competitive effects brought by FFP would be justified.<sup>150</sup>

The CJEU has previously stated that a legitimate aim of sporting activities, especially football, is to maintain a balance between clubs by having a certain degree of equality and uncertainty as to the outcome of games. Furthermore the encouraging recruitment and training of youth players must be accepted as legitimate in terms of EU law.<sup>151</sup> The purpose of FFP is to achieve and maintain a long-term financial viability, and not to improve competitive balance.<sup>152</sup> However, the success of a team is dependent on the survival of its competitors, with whom the team can compete. Thus there is a direct interest from clubs in the financial stability of competing clubs. Without any competitors there will be no competition, making the objectives of FFP hard to not see as legitimate according to Lindblom.<sup>153</sup> The fact that European clubs are suffering financially and that FFP will solve this, is not sufficient to justify FFP.

UEFA must prove that FFP is necessary and suitable for the purpose of achieving the aim without being unnecessarily restrictive, and also that there is no alternative less restrictive measure in order to achieve the objectives. FFP is based on the theory of overspending, which is connected to the transfer market, whether it is player transfers or their salaries. This theory is based on that overspending will ultimately lead to the

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<sup>148</sup> "The European Club Footballing Landscape" Club Licensing Benchmarking Report Financial Year 2017 UEFA, p. 5.

<sup>149</sup> P. Craig & De Búrca, "EU Law Text, cases, and materials 6 ed., Oxford University press 2015, p. 551.

<sup>150</sup> C-519/04, Meca Medina, p. 41-47.

<sup>151</sup> C-415/93, Bosman, p. 105-106.

<sup>152</sup> See UEFA Financial Fair Play Regulation 2018, art. 2.

<sup>153</sup> J.Lindblom, "The problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play", Texas review of entertainment & sports law 2010 vol. 12.2, p. 205.

bankruptcy of clubs if there is no external intervention.<sup>154</sup> This has lately been an issue in European football leading to financial difficulties for clubs across EU where FFP serves to limit overinvestment.<sup>155</sup> However, the overinvestment is in fact dominated by “big-5” European leagues amounting to over 70% of global spending in the last decade, limited to a minority of clubs.<sup>156</sup> Thereby there is reason to question the validity of FFP and if FFP may be suitable of solving the financial situation of overspending.

Leading to the final step of the proportionality test, if there is any other less restrictive way for FFP to resolve the financial situation. Since FFP has not yet been subject to EU law there is no guarantee to provide a definite answer, however presented below are a few alternatives that could be less restrictive.

One could argue that the underlying problem with overinvestment is the strong connection between financial gains and sporting success. The strong connection of financial and sporting success could be the reason why clubs tend to overinvest in order to be successful in international competition, but also in order to gain higher revenues.<sup>157</sup> One way of approaching this problem according to Lindblom, is to reduce compensation to clubs taking part in UEFAs internationally competitions, if the compensation is reduced, maybe the incentive to overinvest will follow, due to the natural connection between financial gains and sporting success.<sup>158</sup> Another alternative could be revenue sharing due to the financial disparity between the clubs in international competitions due to the fact that 30 clubs account for 49% of all top-division football clubs revenue.<sup>159</sup> An absolute salary cap could also be less restrictive than FFP, solving the overinvestment problem while promoting competition between teams. While a salary cap has similar attributes as FFP in terms of restricting competition and the freedom of movement, it would be a lesser restrictive measure providing greater positive effect than FFP.

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<sup>154</sup> Ibid.

<sup>155</sup> See sub-chapter 2.2 “Player transfers in EU”.

<sup>156</sup> ”The European Club Footballing Landscape” Club Licensing Benchmarking Report Financial Year 2017 UEFA, p. 78-80.

<sup>157</sup> See sub-chapter 2.2 “Player Transfer in EU”, and supra note 30.

<sup>158</sup> J.Lindblom, ”The problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play”, p. 209.

<sup>159</sup> ”The European Club Footballing Landscape” Club Licensing Benchmarking Report Financial Year 2017 UEFA, p. 53.



In conclusion, there is reason to argue that FFP may not be exempted through the *Wouters* test on proportionality grounds. There is arguable a legitimate aim in FFP in order to maintain a healthy economy for European football clubs, however the measure adopted cannot be accepted to be the least restrictive way to obtain the objectives of FFP. In addition it seems that FFP will only result in decreasing the competitive balance between European clubs by cementing the position of financially stronger clubs. The principle of proportionality cannot in this sense be viewed as fulfilled in terms of the *Wouters* test nor can it be viewed as an effective way to achieve the objectives of FFP. The objectives of FFP may also be viewed as too wide and generic where any or no rule at all may be viewed as inherent to them according to Bastianon.<sup>160</sup> A potential last resort for UEFA to defend FFP if it were subject to EU law, would be through the exemption given in article 101(3) TFEU. It is clear that FFP may be subject of breaching article 101 TFEU on more than one point, however, this may be declared inapplicable if FFP fulfills the condition in article 101(3) TFEU.

#### 4.3 Hail Mary for FFP through Article 101(3)

In order for UEFA to argue that FFP should be exempted through 101(3) TFEU four cumulative conditions must be fulfilled.<sup>161</sup> In essence to contribute to improve production or distribution of goods or promote technical or economic progress, allow consumer a fair share of the resulted benefits, the agreement must not impose on the undertaking concerned restriction which are not indispensable to the attainment of these objectives nor afford the undertaking the possibility of eliminating competition in a substantial part of the products in question.<sup>162</sup> Article 101(3) TFEU does not exclude any agreements beforehand, leaving the option for any types of agreements to be granted exception. However, some agreements that are considered more severe e.g. horizontal agreement to fix prices are unlikely to fulfill article 101(3) TFEU.<sup>163</sup> Article 101(3) TFEU also require that FFP is “indispensable to the attainment of the objectives” mentioned above. Hence this concludes that it will not be an easy task arguing that FFP are necessary to obtain their object and that there might be less restrictive measure that could be adopted instead of FFP.

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<sup>160</sup> Stefano Bastianon, ”The Striani Challenge to UEFA Financial Fair-Play, p. 35.

<sup>161</sup> R. Wish & D. Bailey, Competition Law, p. 161. Illustrated in C-68/12, Slovenská, judgment of the Court, 7 February 2013, ECLI:EU:C:2013:71, p. 36.

<sup>162</sup> Art. 101(3) TFEU.

<sup>163</sup> Commission Guidelines on the application of Art. 81(3) OJ 2004, C 101/97, p. 46.

Even if UEFA manages to throw a Hail Mary by arguing that FFP should be exempted through article 101(3) TFEU, there is still a possibility to argue that FFP restrict the free movement of workers (players) where history will probably repeat itself.<sup>164</sup> Furthermore, there is also a possibility of arguing that FFP violate free movement of services, capital and freedom to conduct a business and right to property.<sup>165</sup> Thus, FFP might create a “Structure where smaller clubs and smaller nations and all of their supporters never will have a chance of following their dream” of success in Europe, ironically quoted by UEFA when 14 of the richest clubs pursued the formation of a European Super League, also known as the G-14.<sup>166</sup> This is the structure that UEFA opposed 13 years ago, that is in fact happening in European football today with rules set up by UEFA.

It could be argued that the reason for FFP not being subject to EU law yet, is the fact that the Commission has previously expressed its belief in the rules set up by UEFA.<sup>167</sup> The Commission might wish to continue its strong relationship with UEFA, this could be seen as one of the reasons why the Commission dismissed the case of *Striani* and referred it back to the national court, with a doubtful argument that the case lacked EU interest.<sup>168</sup> Even though the outcome of *Striani* was unsatisfying, the Commission could have taken up the matter “ex officio”. However, the Commission may have disregarded the opportunity to clarify the validity of FFP, in order to save face. Thereby it is highly questionable if FFP is a regulation that is compatible with EU competition law and internal market law.

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<sup>164</sup> C-415/93, Bosman.

<sup>165</sup> Art. 45 TFEU, art. 56 TFEU, art. 63 TFEU and art. 16 and 17 Charter of fundamental Rights of the European Union.

<sup>166</sup> Peter J. Sloane, Rottenberg and the economics of sports after 50 years: an evaluation, June 2006 discussion paper no. 2175, p. 16-17.

<sup>167</sup> See supra note 27, 99 and 118.

<sup>168</sup> See sub-chapter 3.3.1. “Striani, a disallowed goal”.

## 5. FFP and Abuse of Dominant Position

### 5.1 Abusive Behavior and FFP

Chapter four settled, at least in theory, that FFP might breach article 101 TFEU. Furthermore, it brought up that there is a chance of UEFA proving that FFP is necessary, proportionate or should fall under the exemption rule 101(3) TFEU. However, this thesis also seeks to examine if article 102 TFEU might apply to dominant football clubs, and abusive behavior on the transfer market. The result of FFP is that some clubs may enjoy a dominant position due to their financial strength, allowing them to maintain or strengthening their dominant position by inflated transfer fees or wages. Previously discussed, it is evident that FFP might in fact cement the difference between rich and not so rich clubs.<sup>169</sup> The following chapter will explore the possibility of applying article 102 TFEU to dominant actors in European football, individually or collectively.

FFP applies to every club wishing to participate in competitions set up by UEFA, thus every club is treated in the same way under FFP irrespective of their financial status.<sup>170</sup> This allows for already rich/bigger clubs to gain a competitive advantage over smaller/poorer ones. Bigger clubs has in general higher revenue due to previous investments or successes, e.g. FFP will have a lesser impact on clubs such as Manchester City and Manchester United than Hull City and Middlesbrough.<sup>171</sup>

Due to the financial disparity between teams, FFP might have the effect of creating an “oligopoleague” where only the richest clubs compete internationally. Furthermore, if there might be an abuse of this financial dominant position. For example: Club A with a revenue of €300m/year can exceed this with a tolerance level of €5m in the following year. The same applies for club B with a revenue of €20m/year, this results that few clubs could actually benefit from FFP by restricting competition to the detriment of smaller/poorer clubs.<sup>172</sup> This legitimatizes the question whether or not FFP may create or maintain dominant actors that could abuse that position and if this may be subject to article 102 TFEU.

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<sup>169</sup> See sub-chapter 2.2 “Player transfers in the EU” and 2.3 “UEFA Financial Fair Play”.

<sup>170</sup> UEFA Financial Fair Play Regulation 2018, art. 1.

<sup>171</sup> Deloitte, Annual Review of Football Finance 2018, Sports Business Group June 2018, p. 19.

<sup>172</sup> UEFA Financial Fair Play Regulation 2018, art. 61.

### 5.1.1 Is there an Abusive Practice by European Football Clubs

Article 102 TFEU cover the unilateral conduct of dominant firms acting in an abusive manner. The dominant position being unlawful subject to article 102 TFEU “relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors”.<sup>173</sup> Football clubs has previously been declared as undertakings in this thesis, which enable the application of article 102 TFEU, if there is an abuse of their dominant position.<sup>174</sup> There is reason to argue that some football clubs, being an undertaking, enjoys the position of economic strength, which enables it to prevent effective competition in terms of player transfers while acting to an appreciable extent independently. Article 102 may be applied even though there is lively competition on the market e.g. transfers market.<sup>175</sup>

However, an undertaking either posses a dominant position and is subject to article 102, or it is not considered dominant falling outside the scope of article 102 TFEU. In order to determine dominance, the definition of the relevant market is essential.<sup>176</sup> European football contains several connected markets, e.g. sponsorships and media rights, these are markets exploited based on the clubs success on the pitch, evident by the fact that success leads to more lucrative sponsorships. According to Lindblom it could be said that the main relevant market where football clubs compete against each other is in the market for “raw material” i.e. the transfer market where the clubs act as buyers.<sup>177</sup>

By tying expenses to the income in accordance with FFP, competition might be restricted by FFP that could be exploited by wealthier clubs. Richer clubs are able to

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<sup>173</sup> C-27/76, *United Brands*, judgment of the Court 14 February 1978, ECLI:EU:C:1978:22, p. 65. Also see the exact same reciting in C-85/76, *Hoffmann la Roche*, judgment of the Court 13 February 1979, ECLI:EU:C:1979:36, p. 38.

<sup>174</sup> See supra note 129. There is no distinction to the term undertaking when applying articles 101 or 102 TFEU.

<sup>175</sup> C-27/76, *United Brands*, p. 113-121.

<sup>176</sup> C-6/72, *Continental Can*, p. 32.

<sup>177</sup> J. Lindblom, “Can I please have a slice of Ronaldo? The legality of FIFA’s ban on third-party ownership under European Union Law”, *The International Sports Law Journal* vol. 15 January 2016, p. 11.

acquire better players, that leads to them maintaining or strengthening a dominant position in European football to the detriment of less financially blessed clubs. This is the natural outcome from an indirect price fixing agreement among clubs (buyers) contrary to article 101(1) TFEU, where FFP might benefit dominant actors.<sup>178</sup> The player market of Europe is arguably the relevant market in determining dominance, where clubs compete in order to purchase the best services available. Better players will presumably lead to successes generating revenues in tournaments but also in exploitation markets.<sup>179</sup> Hence, the player market is the market subject to an abusive behavior by a dominant actor, defined by the area where clubs are involved in the supply and demand of services in which the conditions are sufficiently homogeneous and may be distinguished from neighboring areas.<sup>180</sup>

So far the terms undertaking and relevant market are established in order to apply article 102 TFEU. In order to make an article 102 TFEU case possible, a dominant position leading to affect trade between MS is also required. CJEU has previously held that the requirement, effect on trade between MS, would be satisfied if the conduct of a dominant undertaking would alter the competitive structure on the internal market, e.g. elimination of competitors due to the dominant position.<sup>181</sup> The effect on trade is required due to the fact that article 102 TFEU only applies to an already dominant actor, otherwise the effect on trade would have little or no effect on the internal market. Dominance has been described previously, the term independently relates to the degree of competitive constraints exerted on the dominant undertaking.<sup>182</sup> If the competitive constraints are insufficiently and ineffective on the undertaking leading to substantial market power over a period of time the undertaking might be considered dominant.<sup>183</sup>

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<sup>178</sup> See sub-chapter 4.2 “Financial Fair Play or Financial Foul Play.”

<sup>179</sup> Commission’s notice on the definition of relevant market for the purposes of Community competition Law (97/C 372/03), OJ 1997 C 372/5, p. 2.

<sup>180</sup> *Ibid*, p. 8.

<sup>181</sup> C-6/73, *Commercial Solvents*, judgment of the Court of 6 March 1974, ECLI:EU:C:1974:18, p. 33.

<sup>182</sup> See *supra* note 173-175.

<sup>183</sup> Communication from the Commission- Guidance on the Commission’s enforcement priorities in applying article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para 10. Note that art. 82 EC is the older version of the current art. 102 TFEU.

Even though the guidance on enforcement priorities in applying article 82 EC is not binding, it provides valuable guidance on establishing dominance in order to apply article 102 TFEU. Three issues are usually examined to determine the competitive structure of the market and if dominance is evident, for relevance of this thesis two issues will be examined, the actual competitors and potential competitors.<sup>184</sup>

There is arguably lively competition on the transfer market, the “big-5” football leagues are responsible for 75-76% of global spending.<sup>185</sup> Furthermore, there will always be potential competitors in the transfer market, rebuilding a team for an upcoming season is an inevitable feature in European football. However, this does not exclude barriers to entry that could take various forms, e.g. significant investments, which entrants or competitors would have to match, leading to high barriers to entry in international football competition.<sup>186</sup> Even without previous significant investments or other barrier to entry, the conduct of an undertaking might be decisive when determining dominance, e.g. inflated transfer fees that will result in inflated transfer fees in general on the transfer market. This can restrict access to the market for less financial blessed competitors.<sup>187</sup> This conduct will affect both potential and actual competitors and can be considered an abuse of dominant position affecting trade on the internal market.

Application of article 102 TFEU requires that the dominant position of the undertaking is being held in a substantial part of the internal market. Since football clubs compete in a domestic league and in international competitions, the position of dominance may be less obvious since it could only concern one MS. However, the structure of international competitions such as CL allows national teams a chance of competing internationally, thereby even if there is a dominant position nationally, it could have a spillover effect internationally affecting trade between MS.

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<sup>184</sup> Ibid, p 12. The third assessment is in regards of the countervailing buyer power by the customers.

<sup>185</sup> ”The European Club Footballing Landscape” Club Licensing Benchmarking Report Financial Year 2017 UEFA, p. 79.

<sup>186</sup> Guidance on the Commission’s enforcement priorities in applying article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings, p. 17. Analogy in terms of investment and barriers to entering the market may be drawn from C-27/76, United Brands, p. 122. Also see supra note 46-49.

<sup>187</sup> See sub-chapter 2.2 “Player transfers in the EU”. T-203/01, Michelin, judgment of the Court of First Instance, ECLI:EU:T:2003:250, p. 239. Illustrates that it is sufficient to show that the abusive conduct in a dominant position tends to restrict competition or that the conduct is capable of having that effect. Also see supra note 42.

Furthermore, previous case law indicates that each MS may be considered a substantial part of the internal market.<sup>188</sup> Clubs being a dominant actor in one of the domestic European leagues, might be considered to constitute a substantial part of the internal market, e.g. Paris Saint Germain in France, Manchester City in England, Real Madrid in Spain and Juventus in Italy. In addition, parts of a MS may also constitute a substantial part of the internal market.<sup>189</sup> FFP applies to all European clubs, thereby it is safe to say that FFP covers not only a substantial part of the internal market, but the whole internal market while affecting trade between MS.<sup>190</sup> So far all of the criteria found in article 102 TFEU has been met except one, and maybe the hardest one to determine, the abuse of a dominant position.

The fact that some European clubs has a dominant position is not per se unlawful, what is unlawful is the abuse of a dominant position. The dominant position requires a “special responsibility” on dominant undertakings to behave in a certain way, due to their dominance, and to not impair genuine undistorted competition on the internal market.<sup>191</sup> The “special responsibility” is what some dominant clubs has failed to show, e.g. heavy investments contrary to FFP or overestimate sponsorships to circumvent the rules of FFP distorting genuine competition.<sup>192</sup> The alleged clubs have also maintained dominant positions in European football that has been abused through financial gains and external investments contrary to FFP. The repercussions of breaching FFP for these financial giants will probably result in fines, which will give little or no effect to the club.<sup>193</sup> This leads to the question if FFP is really an adequate tool to deter clubs from breaching FFP, or if article 102 TFEU would be a better solution in order to stop the distortion in European football.

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<sup>188</sup> T-229/94, Deutsche Bahn, judgment of the Court of First Instance of 21 October 1997, ECLI:EU:T:1997:155, p. 58. See also C-127/73 BRT, judgment of the Court 21 March 1974, ECLI:EU:C:1974:25, p. 5.

<sup>189</sup> C-40/73, Suiker Unie, judgment of the Court of 16 December 1975, ECLI:EU:C:1975:174, p. 371-375.

<sup>190</sup> See supra note 132.

<sup>191</sup> C-322/81, Michelin, judgment of the Court of 9 November 1983, ECLI:EU:C:1983:313, p. 57. See also C-52/09, TeliaSonera Sverige, p. 24.

<sup>192</sup> See supra note 6.

<sup>193</sup> Procedural rules governing the UEFA club Financial Control Body, art. 29. There is a list of disciplinary measures in the procedural rules. See supra note 6, both Manchester City and PSG has been active in the CL season 2018/2019 and there has been no point deduction from the domestic league. One can only assume that any fine imposed on these dominant teams has little effect due to their financial strength of their owners.

## 5.1.2 Are the Sanctions of Breaching FFP an Effective Tool

Breaching FFP has previously been sanctioned, Rubin Kazan was handed a season ban from European competitions, a rare situation where a club is excluded from European competitions.<sup>194</sup> The same situation almost applied to Milan for breaching FFP.<sup>195</sup> Unlike Rubin Kazan, Milan appealed to Court of Arbitration for Sports (CAS) resulting in that CAS held that the appeal brought from by Milan was admissible.<sup>196</sup> CAS further stated, that the ban from European football by CFCB was disproportionate and referred back the case to the CFCB to take a proportionate disciplinary measure.<sup>197</sup> This illustrates that breaches of FFP may be sanctioned where clubs might be banned from European football depending on the severity of the breach. However, breaches of FFP is yet to produce any real effect against dominant clubs such as Manchester City and PSG, where a ban could be more suitable than a fine due to the severity of the FFP breach.

Manchester City breached FFP in 2014 and reached a settlement agreement with UEFA to pay a fine of £49 million, however new allegations has arisen that the club has manipulated sponsorships in order to circumvent FFP.<sup>198</sup> UEFA's chief FFP investigator claimed that Manchester City could be excluded from CL if the claims are proven.<sup>199</sup> The outcome of the investigation will prove to be crucial for the validity of FFP and its effectiveness. Excluding the club from international competitions would send out a deterrent effect to other clubs trying to circumvent FFP. However, if the club is yet again fined, there is reason to question the effectiveness of FFP. Furthermore, this supports the idea that article 102 TFEU may be a more effective way to handle abusive behavior by dominant football clubs.

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<sup>194</sup> "Rubin Kazan get European ban over financial fair play breach" ESPN information from Reuters: <http://www.espn.com/soccer/fk-rubin-kazan/story/3672116/rubin-kazan-get-european-ban-over-financial-fair-play-breach> accessed 9th April 2019. In the article one may find that clubs breaking FFP generally reach "settlement-agreements" with UEFA accepting restrictions on transfers and squad size for a given number of seasons. This does not however seem to be the case regarding Manchester City and/or PSG where they continually reinforce their teams for upcoming seasons. See note 8 and 10.

<sup>195</sup> "AC Milan: Italian giants banned from European football for one season" BBC: <https://www.bbc.com/sport/football/44599326> accessed 9th April 2019.

<sup>196</sup> CAS 2018/A/5808 AC Milan v. UEFA.

<sup>197</sup> Ibid, p. 157-159.

<sup>198</sup> "Manchester City: Alleged financial fair play violations investigated" BBC Sport: <https://www.bbc.com/sport/football/47490375> accessed April 9th 2019. See supra note 6.

<sup>199</sup> "UEFA's chief investigator confirms Manchester City could face Champions League ban" The telegraph: <https://www.telegraph.co.uk/football/2019/01/03/uefa-chief-investigator-confirms-manchester-city-could-face/> accessed 9th April 2019.



There is reason to argue for the application of article 102 TFEU on football clubs, due to the fact that some might have abused their dominant position affecting trade between MS. The abuse of the dominant position regarding football clubs can be the increase of transfer fees that competitors cannot match due to the investment restrictions in FFP. This would enable rich clubs to raise prices on transfers to the detriment of normal clubs.<sup>200</sup> This could be connected to competition on the merits previously discussed in this thesis, where in the sports area, a parallel could be made to “sporting on the merits”.<sup>201</sup> Dominant clubs might adopt price practices, which have an exclusionary effect on its equally efficient, actual or potential competitors, making market entry difficult or impossible for such competitors. Furthermore, this strengthens or maintains its dominant position using methods contrary to competition on the merits.<sup>202</sup> The elimination of a competitor by a dominant undertaking while strengthening its position using methods other than those in the scope of competition on the merits is prohibited.<sup>203</sup>

This section of this chapter concludes that there could be abusive practice by dominant actors in European football. Furthermore, that application of article 102 TFEU would be a more effective tool to maintain competition in European football. Competition on the merits sets out a form of “rules” for dominant actors to act accordingly, in order to ensure that markets function properly and maintains effective competition between undertakings.<sup>204</sup> It could be argued that FFP is contrary to competition on the merits, since the rules apply to all clubs wishing to participate in tournaments arranged by UEFA, while disregarding the financial disparity between clubs. Thereby FFP does in fact benefit financial stronger clubs. However, this chapter opens up an important question, if FFP creates or maintains an oligopoly (oligopoleague) of superior clubs in UEFA competitions due to their financial position, and if this could be subject to article 102 TFEU.

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<sup>200</sup> See sub-chapter 2.2 “Player Transfers in the EU”. Aware that some of the mentioned transfers are in regards to “high profile players” the effect these transfers has on the market in general, leads to higher transfer-fees affecting competition and smaller teams more noticeable, where an abuse of dominant position may be the case.

<sup>201</sup> See supra note 98.

<sup>202</sup> C-280/08, Deutsche Telekom, judgment of the Court 14 October 2010, ECLI:EU:C:2010:603, p. 177.

<sup>203</sup> C- 457/10, AstraZeneca, judgment of the Court 6 December 2012, ECLI:EU:C:2012:770, p. 75.

<sup>204</sup> Guidance on the Commission’s enforcement priorities in applying art. 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings, p. 5. Note that this list is not exhaustive.

## 5.2 Oligopoly in European Football

This thesis has examined whether or not FFP might be subject to article 101 TFEU by being an anti-competitive agreement between competitors. There is reason to question the validity of FFP, furthermore if there is no less restrictive measure to be adopted. FFP might allow financially stronger clubs to maintain or strengthen their position, which could create an oligopoly or collective dominance in European football. The market defined by oligopoly according to Wish and Bailey, is that a few dominant actors dictate on the market where they are able to behave in a parallel manner, adopting similar market strategies, while gaining benefits from their collective market power.<sup>205</sup> The market power in this oligopoly is connected to clubs financial strength. To clarify, richer clubs would gain an advantage on the transfer market due to their financial position that enables better players and higher salaries without breaching FFP, this could create an oligopolistic market structure in European football.

Article 102 TFEU applies to “any abuse by one or more undertakings of a dominant position within the internal market”. The wording of article 102 TFEU suggests that this may be applicable to more than one undertaking abusing its dominant position. This is an area of EU competition law filled with complexity. The idea of collective dominance was first rejected by the CJEU, the court stated that a dominant position must be distinguished from parallel behavior defined by oligopolies and when undertakings possesses a dominant position the conduct is determined unilaterally.<sup>206</sup> It would take more than ten years until collective dominance was subject to EU competition law again, this time the Commission held that three Italian producers of flat glass had a collective dominance and abused their position.<sup>207</sup> The producers had enjoyed a degree of independence from competitive pressure, which impeded effective competition while the producers acted independently from its competitors. The case was appealed to the General Court confirming that collective dominance by two or more undertakings can be subject to article 102 TFEU.<sup>208</sup>

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<sup>205</sup> R. Wish & D. Bailey, *Competition Law*, p. 594-596.

<sup>206</sup> C-85/76, *Hoffmann la Roche*, p. 39.

<sup>207</sup> Commission Decision OJ (1989) L 33/44, of 7 December 1988 “Italian flat glass”.

<sup>208</sup> T-68/89 *Società Italiana Vetro*, judgment of the Court of First Instance 10 March 1992, ECLI:EU:T:1992:38, p. 358.

Following “Italian Flat Glass” the definition on collective dominance became slightly clearer. CJEU stated that, “In order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market”.<sup>209</sup> Thus, the Court was looking at “tacit coordination” where the market structure would benefit the coordinated behavior, in order to find tacit coordination three conditions may be met according to Wish and Bailey. First transparency, where the competing undertakings may monitor and adjust their behavior to their competitors on the market, secondly sustainability where firms deviating from the coordination would be punished in some way and finally any absence of competitive constraints from competitors, consumers threatening the coordination.<sup>210</sup> The parallel behavior is evident in European football today, clubs monitor and adjust their behavior to competing clubs due to the transparency on the transfer market and to stay competitive. The deviation from the coordination would be harder to prove, however the increase of transfer fees requires clubs to continually raise prices in order to acquire new players. Any deviation from this could punish the club in terms of being less successful or competitive by failure of signing a new player. The constant increase in transfer fees could be in line with “tacit coordination” where competitive constraints from less financial clubs would be absent.

Opinion of Advocate General Lenz in *Bosman* stated that professional football clubs might possess a collective dominance.<sup>211</sup> Lenz argued inter alia, that the rules in question relate to engagement of players is a matter of the clubs and not associations or UEFA, and that European clubs could have a potential collective dominance due to their “economic link” subject to article 102 TFEU.<sup>212</sup> The opinion may be of use in order to assess collective dominance in European football today. *Bosman* concerned the relationship between clubs and players and it was considered that there was no abuse of dominance, however *Bosman* did not concern to address the issue with any collective dominance clubs might have.<sup>213</sup> This line of reasoning enables the possibility of applying article 102 TFEU on football clubs abusing their dominance collectively.

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<sup>209</sup> C-393/92, *Almelo*, judgment of the Court 27 April 1994, ECLI:EU:C:1994:171, p. 42.

<sup>210</sup> R. Wish & D. Bailey, *Competition Law*, p. 598. Also see T-193/02, *Piau*, p. 111.

<sup>211</sup> Opinion of Advocate General Lenz in C-415/93, *Bosman*, p. 279-283. Note that the transfer rules by UEFA in *Bosman* did not comply with the principle of proportionality according to Lenz, p. 234.

<sup>212</sup> *Ibid*, p. 284-285.

<sup>213</sup> *Ibid*, p. 286.

Collective dominance was further clarified by the CJEU by stating that in order to establish a collective dominance it is necessary to examine the economic links or factors, enabling the undertakings to act together independently of their competitors.<sup>214</sup> The CJEU clarified collective dominance by stating that, the existence of a collective dominance may flow from the nature and terms of an agreement between the undertakings. Furthermore, the CJEU stated that the existence of an agreement or of other links in law is not indispensable to establish collective dominance, such a finding may be done based on other factors depending on an economic assessment, and especially the assessment of the structure of the market in question.<sup>215</sup> In other words, the CJEU stated that there is no legal requirement of an agreement or of other links in law in order to establish collective dominance. Hence, opening up the possibility that football clubs might enjoy collective dominance, since the oligopolistic nature of the transfer market created by FFP, enables parallel behavior between dominant actors acting independently of their competitors.<sup>216</sup>

However, dominance is not per se illegal, it is the abuse of the clubs dominant position that would be subject to article 102 TFEU, this irrespective if there is one or several dominant clubs.<sup>217</sup> The potential abuse this thesis seeks to clarify is if the financial position by some European football clubs is being abused, and if price parallelism can be viewed as “tacit coordination”. Furthermore, if collectively dominant clubs inflate transfer fees comparing to a competitive market, thereby exploiting their financial strength. This would be the case if collectively dominant clubs would abuse their position by directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions subject to article 102 TFEU.<sup>218</sup> By charging excessively high prices, dominant clubs (the “oligopoleague”) will alter the market structure of buying and selling football players. The inflated transfer fees in European football could lead to an increase of transfer fees in general to the detriment less financial competitors.<sup>219</sup>

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<sup>214</sup> C-395/96, *Compagnie Maritime*, judgment of the Court 16 March 2000, ECLI:EU:C:2000:132, p. 41-42.

<sup>215</sup> *Ibid.*, p. 45.

<sup>216</sup> R. Wish & D. Bailey, *Competition Law*, p. 614. Also established in C-413/06, *Impala*, judgment of the Court of 10 July 2008, ECLI:EU:C:2008:392, p. 121-122.

<sup>217</sup> C-395/96, *Compagnie Maritime*, p. 37-38.

<sup>218</sup> Art. 102 (A) TFEU.

<sup>219</sup> See sub-chapter 2.2 “Player Transfers in the EU”. La Liga President Tebas stated that there is a massive damage on Euro football due to inflation on the market, see *supra* note 42.

There is reason to question the divergence of the transfer fees paid by clubs and the actual value of players. The hyperinflation is evident on the transfer market in European football and could be argued to be the outcome from an abuse of collective dominance.<sup>220</sup> The structure of the market is currently determined by a collective of dominant actors acting as price leaders in an oligopolistic market, which can result in an overall increase of transfer fees for football players. Example given: the top ten highest transfer fees ever paid in European football is between PSG, Barcelona, Manchester United, Real Madrid and Juventus where the highest transfer fee in 2013 increased from €86.2m to €222m in 2017 for the same player.<sup>221</sup>

### 5.2.1 More Money, More Success in the “Oligopoleague”

It is clear that there is lively competition on the transfer market where the “big-5” football leagues are responsible for 75-76% of global spending.<sup>222</sup> However, this only illustrates the expenditure of the “big-5” league, which includes all of the teams within those leagues. Recent studies based on the relationship between clubs transfer market activities and sportive performance illustrates that the spending arising from the “big-5” is concentrated to a few clubs.<sup>223</sup> It is evident how the correlation between the net amounts of transfer spending by all clubs of a league, and the corresponding points that the clubs achieved in UEFA competitions, differs from the same correlation at club level.<sup>224</sup> Indicating that performance in UEFA competition is money-driven, where financially strong clubs achieve more success. The rivalry is intense in UEFA competitions, however only a few clubs continually achieve top position in these tournaments, thus maintaining an oligopolistic structure where rich clubs succeed more often in international tournaments than less financially clubs.

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<sup>220</sup> See supra note 39-42. Also see supra note 5 on the increase from season 07/08 to 17/18.

<sup>221</sup> “The 100 most expensive football transfers of all time” Goal: <https://www.goal.com/en/news/the-100-most-expensive-football-transfers-of-all-time/ikr3oojohla51fh9adq3qkwpu> accessed 16th April 2019. Note that the transfer window of 2019 has not yet opened, and there is reason to expect a new world record signing.

<sup>222</sup> See supra note 185.

<sup>223</sup> Matesanz D, Holzmayer F, Torgler B, Schmidt SL, Ortega GJ (2018) Transfer market activities and sportive performance in European first football leagues: A dynamic network approach. PLoS ONE 13(12): e0209362. The study analyze transfer market activities among 21 European first leagues between season 96/97 and 15/16 including 2,200 clubs involved in more than 135,000 transfers during this period.

<sup>224</sup> Ibid, p. 7. See figure 4 and compare the blue line being all of the clubs and the red line being the individual clubs points achieved in UEFA competitions.

The data provided in the study mentioned above confirm that European football is driven by money and heavy investments, in order to be successful internationally. The disparity between clubs financial position are unequal to an extent where the richest clubs could outspend a normal club by ten or hundred times. The oligopolistic market structure has allowed for inflated transfer fees, where only the rich are able to strengthen their teams to the detriment of overall European football competition. The introduction of FFP and the break-even requirements strengthen the argument that financially strong clubs will continue to be competitive in international competitions, where only a few is “actually” competing, leading to an oligopoly (oligopoleague) in European football. Since richer clubs may be able to finalize inflated transfer fees in line with their break-even requirements, it is hard to argue that there is an abuse of a dominant position. However the inflated transfer fees between rich clubs might have had the effect to increase transfer fees in general on the transfer market, which could be considered as abusive behavior of their dominant position.<sup>225</sup>

The market structure of player transfers in European football has its foundation in FFP. The objectives of FFP restrict investment opportunities by effect based on the break-even requirements, and since FFP applies to all participating teams in UEFA competitions, it is inevitable that FFP will have a distortive effect on competition. This results in that the market structure of European football allows for oligopoly where only the rich (er) teams compete on equal terms, where normal/smaller clubs may be viewed as a stepping stone for rich clubs to advance further in competition such as CL. In order to deal with the oligopoly in European football, structural measures of the market could be done, this could end the parallel behaviour of dominant clubs, that distorts competition and at the same time harms end-consumers.<sup>226</sup>

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<sup>225</sup> See supra note 187.

<sup>226</sup> End consumers in terms of individual persons, could be harmed financially by increased ticket prices to games being the product offered for consumption, this in order for the club to gain higher revenue allowing for player transfer fees. It could be argued that the consumers could also be football clubs in the case of international competitions such as CL, where UEFA offers its products/competition to clubs, which are the consumers in that regard. Since UEFA is the only provider of European football competitions, there is no other “rival product” thereby UEFA could be considered a monopolist where a structural measure could be the only way of restoring competition in European football.

## 5.2.2 A Structural Measure, the Remedy of European Football

Markets defined by oligopoly might enable dominant actors to act in a parallel behaviour in their pricing strategies to the detriment of competitors and consumers. This is arguably evident in European football, dominant clubs adopt a parallel behaviour on the transfer market, where their financial strength allows them to pay inflated transfer fees in order to attract better players. The transfer of high profile players for inflated prices is not per se prohibited, however the market structure based on the break-even requirements found in FFP allows for an oligopoly-like market where only the financially strong clubs may compete in international competitions and for the raw material being the players.<sup>227</sup>

A potential solution, in order to battle the negative effect of an oligopoly-like market, would be a structural approach to solve the uncompetitive outcomes. According to Wish and Bailey, the idea is to create a system that prevents the market of being receptive to tacit coordination allowing for uncompetitive parallel behavior.<sup>228</sup> This is possible through enforcement powers by the Commission. The Commission has the power to impose structural remedies to an undertaking and associations of undertakings when there has been an infringement of article 101 and/or 102 TFEU, where there is no equally effective behavioral remedy on the undertakings in question.<sup>229</sup> The situation where the Commission intervenes with structural remedies in order to restore competitive balance on the market is a rare sight, however the possibility exists and can be done by the Commission.<sup>230</sup>

The parallel behaviour of dominant clubs can be attributed to the oligopolistic structure of the market where the parallel behaviour is a natural response to the structure of the market, thus making it harder to prove that these clubs are acting in a collusive manner subject to article 101 or 102 TFEU. Hence, a structural approach would be more suitable than a behavioral one. However, this does not exclude the

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<sup>227</sup> J.Lindblom, "The problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play", p. 200.

<sup>228</sup> R. Wish & D. Bailey, *Competition Law*, p. 601.

<sup>229</sup> Council Regulation (EC) No 1/2003, art. 7 (1).

<sup>230</sup> See sub-chapter 3.3.1 "Striani, a disallowed goal" This was a situation that could have changed the situation with FFP by the Commission. See opinion of General Ruiz-Jarabo in C-119/97, UFEX, judgment of the court 4 March 1999, ECLI:EU:C:1998:255, p. 72.

possibility that there is a collusive behavioral conduct. An understanding of the economics in the oligopolistic market is needed to determine if there is a collusive behaviour or if the parallel conduct could be a natural response to the oligopolistic market structure. An in depth investigation of the market structure by the Commission or national competition authorities (NCA) is therefore needed in order to determine if the parallel conduct of the dominant clubs are considered to be collusive, or just a response to the market structure set up by FFP.

A final possibility of dealing with the oligopolistic market of European transfers is through regulation. This is a highly controversial measure according to Wish and Bailey, since the Commission and NCA act to protect the process of competition, and not as price regulators.<sup>231</sup> However, where oligopolistic markets create high barriers to entry, the Commission and NCA should examine if FFP could be the reason for the distortion of competition.<sup>232</sup> The Commission has been reluctant to examine the FFP in light of EU competition law, thereby failing to protect the process of competition if FFP is considered to be incompatible with EU competition law.

Any structural, behavioral or regulatory approach to the oligopolistic market in European football will be hard to achieve without the interest of the Commission. The Commission has shown little interest of interfering in the business of UEFA and FFP.<sup>233</sup> The parallel behaviour by dominant European clubs could be viewed as the outcome by the oligopolistic market structure, strengthened by FFP due to the investment restrictions imposed by the break-even rules. Thus, making the behaviour lawful, due to the difficulty of distinguishing conduct subject to article 101 and 102 TFEU and parallel conduct attributed to an oligopolistic market.<sup>234</sup> Without the intervention of the Commission or NCA and clarification from the CJEU on the validity of FFP, the market structure of European football will remain unchanged. Internal rules of UEFA has been subject to EU law before and the question remains if history will repeat itself on FFP<sup>235</sup>, in order to create a more competitive market in European football, or if FFP will be deemed to be compatible with EU law.

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<sup>231</sup> R. Wish & D. Bailey, *Competition Law*, p. 602.

<sup>232</sup> See sub-chapter 5.1.2 "Is there an abusive practice by European football clubs".

<sup>233</sup> See sub-chapter 3.3.1 "Striani, a disallowed goal".

<sup>234</sup> R. Wish & D. Bailey, *Competition Law*, p. 601-602.

<sup>235</sup> C-415/93, *Bosman*.



## 6. Analysis and Conclusion

In order to answer the first research question, it was necessary to update the reader on the rules of FFP and its objectives.<sup>236</sup> Following the rules of FFP, a review of the current state of the player transfer market was done in order to demonstrate the issue between inflated transfer fees and FFP. Chapter three examined if sports are specific in nature as stated in the treaties<sup>237</sup> or if a comparison could be made to a traditional economic market, where the interest of gaining revenue is more important than the sport itself. Chapter three also stresses the need of EU competition law as a vital tool in order to protect competition. Goals of competition are divided, however the goal of protecting the process of competition and market participants, focus on the protection of the market structure and process rather than the outcome, is vital in the field of sports.<sup>238</sup> This is due to the fact that without any competitors there will be no competition.<sup>239</sup>

Case law from the CJEU illustrates the development on the relationship between sports and EU law. The starting point of European sports law through *Walrave and Koch* stated that sports enjoyed autonomy from application of EU law, however this changed throughout the years. *Bosman* challenged the internal transfer rules by UEFA that breached fundamental freedom of movement for workers, and the autonomy of EU law application on sports was impaired. *Meca Medina* was the landmark case paving the way of EU competition law into sports. Stating inter alia the fact that a rule is purely sporting in nature does not exclude it from application of EU competition law thereby eliminating the “purely sporting rule” developed in *Walrave and Koch*.<sup>240</sup> The reasoning in *Meca Medina* permeates the White paper of sports by the Commission leading to an assessment of balancing pro-competitive features in a rule against its anticompetitive effects in order to decide if the rule should be prohibited.<sup>241</sup> The European rule of reason in *Meca Medina* expanded into the sports area, thus dismantling the illusion of sports being specific in nature.

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<sup>236</sup> See sub-chapter 2.1 “UEFA Financial Fair Play”.

<sup>237</sup> Art. 165 TFEU.

<sup>238</sup> Supra note 52.

<sup>239</sup> Supra note 153

<sup>240</sup> Supra note 74.

<sup>241</sup> Supra note 80-82.

The introduction of article 165 in the Lisbon treaties gave little clarification on the powers given to the EU on the field of sports. The drafting of the text is rather vague and provides little guidance on the practical use by the courts of EU. The cautious way of drafting it by the EU might be the intention of merely assisting in promotion and develop the European dimension of sports and not trying to regulate it.<sup>242</sup> However, with a treaty reference and developed case law through *Meca Medina*, there should already have been a way of clarifying European sports law and especially the validity of FFP. The missed opportunity by the Commission to make a case in *Striani* illustrates the lack of interest by the EU institution to intervene in the affairs of UEFA.<sup>243</sup> Previous endorsement of FFP by the Commission could be one of many reasons why the Commission abstained intervention from reviewing the validity of FFP. This could be viewed as an indication that the relationship between the Commission and UEFA is stronger than ever.<sup>244</sup>

It seems that sport lost its specific nature once it became commercial incentivized, and there should be no reason to treat it any different to other economic sectors in Europe. The development of case law from the EU courts indicates that there is little possibility to argue that sport's specific nature should exempt the application of EU competition law. Especially in terms of anti-competitive agreements and any abuse of domination. It appears that sports were never specific in nature but the internal rules adopted by the federations supervising sports were. The internal rules serve to create a uniform sport, e.g. size of the field, how many players that would be allowed on the pitch, size of the football or the number of substitutes. This cannot be interpreted to exempt anti-competitive agreements or abuse of dominant position with the argument that sports are specific in nature. Furthermore, this should not be possible to exploit by the fact that sports may enable for anti-competitive agreements through the *Wouters* test used in *Meca Medina*.<sup>245</sup> In conclusion, sports specific nature should not generally grant exemption to anti-competitive agreements and abuse of dominance without the test used in *Meca Medina*.

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<sup>242</sup> Supra note 90.

<sup>243</sup> See sub-chapter 3.4 "Striani, a disallowed goal".

<sup>244</sup> Supra note 27, 99 and 118.

<sup>245</sup> Supra note 74

The second research question examined whether or not FFP might be considered a horizontal anti-competitive agreement subject to article 101 TFEU. *Meca Medina* stated that purely sporting rules should not be exempted through the application of EU competition law, however if the anticompetitive effect by the rules are inherent and proportionate to the objectives pursued, the rule could exempt application of EU competition law.<sup>246</sup>

The anticompetitive effect by FFP is that the break-even requirement concentrates the success to a small number of participants in international competitions due to their financial resources.<sup>247</sup> Furthermore, FFP restricts investment by clubs, which most likely creates an indirect salary cap on clubs. FFP is likely to protect bigger clubs by creating a high barrier to entry for small clubs due to the natural nexus between financial gains and success.<sup>248</sup> However, objectives of FFP are to promote and improve the financial situation of European football clubs. Hence, it was necessary to examine FFP in light of the formula used in *Wouters* and *Meca Medina*, where the overall context of FFP was examined.

The conclusion after examining FFP through the *Wouters* formula was that the test of proportionality could challenge the rules of FFP. The investment restriction imposed on European clubs may be viewed as excessive in relationship to the objectives pursued. The negative effects by FFP in terms of investment restriction and indirect salary cap, could potentially have a spillover effect on other fundamental freedoms found in EU law, such as free circulation of workers, freedom to provide services, but also fundamental rights might be affected.<sup>249</sup>

The fact that some European clubs are suffering financially should not be enough to justify the validity of FFP. UEFA has to prove that FFP is necessary and suitable for the purpose of achieving the objectives, but also that there is no less restrictive measure in order to achieve the objectives of FFP. FFP has not been subject to EU law, so there is no certain way to determine if there is an alternative less restrictive

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<sup>246</sup> Ibid, see also supra note 126.

<sup>247</sup> See sub-chapter 2.3 “UEFA Financial Fair Play”.

<sup>248</sup> Supra note 30.

<sup>249</sup> Supra note 144-145 and supra note 103.

measure, however there has been alternatives presented.<sup>250</sup> The fact that the objectives of FFP are so wide and generic may enable any rule to be viewed as inherent to them. This has led to the conclusion that there is reason to argue that FFP may not be exempted through *Wouters* on proportionality grounds. There is arguably a legitimate aim in FFP, however in line with the principle of proportionality, the measure adopted cannot be accepted as the less restrictive way of obtaining the objectives of FFP.

The negative effects of the break-even requirement are so appreciable that it will in fact cement international success to a handful of European clubs due to their financial strength. Thus FFP may create a structure where smaller clubs and nations and their supporters never will have a chance of following their dream of success in Europe.<sup>251</sup> A structure UEFA opposed 13 years ago that is evident in European football today due to FFP.

UEFA could still argue for the validity of FFP, under the exemption rule in article 101(3) TFEU. However, article 101(3) TFEU requires that FFP are “indispensable to the attainment of the objectives”. Since there might be a less restrictive way of achieving the objectives, it is unlikely that UEFA will be able to benefit from the exemption rule in article 101(3) TFEU. UEFA could still defend FFP and argue that there is no less restrictive way to obtain the objectives, however this does not stop any claims that FFP is in fact breaching fundamental freedoms or rights. It could be argued that the reason for FFP not being subject to EU law, is the previous expressly belief in the rules set up by UEFA by the Commission.<sup>252</sup> The Commission rejected the claim in *Striani* on questionable grounds. Hence, it is highly questionable that FFP is compatible with EU competition law and internal market law.

The third and final question, concerned if FFP may create an oligopolistic market in European football allowing for collective dominance subject to article 102 TFEU. The FFP could in fact distort competition in European football due to the financial restrictions it imposes.<sup>253</sup> The financial restriction imposed by FFP might lead to an oligopolistic market structure (oligopoleague), this market structure might be abused

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<sup>250</sup> Supra note 157-159.

<sup>251</sup> Supra note 166.

<sup>252</sup> Supra note 27, 99 and 118.

<sup>253</sup> Supra note 172.

by richer clubs by paying inflated transfer fees or by price parallelism. This behaviour could end up in higher transfer fees in general, and would be to the detriment of normal clubs.<sup>254</sup>

This thesis addresses if there could be any abusive practice by European football clubs and furthermore if the sanctions of breaching FFP are an effective tool. The lively competition on the transfer market for new players does not exclude the fact that there are barriers to entry. The barriers to entry are connected to significant investments that competitors would have to match. However, this will be proven to be hard by competitors since FFP limits investments based on clubs individual revenues. This is an issue that could be abused by dominant actors in European football, by paying inflated transfer fees, the dominant actors limits competition to the “raw material”, thereby creating or strengthen their dominant position.<sup>255</sup> Furthermore, there has previously been questionable behaviour by some dominant clubs in terms of sponsorships and overspending contrary to FFP, which might distort competition.<sup>256</sup>

Pending investigation by UEFA will prove to be crucial for the effectiveness and validity of FFP.<sup>257</sup> There is reason to question the effectiveness of sanctions found in FFP, and if not an application of article 102 TFEU is a more effective way to end abusive behaviour in European football. Sanctions found in FFP only regards any breach of the break-even requirement, thus allowing parallel price practice that could have an exclusionary effect, contrary to competition on the merits.<sup>258</sup> FFP enables an oligopoly of dominant clubs in European football, where a few dominant clubs dictate on the market by behaving in a parallel manner, adopting a similar market strategy that results in gaining benefits from their collective market power. This behavior could be considered as a “tacit coordination”, and might be the situation in European football, especially considering that dominant clubs alter their behavior to competing clubs, while increasing transfer fees to the detriment of less financially strong clubs.

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<sup>254</sup> Supra note 42.

<sup>255</sup> Supra note 178.

<sup>256</sup> Supra note 6.

<sup>257</sup> Supra note 199.

<sup>258</sup> Supra note 201.

<sup>259</sup> Supra note 98.

The behavior enables the undertakings to act together independently of their competitors and could be based on the structure of the market. Thereby it can be concluded, that some European clubs enjoy collective dominance since the oligopolistic nature of the transfer market, created by the investment restrictions in FFP, enables “tacit coordination” between dominant actors. The nature of the market enables dominant clubs to exploit their financial strength, through inflated transfer fees that can be subject to article 102 TFEU.<sup>260</sup>

The inflation on transfer fees might be the outcome of an abuse of collective dominance since the market structure enables oligopoly of dominant actors. Furthermore, the dominant actors might act as price leaders on the transfer market that could result in an overall increase of transfer fees for football players. This leads to the crossroad that, either there is an abuse of dominant position by a few rich European football clubs, or that FFP restricts competition to the benefit of financial stronger clubs, allowing an oligopoly that restricts competition in European football. The financial position by collective dominant clubs could be used in an exploitative way that enables inflated transfer fees that will exclude competitors to acquire football players. This could lead to new strategies by normal and smaller clubs in order to survive in the competitive environment of European football e.g. focusing on youth development. However, options to adopt new strategies are limited in order to be successful. The fact that transfer spending is connected to better performance in European football, leads to the conclusion that FFP limits fair competition and that some clubs might abuse their financial strength to the detriment of competition.<sup>261</sup>

A last possibility to end the “oligopoleague” in European football is through a structural measure. The break-even rules found in FFP create an oligopolistic market structure, this could result in parallel behaviour and “tacit collusion”. A potential remedy to this would be in the enforcement powers by the Commission, the enforcement powers allow the Commission to impose structural remedies to the market. Even though this is a rare situation, the possibility still exists in order to restore freedom of competition.<sup>262</sup> The parallel behaviour of dominant actors in

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<sup>260</sup> Supra note 220-221.

<sup>261</sup> Supra note 30 and 224-225

<sup>262</sup> Supra note 230.

European football is a natural response to the oligopolistic market, however this does not exclude the possibility that the behaviour is collusive.

There is reason to require an in-depth investigation of the market structure by the Commission or NCA, to examine if the parallel conduct by dominant actors in European football are collusive, or just a response to the market structure set up by FFP. This would determine if FFP restricts competition in European football or the behaviour of dominant actors. Furthermore, regulation could also deal with the issue with an oligopolistic market structure in European football.

Any remedy to the oligopolistic market in European football will be hard to achieve without the interest of the Commission. The Commission has shown little interest of interfering in the business of UEFA and FFP, and has previously endorsed the regulation of FFP.<sup>263</sup> The parallel behaviour by dominant European clubs could be the natural response by the oligopolistic market structure that FFP has created. This would allow the parallel behaviour, due to the difficulty of distinguish conduct subject to article 101 and 102 TFEU and parallel conduct attributed to an oligopolistic market. Without any intervention of the Commission or NCA, and clarification of the CJEU on the validity of FFP, the market structure of European football will remain unchanged. There is reason to question the behaviour of dominant actors in European football and the sanctions found in FFP. However without any interest by the Commission or NCA little can be done in order to clarify the issue in European football. The internal rules of UEFA have been subject to EU law before and the question remains if history will repeat itself with FFP, or if the question on the validity and effectiveness of FFP will just fade away.

To sum up, the legal test used in *Meca Medina* may exempt application of EU competition law to anti-competitive agreements in sports. Furthermore, the FFP rules are considered to be an anti-competitive agreement that could be subject to article 101 TFEU, and would most likely be deemed to be incompatible with EU competition law due to the principle of proportionality. Finally, FFP creates an oligopolistic market structure allowing for collective dominance that could be subject to article 102 TFEU.

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<sup>263</sup> Supra note 27, 99, and 118.

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